IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-678

No. COA20-404

Filed 7 December 2021

Wake County, No. 17 CVD 9670

KEVIN NESBETH, Plaintiff,

v.

SHANNON FLYNN, Defendant.

Appeal by Plaintiff from orders entered 11 and 20 of December 2019 and 6 January 2020 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 26 May 2021.

Tharrington Smith, LLP, by Steve Mansbery, for Plaintiff-Appellant.

Moore Law Group, P.L.L.C., by Jillian Mack, for Defendant-Appellee.

WOOD, Judge.

¶ 1 On December 11, 2019, the trial court entered a Permanent Child Custody Order ("PCC Order") resolving custody of Kevin Nesbeth's ("Plaintiff") and Shannon Flynn's ("Defendant") minor children. On December 20, 2019, the trial court entered an Order Appointing Parenting Coordinator By Consent ("APC Order") and on January 6, 2020, the trial court entered an Order (Third-Party Therapist Motion) ("Therapist Order"). On appeal, Plaintiff appeals numerous facets of the PCC Order and petitions this court for a writ of certiorari to review the Therapist Order. We

affirm the PCC Order of the trial court and deny Plaintiff's petition for a writ of certiorari.

I. Background

¶ 2 Plaintiff and Defendant (collectively, "the parties") began their relationship in 2001. The parties were never married but lived together and are the parents of three daughters (collectively, "the children"). Plaintiff moved to New York while Defendant and the children remained in North Carolina. During their relationship, the parties and the children traveled together as a family and resided in the same house whenever Plaintiff was in North Carolina. Defendant and Plaintiff ended their intimate relationship in 2015. Plaintiff then filed a child custody complaint against Defendant. A permanent custody order resulted from the action, granting Defendant the primary physical custody of the children and Plaintiff visitation rights with the children every other weekend. However, this custody order was ultimately set aside due to a procedural defect.

¶ 3 On August 7, 2017, Plaintiff initiated this present child custody suit, requesting shared legal and physical custody of the children. On September 15, 2017, Defendant filed a counterclaim requesting primary custody of the children. Thereafter, the parties entered into a Memorandum of Judgment which granted Defendant primary physical custody of the children and Plaintiff visitation rights and required reunification therapy with the children. On February 6, 2018, Plaintiff filed

an Order to Show Cause and Motion for Contempt, alleging violations of the Memorandum of Judgment, followed by a Motion for Order Appointing Parenting Coordinator and For Order Designating Reunification Therapist on April 10, 2018. On July 8, 2018, the trial court found parts of the Memorandum of Judgment had been violated in regards to the children's phone calls and dinners with Plaintiff and held Defendant in civil contempt. Also on July 8, 2018, the parties' attorneys agreed to appoint Dr. Harris-Britt as the new reunification therapist. Defendant then complied with the July 2018 order, and the children called Plaintiff and attended dinner visits with Plaintiff. However, when the purge period ended, the children stopped visiting with Plaintiff. Meanwhile, Dr. Harris-Britt conducted several therapy sessions but ultimately suspended therapy "so that Plaintiff could work on his individual communication and behavior to better prepare himself for reunification therapy." Subsequently, Plaintiff revoked his consent for reunification therapy and, to date, neither Plaintiff nor the children are receiving reunification therapy.

¶ 4 In September 2018, both parties individually filed Motions For Order To Show Cause And Motions For Contempt. The trial court initially ordered both parties to appear and show cause why they should not be held in contempt but ultimately dismissed these orders. Prior to trial, Dr. Harris-Britt was subpoenaed to produce her entire file related to the case. Dr. Harris-Britt's attorney filed a Motion to Quash the subpoena which was addressed in open court on September 30, 2019, during

which time the trial judge admitted she mistakenly believed Dr. Harris-Britt was the Parenting Coordinator, not the reunification therapist. The trial court judge granted the Motion to Quash, concluding it was "not in the best interest of the parties involved to release the records of the reunification therapist" and ordered the subpoenaed records to be destroyed. On January 2, 2020, the trial court entered the Therapist Order to memorialize what had occurred surrounding Dr. Harris-Britt's records.

