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NO. COA10-259

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

IN THE MATTER OF: H.F.

Orange County
No. 07 JA 166

Appeal by respondent-mother from order entered 17 December 2009 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 2 August 2010.

Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

Pamela Newell, for guardian ad litem.

ERVIN, Judge.

Respondent-Mother Tammy C. appeals from an order in which the trial court granted custody of her teen-aged daughter, H.F. (Hannah),¹ to the Respondent-Father Thomas F. After careful consideration of Respondent-Mother's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed in part and reversed and remanded for further proceedings in part.

I. Factual Background

¹ "Hannah" is a pseudonym that will be used throughout the remainder of this opinion for ease of reading and to protect the juvenile's privacy.

Respondent-Mother has three children, including a fourteen-year-old daughter named Hannah, a six-year-old son named H.C. (Hal)², and nine-month-old daughter named A.F. (Amy).³ All three of Respondent-Mother's children have a different father. On 11 December 2007, the Orange County Department of Social Services filed a juvenile petition alleging that Respondent-Mother's children, each of whom lived with her at that time, were neglected and dependent juveniles. Although the children were originally allowed to remain in Respondent-Mother's custody, Respondent-Mother became uncooperative with the social worker assigned to her case. In addition, DSS received additional reports alleging that the children were neglected. As a result, DSS obtained the issuance of a non-secure custody order authorizing DSS to take the children into its custody on 15 January 2008. At that time, Amy was placed in foster care, Hal was placed with his father, and Hannah was placed with a family friend.

In April, May, and June 2008, the trial court conducted an adjudication hearing. On 2 July 2008, the trial court entered an order adjudicating the children to be neglected juveniles. As a basis for this decision, the trial court found that Respondent-Mother had an opiate dependency which impaired her ability to care for her children. The trial court also found that Hal and Hannah

² "Hal" is a pseudonym that will be utilized throughout the remainder of this opinion for ease of reading and to protect the juvenile's privacy.

³ "Amy" is a pseudonym that will be utilized throughout the remainder of this opinion for ease of reading and to protect the juvenile's privacy.

failed to attend school regularly; that Hannah had a "D" grade average; that Hal was allowed to roam the neighborhood without supervision; that Hal had been locked out of his home on one occasion while Respondent-Mother was in the residence; that Respondent-Mother appeared to be impaired at a meeting at Hannah's school; and that Amy was four months behind on her immunizations and had a yeast infection, mild eczema, and cradle cap. The trial court also found that Respondent-Mother had been uncooperative with the social worker assigned to her case. On one occasion, Respondent-Mother refused to let the social worker in her house and berated the social worker for approximately 45 minutes.

The trial court conducted a separate dispositional hearing on 13 August 2008 and entered a dispositional order on 18 September 2008. In its dispositional order, the trial court found that Respondent-Mother had failed to adequately address the underlying issues that led to the determination that the three children were neglected, that the conditions which led to the removal of the children from the home still existed, and that return of the children to Respondent-Mother would be contrary to their welfare. More specifically, the trial court noted that Respondent-Mother had refused treatment for her opiate dependency, interfered with Amy's placement, and acted inappropriately during visitation sessions. The trial court awarded custody of Hal to his father, ordered that Amy remain in DSS custody in a foster care placement, and placed Hannah in a trial placement with Respondent-Father despite the fact that she remained in DSS custody. The trial court based its

decision that Hannah should be placed with Respondent-Father on the following logic:

[Respondent-Father] and his wife [] provide a fit and proper home for the placement of [Hannah] and it is in [Hannah's] best interest that she remain in OCDSS custody but be placed in their home for a trial placement. This Court is not awarding [Respondent-Father] custody of [Hannah] at this time because it is early in his recovery and remission from alcohol and/or drug addiction. If [Respondent-Father] continues to address his addiction and provide proper care and supervision to [Hannah], the Court may consider awarding him custody in the future.

Finally, the trial court awarded supervised visitation to Respondent-Mother, while ordering her to have no contact with Hannah outside the context of the court-ordered visitation sessions. The trial court also required Respondent-Mother to obtain a psychological evaluation, to complete a substance abuse assessment and cooperate with treatment, and to attend parenting classes.

Respondent-Mother and Amy's father noted appeals to this Court from the adjudication and disposition orders. By means of an opinion filed on 16 June 2009, we reversed and remanded the adjudication order in part, dismissed Respondent-Mother's appeal as moot in part, and affirmed in part. *In re H.D.F.*, ___ N.C. App. ___, ___, 677 S.E.2d 877, 887 (2009). Although we affirmed the adjudication and dispositional orders as they pertained to Hannah, we reversed the trial court's orders as they pertained to Amy's father, who had not gotten notice of and been able to participate in certain of the proceedings leading to the entry of the

adjudication and dispositional orders. *Id.* at ___, 677 S.E.2d at 884-85.

