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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-99

Filed: 15 December 2020

Gaston County, Nos. 18 JA 208–09

IN THE MATTER OF: K.A.W. and J.M.W.

Appeal by respondent-mother from order entered 11 October 2019 by Judge Pennie M. Thrower in Gaston County District Court. Heard in the Court of Appeals 3 November 2020.

*Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Health and Human Services.*

*Office of the Parent Defender, by Parent Defender Wendy C. Sotolongo and Assistant Parent Defender Jacky Brammer, for respondent-appellant mother.*

*GAL Appellate Counsel Matthew D. Wunsche for the guardian ad litem.*

*No brief filed for respondent-father.*

BRYANT, Judge.

Respondent-mother appeals from an order removing custody of her children K.A.W. (“Kim”) and J.A.W. (“Josh”) from the Gaston County Department of Health

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and Human Services (“DHHS”) and returning them to the custody of their father.<sup>1</sup> We affirm.

*Facts and Procedural History*

DHHS instituted the underlying case on 17 September 2018, when it obtained nonsecure custody of the children and filed a juvenile petition alleging they were abused and neglected juveniles.<sup>2</sup> After a hearing was held on 4 and 5 February 2019, the trial court entered orders adjudicating Kim to be an abused and neglected juvenile and Josh to be a neglected juvenile. The court continued disposition and held a dispositional hearing on 21 May 2019.

In its disposition order entered 2 July 2019, the trial court continued custody of the children with DHHS and left placement of the children in DHHS’s discretion. The children had been placed with respondent-father since they were taken into DHHS custody. Out of concerns for the safety of the children, the trial court granted respondent-mother only biweekly electronic supervised visitation with them. The court adopted DHHS’s recommended case plan for respondent-mother and ordered her to comply with the plan. Respondent-mother’s court ordered case plan required her to, in part, “[p]articipate in psychotherapy with a therapist who has experience

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<sup>1</sup> We use pseudonyms throughout this opinion for ease of reading and to preserve the anonymity of the juveniles.

<sup>2</sup> The factual basis for the petitions can be found in this Court’s opinion from respondent-mother’s appeal from the adjudication and disposition orders entered in this case. *See In re K.W.*, No. COA19-943 (N.C. Ct. App. Jul. 21, 2020).

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treating individuals with Factitious Disorder or other somatic-related disorders” and “[c]omply with any further requested psychological testing[.]”

Respondent-mother appealed from the adjudication and disposition orders, *see In re K.W.*, No. COA19-943 (N.C. Ct. App. Jul. 21, 2020). This Court affirmed the adjudication and disposition orders but remanded the case to the trial court for entry of an order showing it had informed respondent-mother of her right to seek review of the visitation plan. *Id.* slip op. at 17.

The trial court conducted a permanency planning and review hearing on 17 September 2019. In its order from that hearing (entered 11 October 2019), the trial court found respondent-mother had not: (1) demonstrated any change in her behavior that brought the juveniles into DHHS custody; (2) completed therapy with an appropriate therapist; (3) provided all the personal items requested by the children; (4) agreed to, nor signed, a case plan with DHHS; (5) provided information about her new husband to DHHS; (6) provided her current physical address or further information on her current living situation to DHHS; or (7) offered to pay, or paid, financial support for the children. Respondent-mother had attended all six offered visitations with the children. The court further found respondent-father had complied with everything DHHS had requested, including completing parenting classes, engaging in family-centered therapy with the children, maintaining good communication with DHHS, and providing the children with a safe and stable home.

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The court found continued reunification efforts with respondent-mother would be futile and inconsistent with the children's health, safety, and need for a safe permanent home within a reasonable time. Additionally, the court found reunification with respondent-father and guardianship were the best primary and secondary permanent plans for the children.