¶ 5 On December 11, 2019, the trial court entered the PCC Order. In the PCC Order, the trial court judge made thirty-nine findings of fact and granted joint legal custody to Plaintiff and Defendant, with Defendant having the final decision making authority and final legal authority in regards to the children's extracurricular activities. Plaintiff was granted visitation rights with the children one weekend per month, holiday time, and two full weeks during summer vacation. Amongst other requirements, Plaintiff may not exit his vehicle when picking up the children from school, neither party may initiate phone calls with the children during the other parent's custodial time, Plaintiff may not attend the children's medical appointments, and the children may refuse to go with the Plaintiff for a custodial period. On December 20, 2019, the trial court entered the APC Order.

¶ 6 Plaintiff timely appealed the PCC order and APC Order seven days later. Afterwards, the trial court followed the PCC Order, with the Therapist Order on January 6, 2020 to resolve a dispute surrounding Dr. Harris-Britt's testimony.

However, the Therapist Order was not served upon Plaintiff's counsel. Plaintiff now appeals to this Court 1) alleging the trial court erred in making findings of fact in the PCC Order, allowing an exhibit to be played for impeachment purposes, in making certain conclusions as a matter of law in the PCC Order, and ordering various decrees in the PCC Order; 2) contending Plaintiff's Fourteenth and First Amendment Rights under the United States Constitution were violated; 3) alleging various North Carolina statutes were violated; and 4) petitioning this Court through a writ of certiorari on June 5, 2021 to review the Therapist Order. We affirm the PCC Order of the trial court and deny Plaintiff's petition for writ of certiorari.

II. Discussion

A. The Permanent Custody Order's Findings of Fact

¶ 7 Plaintiff challenges several of the PCC Order's Findings of Fact. When reviewing the findings of fact made by a trial court judge, we look to see whether the "trial judge's underlying findings of fact are supported by competent evidence." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation omitted). The trial court is in the ideal position to resolve any conflicting evidence because the judge "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971). This appellate Court is "much less favored because it sees only a cold, written record," *Id.*, and as a result we

"accord[] great deference to the trial court in this respect." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Thus, if the findings of fact are supported by competent evidence, then the findings of fact are binding on appeal. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294.

1. *Finding of Fact Number 17 is Supported by Competent Evidence*

¶ 8 Plaintiff challenges the PCC Order Finding of Fact seventeen which states, "[a]s a result of this high conflict, at least one pediatrician has fired the family, and at least one reunification therapist has fired the family." At trial, the district court judge was presented with testimony from the family's pediatrician of thirteen years. The pediatrician stated the children were dismissed from the practice because Plaintiff was no longer consenting to the children's treatment, furthering,

> it was clear that we did not have an appropriate relationship to take care of the kids.
>
> There was no trust between the . . . Plaintiff and myself. . . . [A]nd he stated that he didn't consent and didn't agree with my treatment plan.
>
> So that basically . . . prevents me from being able to treat the kids because those were my recommendations.
>
> So the relationship was just . . . not viable at that point.

Though Plaintiff argues the pediatrician did not fire the family but rather "[Plaintiff] revoked his consent for treatment," we are not required to conduct a *de novo* review of the evidence but only look to see if competent evidence supported the trial court's

findings of fact. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (citation omitted). Giving high deference to the trial court, the PCC Order's fact number seventeen was supported by competent evidence from the pediatrician's testimony and is binding on appeal.

2. Finding of Fact Number 19 is Supported by Competent Evidence

¶ 9 The trial court judge similarly did not err by finding fact number nineteen which states "[t]he parties are able to pay for the cost of the parenting coordinator." We first note the later APC Order contains a provision stating "the parties are able to pay for the cost of the Parenting Coordinator." Both Plaintiff and Defendant stipulated they were in agreement with the APC Order, absent one section that is not applicable to this issue. Plaintiff may not now appeal finding of fact nineteen because "[o]nce a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position." *Rural Plumbing & Heating, Inc. v. H. C. Jones Constr. Co.*, 268 N.C. 23, 31, 149 S.E.2d 625, 631 (1966). Because Plaintiff stipulated that he is able to pay the cost of a parenting coordinator in the APC Order, he may not now challenge the finding of fact nineteen on appeal. *See In re I.S.*, 170 N.C. App. 78, 86, 611 S.E.2d 467, 472 (2005). ("Stipulations are judicial admissions and are therefore binding in every sense."). Accordingly, there is no error in the trial court's finding of fact number nineteen.