During the pendency of the earlier appeal, the trial court conducted a review hearing on 5 February 2009 and entered a corresponding order on 12 March 2009. In its review order, the trial court found that Hannah was doing well in her current placement and that she should continue to be placed with Respondent-Father and his wife. The trial court also found that Respondent-Father and Respondent-Mother were "fit and proper persons to have custody of [Hannah] and that it is in her best interest that custody is returned to [Respondent-Father] and [Respondent-Mother]." As a result, the trial court awarded joint legal custody of Hannah to Respondent-Father and Respondent-Mother and ordered the parents to participate in mediation for the purpose of working out a custody schedule. In the meantime, the trial court concluded that Hannah should reside primarily with Respondent-Father and visit with Respondent-Mother every other weekend.

The trial court held another review hearing on 5 March 2009, resulting in the entry of a review order on 5 November 2009. In this review order, the trial court again placed Hannah in the joint legal custody of her parents. Based on a concern that Hannah's parents were improperly discussing matters related to the case with their daughter, the trial court imposed a number of additional requirements on them, including the following:

- b. When [Hannah] is in the physical custody of either Respondent[-P]arent, that

parent has primary responsibility of [Hannah]. The custodial [parent] shall supervise [Hannah] with limited exceptions (ie. Emergencies).

. . . .

- e. No issues regarding the court proceedings shall be discussed in or near the presence of [Hannah], nor within her hearing distance.
- f. Neither Respondent shall disparage the other in or near the presence of [Hannah].
- g. Any discussion regarding the other parent with [Hannah] shall be void of any negative feelings or implications of negative feelings by the other parent.

The trial court warned Respondent-Parents that, if either of them failed to follow the orders, it would "issue a Show Cause Order . . . requiring them to show cause as to why they should not be held in contempt and place them in custody[.]"

The trial court conducted a further hearing on 7 and 13 May 2009. By means of an order entered 17 December 2009,⁴ the trial court granted sole legal custody of Hannah to Respondent-Father. The trial court also granted physical custody of Hannah to Respondent-Father, subject to visitation with Respondent-Mother. According to the trial court's order, Respondent-Mother was entitled to visitation with Hannah every other weekend and for two weeks during the summer. The trial court also allowed Hannah to

⁴ The trial court entered an original order on 17 November 2009, but amended the order to correct a minor error on 17 December 2009.

participate in family celebrations with Respondent-Mother during holidays and to attend special events with Amy and Hal.

The trial court's decision to give father full custody of Hannah was based on the following undisputed findings of fact, which describe therapy provided to the family by Dr. April Harris-Britt, Dr. Harris-Britt's concerns about Respondent-Mother's conduct, and Hannah's progress:

12. [Hannah] has been seeing Dr. April Harris-Britt[] in individual therapy since February[] 2008. In addition to individual therapy, Dr. Harris-Britt met with both parents for six (6), two (2) hour co-parenting sessions.
13. With regard to the co-parenting sessions, [Respondent-Mother] was late to four (4) of the six (6) sessions and [Respondent-Father] was late to only one (1) session. The purpose of the sessions was to help the parents understand how their conflict affects [Hannah] and to help them implement a strategy to keep [Hannah] out of the middle of their conflict and to reduce [Hannah]'s feelings of being torn between them. The hope was that during the course of these sessions, the parents could come up with a custodial schedule and thus eliminate the need for this litigation. While the parents were able to discuss some difficult issues, they were not able to agree upon a custodial schedule.
14. During one session with [Respondent-Mother] and [Respondent-Father], Dr. Harris-Britt presented them with a list of [Hannah]'s concerns, which was generated by [Hannah]. [Respondent-Father] was able to acknowledge some of his faults and was less talkative, mostly responding to questions and taking notes during the session. [Respondent-Mother] was argumentative, disagreeable and did not believe that [Hannah] had presented the concerns.

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17. Dr. Harris-Britt is of the opinion that [Hannah] initially made progress in therapy in developing a relationship with [Respondent-Father] and in adjusting to living with him, his current wife, and their child. After moving in with her father and engaging in therapy, [Hannah] began to accept personal responsibility; to make better behavioral choices and to improve her coping skills and self-esteem. She began attending school regularly and on time (she had excessive absences while living with [Respondent-Mother]) and has made the A/B Honor Roll (up from a D average while living with [Respondent-Mother]). Her academic progress is so remarkable, that she was selected as Student of the Month in April, 2009. Dr. Harris-Britt is concerned that [Respondent-Mother]'s open negativity toward [Respondent-Father] and his wife, has undermined [Respondent-Father] and [Hannah]'s progress in their relationship and has served to disrupt and diminish [Hannah's] progress in individual therapy.