Based on its findings, the court returned custody of the children to respondent-father and ordered that no further hearings were required in the matter. The children's guardian ad litem ("GAL"), and counsel for respondent-mother, respondent-father, and the GAL were released from further duties in the case.<sup>3</sup> Respondent-mother was denied in-person visitation with the children but granted biweekly electronic visitation with them. The trial court ordered that respondent-mother be permitted to engage in family therapy with the children when it was "therapeutically recommended" that she be included. The court retained jurisdiction over the case and ordered that either party may file a motion to change visitation in the future. To support a change in visitation, the court directed respondent-mother to show her participation in individual therapy to "alleviate the conditions that contributed to the removal of the [children] from her custody" and to allow her therapist to communicate with the children's therapist.

Respondent-mother appeals.

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<sup>3</sup> Respondent-mother represented herself at the permanency planning and review hearing, but the court had appointed provisional counsel to assist her if needed.

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*Standard of Review*

Generally, “[appellate] review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court’s findings of fact are supported by any competent evidence, they are conclusive on appeal.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). “Unchallenged findings of fact are deemed to be supported by the evidence and are binding on appeal. Moreover, erroneous findings that are unnecessary to support the trial court’s conclusions of law may be disregarded as harmless.” *See In re A.C.*, 247 N.C. App. 528, 533, 786 S.E.2d 728, 733 (2016) (citations omitted).

*Sufficiency of Factual Findings*

We first note that respondent-mother challenges several findings of fact made by the trial court as mere summaries of witness testimony and not proper findings that may support the court’s conclusions of law. *See In re Bullock*, 229 N.C. App. 373, 378, 748 S.E.2d 27, 30 (2013) (“Recitations of the testimony of each witness do not constitute findings of fact by the trial judge.” (citation, quotation marks, and emphasis omitted)). However, none of the challenged findings of fact are needed to support the trial court’s order, and we disregard the challenged findings, even if erroneous, as harmless. *See In re A.C.*, 247 N.C. App. at 533, 786 S.E.2d at 733.

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*Consideration of Kim & Josh's Wishes*

Respondent-mother argues the trial court erred in failing to consider evidence from the children about their wishes regarding the outcome of the juvenile case. She contends the GAL failed to perform her duty to ask the children about their wishes, and the GAL's failure prevented the trial court from performing its duty to "consider information from the parents, the juvenile, the guardian, any person providing care for the juvenile, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid in the court's review." N.C. Gen. Stat. § 7B-906.1(c) (2019).

Respondent-mother did not present the issue of whether the GAL properly asked the children about their wishes to the trial court, and she did not otherwise attempt to present evidence of the children's wishes to the court. By not presenting this issue to the trial court, respondent-mother has waived review of her argument on appeal. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."). Respondent contends that her argument is automatically preserved because the trial court failed to follow a statutory mandate, but she has not identified any statutory

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mandate that the trial court failed to follow. *See In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019) (holding “a statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place th[e] responsibility on the judge presiding at the trial, or at specific courtroom proceedings that the trial judge has authority to direct” (alteration in original) (citations and quotation marks omitted)). Respondent-mother asserts the trial court failed to adhere to the statutory mandate of section 7B-906.1(c), but that statute requires only that the court consider information from various sources, including the children, which will aid in its review. N.C.G.S. § 7B-906.1(c). The statute is not a mandate to the court requiring it to order those sources of information to present evidence to the court.

Respondent-mother has not argued the trial court failed to consider any evidence presented to it, as the statute requires. Rather, her argument is predicated on an unsubstantiated belief that the GAL could and should have presented additional evidence regarding the wishes of the children, which prevented the trial court from hearing evidence. This argument is not based on a statutory mandate imposed on the trial court. Thus, the argument must have been presented to the trial court for a ruling to be preserved for appellate review. *See, e.g., In re A.D.N.*, 231 N.C. App. 54, 65, 752 S.E.2d 201, 209 (2013) (“This Court has previously held that in order to preserve for appeal the argument that the trial court erred by failing to

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appoint [a] child a GAL, a respondent must object to the asserted error below.” (citation omitted)). Respondent-mother did not argue at trial that the GAL failed to fulfill her duties to the children or the trial court or that the trial court lacked necessary information regarding the wishes of the children. Accordingly, respondent-mother has waived review of this argument.<sup>4</sup>

*Visitation*

Respondent-mother also argues the trial court erred in ordering her to comply with electronic visitation with the children because it heard no evidence and made no findings of fact to support a complete denial of in-person visitation. Respondent-mother further argues the trial court’s visitation award arbitrarily reduced her electronic visitation from two hours to one hour every two weeks. We disagree.