3. Finding of Fact Numbers 21 and 31 are Supported by Competent Evidence

¶ 10 Finding of fact number twenty-one in the PCC Order states:

> Plaintiff is refusing to accept responsibility for the damage that he has caused to his relationship with the minor children. For example, Plaintiff refuses to get out of the car during exchanges and makes the minor child come to his car. When the child gets to the car Plaintiff repeats the phrase "Get in the car. Get in the car. Get in the car." He has told at least one child to "stop smiling and get in the car." Plaintiff refused to transport the minor children to their practices and events that occur during his visitation because his time takes priority over their events, and he is hostile and aggressive in his interactions with both therapist for the minor children and with the second reunification therapist. Plaintiff does not validate the minor children's feelings and he spends excessive amounts of time lecturing the minor children during the visits the children do attend; said lectures are about why they do not attend visitations instead of enjoying the visit that he is having.

Plaintiff only specifically challenges two portions of fact twenty-one: 1) "Plaintiff is refusing to accept responsibility for the damage that he has caused to his relationship with the minor children[,]" arguing the "record is devoid of any evidence as to what 'damage' was caused[,]" and 2) "Plaintiff does not validate the minor children's feelings." Fact number thirty-one states "[d]uring trial, Plaintiff was evasive, he blames Defendant, the minor children, the lawyers, the therapist, and the professionals, but he takes no personal responsibility for his own actions."

¶ 11 At trial, Dr. Harris-Britt testified Plaintiff's "perception is very incongruent

with the children's expressed experiences." Plaintiff was asked by Dr. Harris-Britt "what if anything you could do differently that might improve the relationship, [Plaintiff] would oftentimes and pretty consistently say nothing, that there were not any problems in his relationship with the children outside of . . . [Defendant's] behavior that were driving the distance between him and the girls." At every session with Dr. Harris-Britt, Plaintiff expressed his belief Defendant was alienating the children, even when Plaintiff was asked to focus on how he could improve his relationship with the children. Plaintiff's communication style was characterized by Dr. Harris-Britt "as quite argumentative[] [and] extremely defensive" Dr. Harris-Britt elaborated how Plaintiff would "often invalidate not just my conclusions, thoughts, perspectives, but even things that I would share with him regarding concerns that the children had . . . often he would say they're just complete lies." Another counselor testified that Plaintiff showed up to the office un-announced one day and was "very angry, very hostile."

¶ 12 On direct examination, Plaintiff flagrantly blamed Defendant for the state of the children, asking the trial court to incarcerate her in order to "let it sink into her head that this is inappropriate what she's been doing." Speaking about a previous motion for contempt, Plaintiff proceeded to blame another district court judge for why an order for contempt was not granted, "I'm not sure what happened, because something must have happened in . . . [the judge's] office because they didn't tell me

what I did wrong." In sum, the trial court had a plethora of competent evidence to find fact number thirty-one and the first part of fact number twenty-one.

¶ 13 Concerning the damage Plaintiff's actions caused the children, the record is clear the children's relationship with Plaintiff has been damaged. Dr. Harris-Britt's testimony demonstrated that at least one child "feels . . . [Plaintiff] is mean and doesn't listen to what she and her sisters want to do"; "cried when recalling a story about her father where he refused to get her supplies for an art project"; "feels her father makes rude comments and is upset by him taking away her and her sisters' electronics when they visit"; "became tearful at times, describing how she believes her father favors her twin sister"; and "wishes her father would value her opinion and not talk about her mother or sisters when she is with him." Both Dr. Harris Britt and another counselor were concerned the children's emotional needs were not being met by Plaintiff.

¶ 14 Because of the testimony and evidence presented above, the trial court had competent evidence to find Plaintiff refuses to accept his responsibility. Dr. Harris-Britt's testimony about the affects Plaintiff's actions have on the children paired with the damage created by a lack of emotional security further validates the trial court's finding of fact twenty-one. We hold the trial court did not err in its finding.

4. Finding of Fact Numbers 26 and 28 are Supported by Competent Evidence

¶ 15 The portion of finding of fact number twenty-six as challenged by Plaintiff provides "Plaintiff lectures the minor children, and he does not validate them emotionally or consider their feelings." As explained above, competent evidence exists to support the trial court's finding of fact number twenty-six. Finding of fact number twenty-eight is similar to fact number twenty-six and states "Plaintiff has used the therapy notes against the minor children and lecture[d] children about things they have told their therapist in the past."