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19. [Hannah] now states that she wants to live with [Respondent-Mother]. According to the Guardian ad Litem, [Hannah] has stated that she believes that her father does not "deserve" to have her as he was absent during her childhood.

20. During the course of Dr. Harris-Britt's therapeutic intervention with both [Hannah] and her parents she concluded that [Respondent-Mother] had said things to [Hannah] about [Respondent-Father] that tended to alienate [Hannah] from her father and state a preference to live with [Respondent-Mother].

21. At the same time that [Hannah] was telling Dr. Harris-Britt that she did not want to live with [Respondent-Father] and was angry with him, she was making progress in all areas of her life. She

was attending school regularly and was making better grades; she appeared more disciplined and happy. She had formed a good relationship with her step-mother and was happy to have a new half-sister in the home.

In addition, the trial court found that:

22. Based upon the psychological evaluation completed by Dr. David Ziff, this court finds that [Respondent-Mother] does not have the ability to 1) temper her anger towards [Respondent-Father]; 2) appropriately receive and respond to discomfoting information from [Hannah]; and 3) understand the complex issues surrounding parenting after divorce.

Based on these findings of fact, the trial court concluded that:

24. [Hannah] has made significant improvement in all aspects of her life since living with her father []. It is in [Hannah]'s best interest that she continue living with [Respondent-Father] and that he be granted sole legal custody of her.

As a result, the trial court terminated its jurisdiction over this case and ordered that it be "converted to the previous Chapter 50 case, pursuant to [N.C. Gen. Stat. §] 7B-911."

In addition to addressing Hannah's custody, the trial court addressed the issue of whether Respondent-Mother had violated the orders that the trial court stated at the 5 March 2009 hearing. In considering this issue, the trial court found that, "[b]ased upon all of the evidence and testimony," Respondent-Mother had "violated a prior order of this court and discussed matters related to this case with [Hannah]." However, the trial court declined to hold Respondent-Mother in willful contempt, because, "[b]ased upon the evidence presented, [Respondent-Mother's] demeanor in court and the

psychological evaluation, [Respondent-Mother] lacks the ability to receive and appropriately respond to discomfoting information” Respondent-Mother noted an appeal to this Court from the trial court’s order.⁵

II. Analysis

A. Termination of Juvenile Court Supervision

First, Respondent-Mother contends that the trial court failed to make sufficient findings pursuant to N.C. Gen. Stat. § 7B-911(c) (2009) in order to support the transfer of the Chapter 7B juvenile case to a Chapter 50 civil custody case. Although we do not agree with all of Respondent-Mother’s arguments concerning the validity of the trial court’s order, we agree with her that the trial court failed to make sufficient findings addressing the termination of the juvenile court’s jurisdiction to support the entry of a valid transfer order, so this case should be remanded to the trial court for further proceedings.

Pursuant to N.C. Gen. Stat. § 7B-911(c), a juvenile court may enter a Chapter 50 civil custody order awarding custody to a parent and terminating the juvenile court’s jurisdiction only if:

- (1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to [N.C. Gen. Stat. §] 50-13.7; and

⁵ The order at issue in the present appeal does not address any issues relating to Amy and Hal.

- (2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:
 - a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and
 - b. That at 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) (2009). Although the relevant statutory provision references the entry of two separate orders, we have previously held that "there is no requirement that the trial court enter two different orders" and that "[t]he trial court may enter one order for placement in both the juvenile file and the civil file as long as the order is sufficient to support termination of juvenile court jurisdiction and modification of custody." *In re A.S.*, 182 N.C. App. 139, 142, 641 S.E.2d 400, 402 (2007). Furthermore, while "the requirements of N.C. Gen. Stat. § 7B-911(c) only apply to civil custody orders and not review orders," *In re H.S.F.*, 182 N.C. App. 739, 744, 645 S.E.2d 383, 386 (2007), the trial court must make findings pertaining to both

subsections (1) and (2) of N.C. Gen. Stat. § 7B-911(c) in the event that only a single order is entered.⁶

In this case, an existing Chapter 50 custody action was referenced in the trial court's order, and the trial court specifically transferred the file back to the "previous Chapter 50 case." Furthermore, the record evidence establishes that Respondent-Mother and Respondent-Father separated in 1996, that they divorced in 1997, and that Respondent-Mother was given custody of Hannah, subject to visitation rights awarded to Respondent-Father. As a result, the trial court was required by N.C. Gen. Stat. § 7B-911(c)(1) to make sufficient findings of fact and conclusions of law to support modification of the existing custody order pursuant to N.C. Gen. Stat. § 50-13.7.