“An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile’s placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile’s health and safety, including no visitation.” N.C. Gen. Stat. § 7B-905.1(a) (2019); *cf. In re K.C.*, 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (holding a trial court may deny a parent visitation by finding either that “the parent has forfeited his or her right to visitation or that it is in the child’s best interest to deny visitation” (citation, quotation marks, and brackets omitted)). “This Court reviews an order

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<sup>4</sup> We note, notwithstanding respondent-mother’s waiver of the argument, that the trial court did make findings of fact regarding the wishes of the children based on the GAL report.



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disallowing visitation for abuse of discretion.” *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citation omitted). “An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 415, 826 S.E.2d at 264 (quotation marks and citation omitted).

The trial court’s order denies in-person visitation to respondent-mother and permits biweekly electronic visitation with the children for one hour. In support of this order, the trial court specifically found:

10. Respondent/mother has not demonstrated any change in her behavior which brought the juveniles into the custody of the Department; she has not completed therapy with an appropriate therapist; she has not provided all the personal items that the juveniles have requested multiple times; she has not agreed to, nor signed, a case plan with the Department; she has not provided information about her new husband to the Department; she has not provided her current physical address or further information on her current living situation; and she has not offered to pay, or paid, financial support for the juveniles.

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15. . . . Visits with Respondent/mother continue to be very difficult for the juveniles and contribute to substantial emotional distress for both the juveniles. The juvenile [Josh] is tearful and angry after visitations. Both juveniles have anxiety regarding visitations.

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29. That the conditions that led to the custody of the juveniles by the Gaston County Department of Health and

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Human Services, Division of Social Services and removal from the home of the Respondent/mother continue to exist and return of the juveniles to the home of the Respondent/mother would be contrary to the health and safety of each said juvenile.

30. Respondent/parents have the ability to complete their case plans; however, Respondent/mother has not entered into a case plan, thus a primary permanent plan of reunification with Respondent/father and a secondary permanent plan of guardianship is the best plan to achieve a safe, permanent home for the juveniles within a reasonable time period.

These findings are clear and specific, not mere summaries of the evidence presented at the hearing. Further, they are unchallenged by respondent-mother, and thus binding on appeal. *In re A.C.*, 247 N.C. App. at 533, 786 S.E.2d at 733.

The court also adopted the DHHS and GAL court reports and incorporated them as findings into its order. The GAL report found:

In June 2019, [Kim] caught [respondent-mother] in a lie during a Skype visit and verbally expressed her displeasure with her mother and walked away from the visit. At the July 3<sup>rd</sup> visit, [Kim] reported she no longer wanted to have visits with her mother. The GAL, therapist, and social worker agreed that [Kim] should not be forced to visit if she did not wish to do so. [Kim] is very protective of [Josh], though, and when she realized her decision would also impact him, she talked with [Josh] about discontinuing visits. [Josh] did not want her to stop participating in the visits, so she agreed to minimal participation.

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. . . During these visits, [Kim] and [Josh] sit in side-by-side chairs facing a tablet. [Josh] visits first and answers, “I don’t know,” or in one-word responses to her questions. At the July 31<sup>st</sup> visit, [Josh] had only been visiting about 15 or 20 minutes when [respondent-mother] asked him twice if he wanted to [go] play. This was his first comment at the conclusion of the visit-that his mother wanted to end his visit even though he had told her the first time she asked that he did not want to go play. Since the contentious visit on July 3, [Kim] does not sit in front of the camera where her mother can see her, but she does stay in hearing range. [Kim] generally gives one-word responses to her mother’s questions. As an example, when [respondent-mother] asked her what she had done that day, [Kim] would say she ate, drank and slept. This was repeated several times. When [respondent-mother] asked her to move so she could see her, [Kim] would cover her head with a throw and lean her covered head into camera range. When [Kim] tired of the questions or didn’t like the questions, she would simply stand up and leave the room.