¶ 16 The trial court similarly did not err in finding competent evidence existed to show Plaintiff lectured and used therapy notes against the children. Dr. Harris-Britt requested the children to write a letter to Plaintiff in order to express their thoughts, feelings, and emotions. When discussing the letters with Plaintiff and Dr. Harris-Britt, Plaintiff "asked questions about the patient's letter and her complaints about his behavior in an aggressive fashion that required intervention from the clinician." Defendant further admitted on cross-examination to talking to at least one child about notes from a counselor. Another counselor testified Plaintiff had "brought up . . . [the] notes to his daughters in a way that's been harmful to our sessions" and "always called asking what the girls are saying." Based upon the above evidence, the trial court did not err in making finding of fact numbers twenty-six and twenty-eight.

5. Finding of Fact Number 39 is Supported by Competent Evidence

¶ 17 Finding of fact number thirty-nine states "Defendant is a fit and proper person

to exercise primary physical custody of the minor children as provided below. Plaintiff is a fit and proper person to exercise secondary physical custody of the minor children as provided below." Plaintiff argues finding of fact thirty-nine should be classified as a conclusion of law, or, alternatively, is not supported by competent evidence. A determination "reached through logical reasoning from the evidentiary facts is more properly classified as a finding of fact" and a conclusion of law is a "determination requiring the exercise of judgment or application of legal principles." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675, (1997) (internal citations and quotations omitted). Here, finding of fact number thirty-nine is the product of logical reasoning from evidence stated above of Dr. Harris-Britt, another counselor, and Plaintiff's own testimony. Therefore, the testimonies presented by Dr. Harris-Britt, Defendant, and Plaintiff were competent evidence to support finding of fact number thirty-nine.

6. The District Court Made the PCC Order in the Children's Best Interest

¶ 18 Plaintiff next argues the trial court failed to make 1) detailed findings of fact the PCC order was in the children's best interest and 2) written findings of fact as required by N.C. Gen. Stat. § 50-13.2(a). Looking to Plaintiff's first argument, a "custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child." *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citation

omitted). "[C]ustody orders are routinely vacated where the findings of fact consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person." *Id.* at 77, 312 S.E.2d at 672 (citation and internal quotations omitted). Per the discussion above, we re-emphasize all the findings of facts specifically challenged by Plaintiff were supported by competent evidence and thus are binding on appeal. Regarding the unchallenged findings of facts, when no "exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). In the PCC order, the trial court made the following relevant findings of fact:

> 16. This is a high conflict case due to the following:
>
> a. The parties cannot co-parent or communicate well at all . . . .
>
> . . .
>
> 20. The minor children are refusing to visit with Plaintiff.
>
> 21. Plaintiff is refusing to accept responsibility for the damage that he has caused to his relationship with minor children. . . . Plaintiff refused to transport the minor children to their practices and events that occur during his visitation time because his time takes priority over their events, and he is hostile and aggressive in his interactions with both therapist for the minor children and with the second reunification therapist. Plaintiff does not validate the minor children's feelings and he spends excessive

> amounts of time lecturing the minor children during the visits the children do attend; said lectures are about why they do not attend visitations instead of enjoying the visit he is having.
>
> 22. Reunification therapy has been unsuccessful with Plaintiff and the minor children.
>
> . . .
>
> 28. Plaintiff has used the therapy notes against the minor children and lectured the minor children about things that they have told their therapist in the past.
>
> . . .
>
> 30. Plaintiff has made significant efforts to support the minor children and attend their events and activities.
>
> 31. During trial, Plaintiff was evasive, he blames Defendant, the minor children, the lawyers, the therapist, and the professionals, but he takes no personal responsibility for his own actions.
>
> 32. Defendant has let the minor children dictate the visits, but she has been cooperative with reunification therapy and tried to implement recommendations that she believed were being made.
>
> . . .
>
> 39. Defendant is a fit and proper person to exercise primary physical custody of the minor children as provided below. Plaintiff is a fit and proper person to exercise secondary physical custody of the minor children as provided below.

Plaintiff's assertion the trial court's findings were not "sufficiently detailed for the appellate court to determine what custodial schedule is in the best interest of the

children" is without merit. The trial court made particularly detailed findings of fact showing the minor children are avoiding visits with Plaintiff, how Plaintiff's actions have damaged the parent-child relationship, that the Plaintiff continues to refuse to accept personal responsibility for the fruit of his own actions, and the aptitude of Defendant as the primary custodian of the children. As a result, the trial court sufficiently stated findings of fact from which to base the PCC Order, and we find no error.