The guardian *ad litem* argues that a substantial change in circumstances need not be found in this instance because this case "originated from a juvenile petition, not a custody challenge." Although the guardian *ad litem* is correct in asserting that the present action began as a juvenile matter conducted pursuant to Chapter 7B of the General Statutes, that fact does not absolve the trial court from the obligation to make sufficient findings of fact to establish a change in circumstances. The plain language of N.C. Gen. Stat. § 7B-911(c)(1) requires findings that support

⁶ The guardian *ad litem* argues that an order of the nature at issue here need not comply with both N.C. Gen. Stat. § 7B-911(c)(1) and N.C. Gen. Stat. § 7B-911(c)(2). However, given that the relevant provisions of N.C. Gen. Stat. § 7B-911(c) are couched in the conjunctive rather than the disjunctive, this aspect of the guardian *ad litem*'s argument has no merit.

modification "if the juvenile is *already the subject of a custody order* entered pursuant to Chapter 50." N.C. Gen. Stat. § 7B-911(c)(1) (emphasis added). Nothing in N.C. Gen. Stat. § 7B-911(c)(1) makes any distinction between actions that originate as juvenile proceedings and actions that originate as civil disputes. Instead, the relevant distinction for purposes of N.C. Gen. Stat. § 7B-911(c)(1) is one between juveniles whose custody has been addressed in a civil proceeding brought pursuant to Chapter 50 of the General Statutes and those whose custody has not been addressed in such a proceeding. In this case, Hannah's custody had been the subject of a previous Chapter 50 custody order. Therefore, we reject the guardian *ad litem's* argument and conclude that the trial court was required to make findings regarding a substantial change in circumstances at the time that it awarded Hannah's custody to Respondent-Father.

It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. While allegations concerning adversity are acceptable factor[s] for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody. Further, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests.

In re A.S., 182 N.C. App. at 142-43, 641 S.E.2d at 403 (internal citations and quotations omitted). In its order, the trial court found and concluded that Respondent-Father was a fit and proper person to have custody of Hannah and that it was in Hannah's best interest to award custody to Respondent-Father. According to Respondent-Mother, the trial court's findings did not sufficiently comply with the findings requirement of N.C. Gen. Stat. § 7B-911(c)(1). We disagree with this aspect of Respondent-Mother's argument.

A similar issue was addressed by this Court in *In re A.S.*, in which we stated that:

In the present case, the trial court attempted to incorporate the previous adjudication order by finding:

The actions of . . . Respondent Mother and . . . Respondent Stepfather, as set out in the adjudication order . . ., would constitute a substantial change in circumstances so as to modify the order in the civil action and place custody of [the] children with . . . Respondent Father.

However, the trial court also made several findings which, independent of its finding incorporating the previous adjudication order, support modification of custody of the children. The trial court found:

1. [The] . . . children were adjudicated neglected by order of this Court . . . on December 12, 2005. The Court found that they were neglected based on Respondent Stepfather . . . administering inappropriate discipline on two occasions.

2. At the disposition hearing following adjudication, this Court placed the . . . children with . . . Respondent Father and ordered regular visitation between Respondent Mother and the . . . children. The Court also ordered the . . . children were not to be in the presence of . . . Respondent Stepfather

3. The . . . children have a lengthy history of behavioral problems at school and at home. Since living primarily with . . . Respondent Father, these discipline problems at school and at home have improved; however, there continues to be occasional behavioral issues from both the . . . children, especially from the oldest . . . child.

. . . .

6. The . . . children now attend counseling . . . for behavioral problems as well as other issues. The . . . children have benefitted from this counseling. It is scheduled to continue approximately one time per month. Respondent Father has borne the brunt of expenses of such counseling.

We hold these findings of fact and the trial court's conclusion of law that "[t]his order is in the best interest of [the] . . . children" to be sufficient to support the modification of custody of the children pursuant to N.C. [Gen. Stat.] § 50-13.7.

In re A.S., 182 N.C. App. at 143-44, 641 S.E.2d at 403. In this case, the trial court found that, in the aftermath of Dr. Harris-Britt's discussion with Respondent-Mother and Respondent-Father concerning "a list of [Hannah's] concerns," Respondent-Father "was able to acknowledge some of his faults and was less talkative,"

while Respondent-Mother "was argumentative, disagreeable and did not believe that [Hannah] had presented the concerns;" that Respondent-Mother has repeatedly expressed her disapproval of [Respondent-Father] and his family with" Hannah; that Respondent-Mother "has discussed the custody hearing and her strategies for gaining custody of [Hannah] with [Hannah];" that Respondent Mother "has been vocal . . . regarding her disapproval of the ways in which [Respondent-Father] is parenting" Hannah; that Hannah "has presented questions and information to Dr. Harris-Britt which could only be the result of information provided to [Hannah] by [Respondent-Mother];" and that Respondent-Mother's "open negativity toward [Respondent-Father] and his wife . . . has undermined [Respondent-Father] and [Hannah's] progress in their relationship and has served to disrupt and diminish [Hannah's] progress in individual therapy." In fact, based on a psychological evaluation conducted by Dr. David Ziff, the trial court found that Respondent-Mother "does not have the ability to 1) temper her anger towards [Respondent-Father]; 2) appropriately receive and respond to discomfoting information from [Hannah]; and 3) understand the complex issues surrounding parenting after divorce." On the other hand, the trial court found that, "[a]fter moving in with [Respondent-Father] and engaging in therapy, [Hannah] began to accept personal responsibility; to make better behavioral choices and to improve her coping skills and self-esteem;" to attend "school regularly and on time (she had excessive absences while living with [Respondent-Mother]);" and was named student of the