Similarly, the DHHS report found:

[Respondent-mother] refuses to accept responsibility for any of the current strain in her relationship with her children, and continues to change the subject or accuse [Kim] of “saying what [DHHS and respondent-father] want her to say.” As a result, the juvenile [Kim] will challenge her mother’s interpretation of events, and will let her know when she feels her mother is being untruthful. The skype visits are scheduled for 2 hours, but due to this behavior, the calls rarely last longer than 45 minutes to an hour before the children signal to the [social worker] and their therapist that they are ready to end the call. The juvenile [Kim] will not sit in front of the tablet’s camera to allow her mother to see her, choosing instead to sit off to the side and converse that way.

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The report further detailed three Skype visits between respondent-mother and the children, which conformed with the findings from the GAL report. Both children became upset at the end of the visits and ultimately expressed a desire to discontinue the visits with respondent-mother. These findings are also binding on appeal, because they are unchallenged by respondent-mother. *Id.*

We hold the trial court's findings evince a well-reasoned decision and support its conclusions that in-person visitation should continue to be ceased and that respondent-mother be permitted only biweekly electronic visitation for one hour with the children. Accordingly, we overrule these arguments.

Respondent-mother also argues the trial court erred in awarding her only electronic visitation with the children, because it failed to establish who was to pay for the electronic visitation or that she had the resources to pay for electronic visitation. Respondent-mother correctly notes that where a trial court orders a parent to pay the costs of supervised visitation with a child pursuant to N.C.G.S. § 7B-905.1 (2019), the court must also make findings of fact showing the parent is able to pay those costs. *See, e.g., In re J.T.S.*, 268 N.C. App. 61, 74, 834 S.E.2d 637, 646 (2019).

Here, however, respondent-mother was only awarded electronic visitation, which this Court has held does “not constitute visitation as contemplated by [the Juvenile Code].” *In re K.W.*, slip op. at 15 n.2 (citing *In re T.R.T.*, 225 N.C. App. 567,

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574, 737 S.E.2d 823, 828 (2013)). The court discontinued actual visitation between respondent-mother and her children and allowed her only limited contact with them. Thus, respondent-mother has not been awarded supervised visitation under N.C.G.S. § 7B-905.1, such that the trial court was required to make any findings that she could pay any costs associated with her electronic visitation.

Respondent-mother further argues the trial court conflated her right to visitation with the prospect of her entering into therapy with the children, by keeping electronic visitation in place until the children's therapist deems it appropriate to bring her into their therapy sessions. She argues the trial court effectively denies her genuine visitation with the children and impermissibly delegates its authority over her only potential visitation with the children to their therapist. *See, e.g., In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) (holding a trial court may not delegate the judicial function of awarding visitation to the custodian of a child). She contends the court's order provides no clear mechanism for how she is supposed to demonstrate sufficient progress to the therapist in order to permit the therapist to allow her to join the children's therapy sessions. Respondent-mother's arguments are misplaced.

It is respondent-mother, and not the trial court, that conflates her potential future inclusion into the children's therapy with visitation with them. As previously discussed, the trial court's order unequivocally prohibits respondent-mother from

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visiting with the children as visitation is contemplated under North Carolina law. The court provided that respondent-mother's contact with the children would be limited to one-hour biweekly electronic sessions with them. This limited contact cannot be changed until it is therapeutically recommended to include respondent-mother in family therapy with the children. Only then could her contact with the children be enlarged to permit her to engage in family therapy with the children. This potential future contact is not visitation, but rather *therapy* designed to help the children. Additionally, and contrary to respondent-mother's argument, her means for demonstrating her progress to the children's therapist was explicitly provided in the court's order. The court's order provides: "To facilitate progress toward incorporating Respondent/mother into family therapy sessions [with] the [children], Respondent/mother is encouraged to allow her individual therapist to communicate with the [children's] therapist." The court denied respondent-mother visitation and limited her contact with the children to electronic means, but provided that her contact with the children could be expanded to include family therapy with them if and when the children's therapist deems it appropriate. The trial court thus did not delegate its statutory duty to determine respondent-mother's visitation with the children to their therapist or otherwise conflate visitation with the children's therapy.