¶ 19 Next, Plaintiff contends the district court failed to comply with N.C. Gen. Stat. § 50-13.2(a) and make written findings of fact. Section 50-13.2(a) states in relevant portions, "[a]n order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child," and the relevant factors are "acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party." N.C. Gen. Stat. § 50-13.2(a) (2021). The trial court made written findings of fact in the PCC order showing the PCC Order was in the best interest of the children. Regarding the factors listed in Section 50-13.2(a), the trial court's findings of fact noted factors pertaining to the safety of the children per Plaintiff's use of therapy notes against the children, Plaintiff's inability to accept personal responsibility, Plaintiff's aggressive behavior towards at least one child in therapy, Plaintiff's aggressive behavior towards therapists, Plaintiff's continuing

actions that operate to emotionally damage the children, and the children's refusal to visit with Plaintiff. Because the trial court analyzed factors relating to safety with the children, along with many other factors, the trial court properly complied with N.C. Gen. Stat. § 50-13.2(a).

B. **The Permanent Child Custody Order's Conclusions of Law**

¶ 20 The standard of review when evaluating a conclusion of law is *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

1. Conclusion of Law Number 4 is Valid

¶ 21 Plaintiff argues the trial court erred in concluding as a matter of law the parties were able to pay for a parenting coordinator. Again, Plaintiff's attorney stipulated in open court to the APC Order which contains the provision "the parties are able to pay for the cost of the Parenting Coordinator." Plaintiff may not now challenge a conclusion of law by the trial court to a statement to which he has previously stipulated. *See Rural Plumbing & Heating, Inc.*, 268 N.C. at 31, 149 S.E.2d at 631; *In re I.S.*, 170 N.C. App. at 86, 611 S.E.2d at 472.

2. Conclusion of Law Number 2 is Valid

¶ 22 Plaintiff next contends the trial court's findings of fact in the PCC Order do not support its conclusion of law number two, which states, "Plaintiff and Defendant are fit and proper persons to exercise the custodial rights awarded to them herein, and it is in the best interest of the minor children that the parties be awarded those custodial rights." We disagree. The PCC Order's findings of fact illustrate the "parties have different parenting styles," "Plaintiff has made significant efforts to support the minor children and attend their activities," and "Defendant . . . has been cooperative with reunification therapy and tried to implement recommendations that she believed were being made." The trial court also found Plaintiff and Defendant "fit and proper persons to exercise joint legal custody of the minor children," found Defendant fit and proper to exercise primary physical custody, and found Plaintiff fit and proper to exercise secondary physical custody.

¶ 23 In sum, the trial court's findings of fact support conclusion of law number two that both parties are fit and proper persons to exercise their custodial rights with their minor children, albeit in different capacities. Accordingly, the trial court did not err in reaching conclusion of law number two.

3. *Conclusion of Law Number 5 is Valid*

¶ 24 The PCC Order's conclusion of law number five states, "[t]he parties are able to comply with terms of this Order." Plaintiff attempts to persuade us the trial court erred as to conclusion of law number five because the trial court's findings do not

support this conclusion. Specifically, Plaintiff alleges there are no findings suggesting Defendant can comply with the PCC Order and showing Defendant or Plaintiff can pay for a parenting coordinator. We disagree. The trial court specifically found that Plaintiff and Defendant "are able to pay for the cost of the parenting coordinator." Moreover, the trial court made sufficient findings showing Defendant will be able to comply with the PCC Order. Thus, the trial court did not err by reaching conclusion of law number five.

C. The Permanent Child Custody Order's Decrees

¶ 25 In custody cases, the welfare of the children is the polar star "by which the courts are to be guided to a right conclusion; and, therefore, they may, within certain limits, exercise a sound discretion for the benefit of the child." *Clegg v. Clegg*, 186 N.C. 28, 36, 118 S.E. 824, 828 (1923) (citation omitted). Since "our trial courts are vested with broad discretion in child custody matters," *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted), we review a child custody order for abuse of discretion. *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986) "The decision of the trial judge regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact supported by competent evidence" *Id.* (citation omitted). Furthermore, as discussed above, all findings of fact challenged by Plaintiff are based upon competent evidence and thus binding on appeal, and all unchallenged

findings of fact are presumptively supported by competent evidence and thus binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731; *Williams*, 362 N.C. at 632, 669 S.E.2d at 294.

1. No Abuse of Discretion with Decrees 1 and 4 of the PCC Order

¶ 26 Decree one of the PCC Order states "[t]he parties shall share joint legal custody of the minor children except that Defendant shall have final decision-making authority with respect to all the minor children's extracurricular activities." Decree number 4 grants Defendant primary physical custody of the children and Plaintiff visitation time with the children one weekend each month, two weeks during the summer, and some holiday time.