month in April, 2009 because of her improved academic performance. Finally, the trial court concluded that Respondent-Father "is a fit and proper person to have legal custody of" Hannah and that "it is in the best interest of [Hannah] that sole legal custody be awarded to" Respondent-Father. In view of the strong resemblance between the findings held sufficient to support a change of custody in *In re A.S.*, which emphasized the problems that the children would face in the event that they remained in the custody of their mother, and the benefits that had accrued to the children since they had come into the care of their father, and the findings made by the trial court in this case, we conclude that the findings and conclusions contained in the trial court's order are sufficient to comply with N.C. Gen. Stat. § 7B-911(c)(1).

The same cannot, however, be said for the trial court's compliance with N.C. Gen. Stat. § 7B-911(c)(2)a, which requires findings and conclusions concerning the extent to which there is a "need for continued State intervention" in an order of the type at issue here. The trial court's order is simply devoid of any findings of fact addressing the need for continued State intervention in Hannah's life. Although this Court upheld an order against a challenge lodged pursuant to N.C. Gen. Stat. § 7B-911(c)(2)a in *In re A.S.* based on the fact that it included findings of fact that, after an initial period during which the DSS supervised visitation with the juvenile, "the parties began communicating sufficiently to arrange their visitation without [DSS's] help"; that "Respondent Mother and Respondent Father have

been able to communicate sufficiently to coordinate visitations between the . . . children and . . . Respondent Mother without significant involvement from [DSS] since March 2006"; that DSS "wishes to be relieved of further involvement in this case"; that "[t]he parties both have suitable homes for visitation and/or custody of [the] . . . children"; and that Respondent-Mother "is capable of properly supervising and disciplining the . . . children and keeping them safe while in her care and custody" and a conclusion of law that "[DSS] and . . . GAL involvement is no longer necessary in this matter," *In re A.S.*, 182 N.C. App. at 144, 641 S.E.2d at 404, the order at issue here is simply devoid of any language from which we can determine that the trial court considered the extent to which continued DSS and guardian *ad litem* involvement was necessary as required by N.C. Gen. Stat. § 911(c)(2)a. As a result, we have no choice but to determine that the trial court failed to make proper findings of fact and conclusions of law concerning the issue delineated in N.C. Gen. Stat. § 7B-911(c)(2)a and that the trial court improperly terminated its jurisdiction over Hannah pursuant to Chapter 7B of the North Carolina General Statutes by transferring the issue of Hannah's custody to a Chapter 50 case. *In re J.B.*, ___ N.C. App. ___, ___, 677 S.E.2d 532, 535 (2009) (holding that "the [trial] court did not find that there was no longer a need for continued State intervention on behalf of [the juvenile] in accordance with N.C. Gen. Stat. § 7B-911(c)(2)(a)"). Thus, we reverse the trial court's order and remand this case to the trial court for further

proceedings, at which the trial court must make findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 7B-911(c)(2)a.

B. Limitations on the Duration of Respondent-Mother's Evidence

Secondly, Respondent-Mother argues that the trial court impermissibly limited the time allotted to her for the purpose of presenting evidence concerning Hannah's best interests. In support of this argument, Respondent-Mother cites *In re Shue*, 311 N.C. 586, 597-98, 319 S.E.2d 567, 574 (1984), in which the Supreme Court held that the trial court erred by failing to hear all of a parent's evidence at a review hearing. In *In re Shue*, the trial court limited the mother to one hour to present additional evidence, so that the parent was unable to call certain witnesses. *Id.* at 589, 319 S.E.2d at 570. The Supreme Court held that the trial court's action was unlawful and stated that "the trial court was [] required to hear and consider all of the evidence tendered to the court by the mother which was competent, relevant, and non-cumulative." *Id.* at 598, 319 S.E.2d at 574. We do not believe that an error of the type described in *In re Shue* occurred in this case.