*Additional Findings*

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We next address respondent-mother's argument that we should reverse the trial court's order and remand for the taking of additional testimony as to whether her sessions with her current therapist complied with her case plan, how many therapy sessions were needed to comply with her case plan, and whether she was required to pay for her own therapy and if she could do so. Respondent-mother concedes, however, that no evidence was presented on these issues. Indeed, testimony from a DHHS social worker established that respondent-mother's therapist had not "made it clear whether or not she is addressing the issues of factitious disorder" with respondent-mother. Similarly, a letter presented to the court from the therapist made no mention of whether or not she was addressing the issues of factitious disorder" with respondent-mother. The trial court thus had no evidence before it from which it could make the requested findings and did not err by not making the findings.

Respondent-mother also argues the trial court was required to make findings as to whether she could pay for her ordered therapy. Section 7B-904(c), provides that a trial court may charge the cost of treatment to a county or area mental health treatment program due to a parent's inability to pay for the treatment in two circumstances: (1) "cases in which the court has conditioned legal custody or physical placement of the juvenile with the parent . . . upon compliance with a plan of treatment"; or (2) where the juvenile's best interests "require that the parent . . .

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undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(c) (2019).

The trial court granted full custody of the children to respondent-father and did not condition custody or placement of the children with respondent-mother upon compliance with therapy. The court also found reunification efforts with respondent-mother would be futile and did not order her to continue therapy as part of her case plan to remedy the conditions that led to the removal of the children from her custody. Further therapy was ordered only if respondent-mother sought to modify the terms of the court's visitation order. Accordingly, the court was not required to inquire into whether respondent-mother could pay for further therapy or order DHHS to provide for the cost of therapy to respondent-mother.

*Conversion to Chapter 50 Custody Action*

Respondent-mother also argues the trial court should have terminated its jurisdiction and transferred this case to a Chapter 50 civil custody matter. Respondent-mother contends the trial court's order logically suggests the matter should be converted to a civil custody case, because the court granted custody of the children to respondent-father, relieved counsel for her, relieved respondent-father, and the GAL of further duties, and waived further hearings. She contends the trial



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court's order is vague as to what DHHS must still do in the case and leaves her status in the case unclear.

Section 7B-911(a) provides that, “[u]pon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to [Chapter 50].” N.C.G.S. § 7B-911(a) (2019). This Court has held:

[This] statute does not expressly require that the court make a finding as to whether jurisdiction in the juvenile proceeding should be terminated and the matter transferred to a Chapter 50 action. However, in the event the trial court chooses to do so, N.C. Gen. Stat. § 7B-911(b) and (c) specify the findings the court must make and procedures it must follow in order to terminate jurisdiction in the juvenile proceeding and transfer the matter to a Chapter 50 civil case.

*In re Y.I.*, 262 N.C. App. 575, 580, 822 S.E.2d 501, 505 (2018) (citation omitted).

Here, as in *In re Y.I.*, the trial court retained jurisdiction and informed respondent-mother of her right to seek review of the visitation plan pursuant to N.C.G.S. § 7B-905.1(d) (2019). Respondent-mother contends the court should have transferred the matter to a Chapter 50 custody action because doing so is “logical” or “better” than retaining jurisdiction.<sup>5</sup> Respondent-mother’s belief that, in her view,

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<sup>5</sup> Respondent-mother also argues the trial court should have more clearly established the rights and responsibilities of the parties in its order if it retained jurisdiction. We have previously addressed respondent-mother’s arguments regarding the clarity of the court’s order and found them without merit.

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transferring the matter to a Chapter 50 custody action would be “logical” or “better” does not present to this Court an argument that the trial court erred or abused its discretion in retaining jurisdiction; thus, we overrule this argument.

*Conclusion*

For the above reasons, we hold the trial court did not err in awarding custody of Kim and Josh to respondent-father, continuing the cessation of in-person visitation with respondent-mother and only allowing her to have biweekly electronic contact with the children, or in retaining jurisdiction in the juvenile case. Accordingly, we affirm the trial court’s order.

AFFIRMED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).