¶ 27 Plaintiff's argument as to decree number one is that the trial court erred by awarding Defendant final decision making authority over the children's extracurricular activities and primary physical custody. Though joint custody must be considered by a trial court if raised by either parent, there "is no presumption in favor of joint custody. Thus, the trial court may grant legal custody only to one party, joint custody to both, or, if proper findings are made, joint legal custody with a split in decision-making authority." *Hall v. Hall*, 188 N.C. App. 527, 536, 655 S.E.2d 901, 907 n.3 (2008). In this case, Plaintiff's original complaint requested the trial court to grant joint legal custody. Because Plaintiff requested that the trial court consider ordering joint custody, the trial court did not abuse its discretion in doing so.

¶ 28 The trial court similarly did not err in granting Defendant final decision-making authority regarding the children's extracurricular activities. The district court found although the children "had significant extracurricular activities," Plaintiff "refused to transport the minor children to their practices and events that occur during his visitation." Plaintiff and Defendant were found to have differing parenting styles, with Defendant allowing "minor children's events to take priority over all else" and Plaintiff not allowing "the minor children much discretion" and believing "his time with the minor children takes priority over everything." As such, the trial court's custody decision was based upon sufficient findings, and the trial court did not abuse its discretion in awarding the decision-making authority surrounding the children's extracurricular activities to Defendant.

¶ 29 Accordingly, the trial court did not abuse its discretion by granting primary physical custody to Defendant. It found that Plaintiff did not validate the children's emotions or to consider their feelings and "spends excessive amounts of time lecturing the minor children during the visits the children do attend." It found that Dr. Harris-Britt suspended reunification therapy due to Plaintiff's action and attitude. It found that Plaintiff continues to refuse to accept personal responsibility for the damage he has caused to his relationship with the children and at trial Plaintiff blamed everyone, including the minor children, except himself for his lack of relationship with his children. Although Defendant was also found to exhibit less than perfect

behavior, Defendant has been cooperative with the therapist and attempted to implement the therapist's recommendations. Notably, the trial court's findings frequently point to Plaintiff's evasive behavior and propensity to place blame on anyone but himself. Thus, the trial court's decree number four demonstrates consideration of its findings based on competent evidence.

¶ 30 Even though Plaintiff requested joint custody, the trial court is permitted to deviate from joint custody and divide the decision making authority if appropriate findings are made as to why such action is in the children's best interest. *Hall*, 188 N.C. App. at 536, 655 S.E.2d at 907 n.3. The trial court made such required showings in the present case. As such, decree number four does not constitute an abuse of discretion by the trial court.

¶ 31 We pause to acknowledge Plaintiff's contention the PCC Order violated N.C. Gen. Stat. § 50-13.01, which provides in relevant parts, "[i]t is the policy of the State of North Carolina to . . . [e]ncourage both parents to share equitably in the rights and responsibilities of raising their child, even after dissolution of marriage or unwed relationship." N.C. Gen. Stat. § 50-13.01(4) (2021). While joint custody is encouraged, it is not absolutely required. A trial court has discretion to grant joint custody yet split the decision making authority. *Hall*, 188 N.C. App. at 536, 655 S.E.2d at 907 n.3. The trial court found the children's best interest is served by Plaintiff and Defendant both having custody but also found that Plaintiff's actions have a

damaging effect on the children. The PCC Order was not a violation of N.C. Gen. Stat. § 50-13.01.

2. No Abuse of Discretion with Decree Number 6 of the PCC Order

¶ 32 Decree number six within the PCC Order states "[a]ll exchanges of the minor children shall occur at the minor children's school when school is in session. Plaintiff shall not exit his vehicle at school. If the children refuse to get into the car with Plaintiff, the Defendant may, after a 30-minute period, retrieve the children from school." Testimony at trial illustrated Plaintiff would go to the children's school unannounced and that at least one child did not want Plaintiff at the school. Plaintiff would also get out of his car when in the school carpool line, an unusual occurrence at the school. The trial court found that Plaintiff's prior actions emotionally damaged the children, and the children are currently refusing to visit with Plaintiff. On this record, we cannot hold that the trial court abused its discretion by prohibiting Plaintiff from exiting his vehicle at the children's school and allowing a 30-minute pickup period.