In *In re Shue*, the trial court appeared to place an arbitrary time limit on the parent's ability to present evidence. In this case, the trial court definitely urged all parties to move along quickly and to avoid repetition. However, the trial court did not single out Respondent-Mother during its attempts to foster expedition or place any sort of arbitrary time limitation on

Respondent-Mother's ability to present evidence. In fact, since the hearing was not completed after nearly an hour-and-a-half on 7 May 2009, the parties were able to schedule a second hearing date on 13 May 2009, at which time the trial court heard the case from 9:46 a.m. to 1:13 p.m., including an hour-long recess. During the course of the hearings, Respondent-Mother was able to present the testimony of three witnesses - Dr. Jane Ross, Respondent-Father, and herself. Although the trial court did preclude Respondent-Mother from calling three other witnesses, the exclusion of their testimony resulted from the allowance of Respondent-Father's motion in limine rather than from the imposition of any arbitrary limitations placed on Respondent-Mother's ability to present her case. As a result, we conclude that the trial court did not impermissibly limit the time available for Respondent-Mother to present evidence.

C. Ruling on Motion in Limine

Thirdly, Respondent-Mother contends that the trial court erroneously restricted the scope of the evidence that she was allowed to present concerning the "best interests" issue. We disagree.

On 7 May 2009, Respondent-Father filed a motion in limine seeking the entry of an order excluding the testimony of Britta Starke, who performed Respondent-Father's substance abuse assessment, and Elizabeth Foust and Kimberly Self, who were expected to testify concerning aspects of Respondent-Father's

personal history. The trial court allowed Respondent-Father's motion in limine.

"Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2009). As we have already noted, a trial judge examining the "best interests" issue is entitled to exclude cumulative evidence. *In re Shue*, 311 N.C. at 597, 319 S.E.2d at 574. In this case, the trial court concluded that Ms. Starke's testimony was cumulative. In addition, the trial court ultimately admitted the substance of the evidence that Respondent-Mother hoped to elicit from Ms. Starke, rendering any error that the trial court may have committed in connection with the exclusion of Ms. Starke's testimony harmless. *State v. Jarrett*, 137 N.C. App. 256, 260, 527 S.E.2d 693, 696 (citing *State v. Willis*, 332 N.C. 151, 168-69, 420 S.E.2d 158, 166 (1992) (holding that "[a]ny error in the trial court's ruling [refusing to allow evidence of the dates shown on a mental health receipt] was cured when the State subsequently offered the receipt into evidence and defendant was able to elicit information through the testimony of another evidence technician"), *disc. review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000)). According to Respondent-Mother, Respondent-Father misrepresented the status of a pending driving while impaired charge during a substance abuse assessment performed by Ms. Starke on 25 and 30 June 2008. In lieu of her testimony, the trial court admitted Ms. Starke's written evaluation and the judgment in Respondent-Father's driving while impaired case into evidence. In addition,

Respondent-Father claimed to have misspoken during the assessment and stipulated that he was convicted of DWI in the fall of 2008. Thus, the information necessary to support Respondent-Mother's contention was admitted into evidence before the trial court. As a result, Respondent-Mother is not entitled to any relief on appeal based on the trial court's decision to preclude Ms. Starke from testifying.

The trial court granted Respondent-Father's motion in limine with respect to the testimony of Ms. Foust and Ms. Self on the grounds that the evidence that Respondent-Mother hoped to elicit from the witnesses in question was irrelevant and was cumulative of other evidence which the trial court had already heard.

Pursuant to the North Carolina Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). While "[a] trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard[,] . . . such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

In re E.P., 183 N.C. App. 301, 303-04, 645 S.E.2d 772, 773-74, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007). The trial court determined that the evidence that Respondent-Mother sought to elicit from Ms. Foust and Ms. Self was not relevant because the events which they were expected to describe had occurred approximately a decade earlier. In essence, the events in question dated back to the time of the parents' marriage, which ended in

1997. According to other evidence in the record, Respondent-Father's circumstances had changed since his divorce from Respondent-Mother. Based on that more current evidence, the trial court had already determined that Respondent-Father was a fit and proper person to have custody of Hannah. As a result, the trial court decided to focus on evidence relating to events that had occurred after the last hearing since evidence of that nature would best reflect each parent's current circumstances and parental abilities. As a result, giving appropriate deference to the trial court's decision as required by the applicable standard of review, we conclude that the trial court did not err in excluding the testimony of Ms. Foust and Ms. Self. *See id.*

Even if the evidence that Respondent-Mother sought to elicit from Ms. Foust and Ms. Self was relevant, we find no error in the trial court's decision to exclude that evidence on the ground that it was cumulative. The decision to exclude evidence as cumulative is an issue committed to the sound discretion of the trial court. *Id.* Since much of the evidence that Respondent-Mother sought to elicit from Ms. Foust and Ms. Self was already before the trial court by virtue of Ms. Starke's substance abuse report and the testimony of Respondent-Mother and Respondent-Father, we conclude that the trial court could correctly determine that the testimony in question was cumulative. Thus, the trial court did not abuse its discretion by precluding Respondent-Mother from eliciting additional testimony concerning Respondent-Father's past conduct from Ms. Foust and Ms. Self.