¶ 33 Plaintiff further argues against decree number six contending it "empower[s] the children to avoid custody with Dad." The trial court's decree number six, which we review for abuse of discretion, is a reasonable solution to protect the children's safety. Forcing the children into a stand-off with Plaintiff at the children's school when the children are refusing to enter his vehicle would not only be unreasonable

but also ruin the sanctity of the school as a safe environment for learning. Because of the competent evidence presented at trial, the trial court did not abuse its discretion in decree number six.

3. No Abuse of Discretion with Decrees Numbers 10 and 11 of the PCC Order

¶ 34 Decree number ten states "[d]uring custodial exchanges, neither party shall photograph, video record, audio record or otherwise record the other party, the minor children, or an aspect of the exchange in any capacity. Neither party shall photograph, video record, audio record or otherwise record the other party at all while they are in each other's presence." Decree number eleven states "[n]either party shall video record, or otherwise record, the minor children unless the minor children are on the field, court, or other platform as part of a sporting event or other extracurricular activity for commemoration purpose."

¶ 35 The trial court did not abuse its discretion in decrees number ten or eleven as shown by the following evidence. Plaintiff admitted to recording his children during exchanges. The children's counselor stated at least one child related to the counselor she wanted Plaintiff "to stop recording their interactions." Plaintiff himself admitted maintaining a dashboard camera to record exchanges of the children between himself and Defendant every time there was an exchange. Plaintiff's acts of videotaping were a significant source of contention between Plaintiff and Defendant. Moreover, the

trial court found both Defendant and Plaintiff had "taken pictures of and videotaped each other." Accordingly, Plaintiff's argument fails as to decrees number ten and eleven.

4. No Abuse of Discretion with Decree Number 13 of the PCC Order

¶ 36 Decree number thirteen provides "[t]he minor children may contact the non-custodial parent at any time by phone, but the parties shall not initiate phone calls with the minor children during their non-custodial time. The parties may text, email, or contact the minor children through other electronic means at reasonable times and intervals during their non-custodial time, but the minor children are not required to respond." The trial court did not abuse its discretion with decree number thirteen. One of the requirements in the 2017 Memorandum of Judgment was that the children were to have individual phone calls with Plaintiff. However, the minor children, as of the date of the hearing, are refusing to visit Plaintiff. Notably, one child has stopped taking phone calls from Plaintiff altogether. The evidence presented to the trial court shows a highly contentious relationship between Plaintiff and the children such that Plaintiff's actions are emotionally damaging to the children.

¶ 37 Viewing the record holistically, decree number thirteen is not beyond the bounds of reason as an effort to preserve the custodial parent's individual time with the children while protecting the children's emotional well-being. Although phone calls are not allowed, the decree allows for communication with the children through

electronic means such as texting or emailing while the children are in the other parent's custody. This provision allows for contact without subjecting the minor children to an excessive or harassing phone calls which could interfere with the custodial parent's time with the children. As such, decree number thirteen does not constitute an abuse of discretion by the trial court.

5. No Abuse of Discretion with Decree Number 16 of the PCC Order

¶ 38 Decree number sixteen prohibits Plaintiff from being present at "the minor children's medical, dental, or psychological appointments, but Plaintiff may follow up with medical providers regarding the appointment. The parties shall not attend appointments with the minor children together to minimize the potential for conflict." The trial court found that "at least one pediatrician has fired the family, and at least one reunification therapist has fired the family." Plaintiff, particularly, was found to be nothing short of "hostile and aggressive in his interactions with both therapist for the minor children and with the second reunification therapist." Additionally, Plaintiff revoked his consent for the children's life-long pediatrician upon discovering at least one child had been prescribed Prozac without his permission. Defendant, conversely, was found to be cooperative with the therapist and working to implement the therapist's recommendations. The evidence concerning Plaintiff's behavior towards medical professionals is a sufficient basis from which the trial court could have made decree number thirteen. Flowing from this reasoning, the trial court did

not abuse its discretion by issuing decree number thirteen.

6. No Abuse of Discretion with Decree Number 21 of the PCC Order

¶ 39 Decree number twenty-one provides "[t]he minor children shall remain in therapy with their current therapist . . . as recommended unless otherwise mutually agreed by the parties in writing. The parties shall follow the recommendations of said therapist that do not contradict this Order." Plaintiff argues against decree number twenty-one alleging it constitutes an improper delegation of judicial authority to the therapist.