D. Consideration of Hannah's Wishes

Fourth, Respondent-Mother contends that the trial court failed to give proper consideration to Hannah's wishes in awarding custody to Respondent-Father. We disagree.

"[T]he trial judge may consider the wishes of a child of suitable age and discretion" in making a custody decision. *Reynolds v. Reynolds*, 109 N.C. App. 110, 112, 426 S.E.2d 102, 104 (1993) (citations omitted). "The child's wishes, however, are never controlling, 'since the court must yield in all cases to what it considers to be the child's best interests, regardless of the child's personal preference.'" *Id.* at 112-13, 426 S.E.2d at 104 (quoting *Clark v. Clark*, 294 N.C. 554, 577, 243 S.E.2d 129, 142 (1978)). Since she was fifteen years old at the time of the hearing, Hannah was clearly of a "suitable age and discretion" and entitled to express her wishes concerning the custody issue. Although the trial court did not honor Hannah's request that Respondent-Mother be awarded custody, we conclude that Hannah's preference was properly considered in the trial court's custody determination.

The trial court spoke to Hannah in chambers before the start of the hearing and acknowledged in its order that Hannah preferred to live with Respondent-Mother. In its order, the trial court made the following findings that, despite Hannah's expressed preference to the contrary, support its conclusion that Hannah's best interests would be served by awarding custody to Respondent-Father:

21. At the same time that [Hannah] was telling Dr. Harris-Britt that she did not

want to live with her father and was angry with him, she was making progress in all areas of her life. She was attending school regularly and was making better grades; she appeared more disciplined and happy. She had formed a good relationship with her step-mother and was happy to have a new half-sister in the home.

. . . .

24. [Hannah] has made significant improvement in all aspects of her life since living with her father []. It is in [Hannah's] best interest that she continue living with her father and that he be granted sole legal custody of her.

Based upon our review of the record, we conclude that the trial court took appropriate steps to ascertain Hannah's wishes concerning the issue of custody, considered her wishes in making its custody decision, and provided ample justification for failing to honor Hannah's expressed wishes. As a result, we conclude that the trial court did not err by giving inadequate consideration to Hannah's wishes concerning the custody issue.

E. Evidentiary Support for Findings of Fact Nos. 15 and 16

Fifth, Respondent-Mother challenges the sufficiency of the evidence to support Findings of Fact Nos. 15 and 16, which are based upon a letter that Dr. Harris-Britt sent to the trial court and the testimony that Dr. Harris-Britt gave during the hearing and relate to Respondent-Mother's conduct during counseling. The challenged findings of fact state that:

15. On March 5, 2009, the parties were ordered not to discuss the pending legal action or say derogatory things about each other to [Hannah]. However, Dr. Harris-Britt was of the opinion and the

court finds that [Respondent-Mother] has repeatedly discussed her disapproval of [Respondent-Father] and his family with [Hannah]; that [Respondent-Mother] has discussed the custody hearing and her strategies for gaining custody of [Hannah] with [Hannah]; and that [Respondent-Mother] has been vocal with [Hannah] regarding her disapproval of the ways in which [Respondent-Father] is parenting [Hannah]. The information and opinions provided to [Hannah] by [Respondent-Mother] has resulted in [Hannah's]'s resistance to comply [sic] with [Respondent-Father's] household rules, as she had done before.

16. In therapy, [Hannah] has presented questions and information to Dr. Harris-Britt which could only be the result of information provided to [Hannah] by [Respondent-Mother]. For example; [Hannah] has asked Dr. Harris-Britt about how to be emancipated; has told Dr. Harris-Britt that she can say where she wants to live when she reaches the age of sixteen (16); and proclaimed that her [guardian *ad litem*] [] had told "lies" about her mother and that [Hannah] could have fired her [], had [Hannah] known that she could have requested another [guardian *ad litem*] to represent her.

Respondent-Mother argues that these findings of fact are not supported by Dr. Harris-Britt's testimony or the letter that Dr. Harris-Britt sent to the trial court given that Dr. Harris-Britt lacked direct knowledge that Respondent-Mother had acted in the manner described in these findings.

After carefully reviewing the record, we conclude that the challenged findings have sufficient evidentiary support. Dr. Harris-Britt's testimony was necessarily couched in the form of her inferences and opinions. In essence, Dr. Harris-Britt was asked to offer her expert opinion, based on the work she performed as

Hannah's counselor, concerning whether any prohibited information was being shared with Hannah. In her letter to the trial court, Dr. Harris-Britt stated that she was concerned that Respondent-Mother was expressing disapproval of Respondent-Father's household; that she suspected that Respondent-Mother had been discussing trial strategy and other custody-related issues with Hannah; and that Hannah's attitude changed after she spent a weekend with Respondent-Mother, at which point Hannah began questioning Respondent-Father's motives. At the hearing, Dr. Harris-Britt testified that she was concerned that Respondent-Mother was discussing prohibited information with Hannah. In fact, Dr. Harris-Britt expressed confidence that Respondent-Mother was the source of the prohibited information in Hannah's possession, since she testified that:

Q. Now if you, uh, are operating on a scale from one to ten, ten being most sure, one being least sure, how confident are you, based on this scale, that information is coming from mom to daughter.

A. A ten.

Furthermore, Dr. Harris-Britt clearly differentiated between what she knew and what she inferred in both her letter and her testimony at the hearing. Based upon our review of the record evidence, we simply cannot agree with Respondent-Mother's contentions that the information that Dr. Harris-Britt provided to the trial court constituted mere speculation, *State v. Garcell*, 363 N.C. 10, 36, 678 S.E.2d 618, 635 (2009) (stating that "[t]estimony that is mere speculation is inadmissible"), or inadmissible hearsay. N.C. Gen.

Stat. § 8C-1, Rule 802 (2009) (stating that “[h]earsay is not admissible except as provided by statute or by these rules”). On the contrary, we believe that the inferences that Dr. Harris-Britt drew from the information in her possession concerning Respondent-Mother’s conversations with Hannah were reasonable and that the trial court could appropriately rely on them in deciding the issues addressed in the custody order. As a result, we conclude that Findings of Fact Nos. 15 and 16 have adequate evidentiary support.

F. Substantive Custody Decision

Finally, Respondent-Mother argues that the trial court abused its discretion by awarding custody of Hannah to Respondent-Father. More particularly, Respondent-Mother contends that the trial court changed Hannah’s custody for the impermissible purpose of punishing Respondent-Mother for discussing prohibited information with Hannah in violation of the trial court’s earlier order. We disagree.

According to well-established North Carolina law, the trial court has wide discretion to adopt a dispositional alternative that is in the juvenile’s best interest, including placing the juvenile in the custody of a parent. N.C. Gen. Stat. § 7B-903(a)(2)b (2009); *see also In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 517 (2007), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008). In this case, the trial court concluded, in the exercise of its discretion, that it was in Hannah’s best interest that custody be awarded to Respondent-Father. The trial court’s decision rested on numerous findings of fact that have been discussed in more detail earlier in this opinion.

In addition to resolving the issue of Hannah's custody, the trial court also addressed the issue of whether Respondent-Mother should be held in contempt for violating the trial court's earlier order not to discuss certain issues with Hannah. The trial court found, with respect to the contempt issue, that:

11. Based upon all of the evidence and testimony, this court finds that [Respondent-Mother] violated a prior order of this court and discussed matters related to this case with [Hannah].

. . . .

23. Based upon the evidence presented, [Respondent-Mother]'s demeanor in court and the psychological evaluation, [Respondent-Mother] lacks the ability to receive and appropriately respond to discomfoting information and therefore cannot be held in willful contempt of the court's prior order.

Although the trial court addressed the issue of contempt in the same order that awarded custody of Hannah to Respondent-Father, we see no indication in the record that the trial court did anything other than attempt to make a proper custody determination in that part of its order addressing custody-related issues, and we have no basis for concluding that the trial court's custody decision amounted to implicit punishment for Respondent-Mother's failure to adhere to the trial court's earlier prohibition against discussing custody-related issues with Hannah. On the contrary, unlike the situation under consideration in the authority upon which Respondent-Mother relies, the trial court provided an ample, non-punitive justification for awarding custody of Hannah to Respondent-Father. *In re Ledbetter*, 158 N.C. App. 281, 286, 580

S.E.2d 392, 395 (2003) (noting that the trial court made "no supporting findings of fact except that respondent was in noncompliance with court orders while the father was in compliance with the prior orders"). As a result, we conclude that, with the exception of the error noted earlier in this opinion, the trial court provided ample justification for its custody decision and did not err by awarding custody of Hannah to Respondent-Father for an impermissible reason. *In re McGraw Children*, 3 N.C. App. 390, 395, 165 S.E.2d 1, 4-5 (1969) (stating that "it is not the function of the courts to punish or reward a parent by withholding or awarding custody of minor children").

III. Conclusion

Thus, for the reasons set forth above, we reverse the trial court's order in part and remand this case to the trial court for the making of appropriate findings of fact and conclusions of law as required by N.C. Gen. Stat. § 7B-911(c)(2)a. With respect to the remaining issues that Respondent-Mother has asserted on appeal, however, we conclude that those arguments lack merit and that the remainder of the trial court's order should be affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).