¶ 40 "When the custody of a child . . . [or] visitation rights are awarded, it is the exercise of a judicial function." *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) (internal citation omitted). Here, decree number twenty-one neither awards custody nor visitation rights to the therapist, but merely requires the children to remain with their current therapist. Nothing in decree number twenty-one delegates power to the therapist to control Plaintiff or Defendant's visitation rights and thus is in accordance with our case law on this issue. *See In re N.K.*, 274 N.C. App. 5, 12, 851 S.E.2d 389, 394 (2020) (vacating and remanding portion of the order as "it seems to delegate the decision to allow visitation, as well as the conditions and schedule of visitation, to three therapists . . . ."); *In re T.K.*, 171 N.C. App. 35, 45, 613 S.E.2d 739, 745 (2005) (holding "[t]he trial court erred in delegating the decision whether respondent may visit with T.K. to the therapist."), *aff'd*, 360 N.C. 163, 622

S.E.2d 494 (2005).

¶ 41 The trial court also had ample evidence to support decree number twenty-one. The trial court found the "minor children should continue with individual therapy." The evidence illustrates the children are not opposed to therapy as at least two of the minor children were receptive of Dr. Harris-Britt's intervention. Because decree number twenty-one does not predicate the parties' visitation or custodial rights on the therapist's recommendations and the need for therapy is supported by competent evidence, the trial court did not abuse its discretion.

7. No Abuse of Discretion with Decree Number 24 of the PCC Order

¶ 42 Decree number twenty-four states "[n]either party shall assault, threaten, abuse, follow, harass, or interfere with the other or the minor children." Plaintiff argues the words "follow" and "interfere" are too vague of terms. The term "vague" means "[i]mprecise or unclear by reason of abstractness . . . ." *Vague*, BLACK'S LAW DICTIONARY (10th ed. 2014). The terms "follow" and "interfere" are neither imprecise nor unclear by reason of abstractness, *Id.*, but rather are common sense terms that are easily definable within the context of their everyday meaning. Additionally, given this is a high conflict case where Plaintiff and Defendant are not able to co-parent, the trial court did not abuse its discretion with decree number twenty-four.

D. No error in allowing Exhibits 26A-D for impeachment

¶ 43 Plaintiff next contends the district court erred by allowing Defendant to introduce in evidence at trial Exhibits 26A-D, audio recordings of Plaintiff. However, the record shows Exhibits 26A-D was only played for impeachment purposes. A witness's credibility "may be attacked by any party . . . ." N.C. Gen. Stat. § 8C-1, Rule 607 (2021). A trial court may use its discretion to admit specific instances of a witness's conduct on cross-examination if the instances concern the witness's truthfulness or untruthfulness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2021). The scope of impeachment questions is "subject to the trial judge's discretion, . . . [but] such questions must be asked in good faith." *State v. Harrell*, 20 N.C. App. 352, 357, 201 S.E.2d 716, 719 (1974). Here, Plaintiff's attorney was given a copy of Exhibits 26A-D, audio recordings, the day prior to the recordings being played but had not yet listened to the recordings. During cross-examination, Plaintiff either fully denied or denied having knowledge of questions asked by the crossing attorney, and, as a result, Exhibits 26A-D were presented in evidence for impeachment purposes. The record does not show that the questions were either asked in bad faith or that the district court judge abused her discretion by allowing Exhibits 26A-D to be played. Thus, playing Exhibits 26A-D for impeachment purposes was not an abuse of discretion by the trial court.

E. United States Constitutional Arguments Not Preserved

¶ 44 Plaintiff contends for the first time on appeal the PCC Order violated his

constitutional rights under the Fourteenth and First Amendment. Our Supreme Court has firmly established a "constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)); *see State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999), *remanded on other grounds*, 357 N.C. 433, 584 S.E.2d 765 (2003); *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Because Plaintiff did not raise these constitutional issues first with the trial court, we decline to address Plaintiff's constitutional allegations.

F. Petition for *Writ of Certiorari*

¶ 45 Finally, we turn our attention to Plaintiff's request for us to grant a *writ of certiorari* to review the Therapist Order. After careful review of the record, in our discretion we deny Plaintiff's petition for a *writ of certiorari*.

III. CONCLUSION

¶ 46 In sum, the trial court did not err in making its findings of fact or in concluding that the children's best interests were met by the provisions of the PCC Order. Furthermore, we hold that Plaintiff has otherwise failed to demonstrate that the trial court abused its discretion. As such, we affirm the trial court's PCC Order. In our discretion, we deny Defendant's petition for a writ of certiorari for review of the Therapist Order.

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).