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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-291

Filed: 19 September 2017

Johnston County, No. 14-JA-192

IN THE MATTER OF: A.P.

Appeal by Respondents from order entered 14 December 2016 by Judge Paul A. Holcombe, III, in District Court, Johnston County. Heard in the Court of Appeals 31 August 2017.

*Jennifer O'Connor, for Johnston County Department of Social Services, Petitioner-Appellee.*

*Marie H. Mobley for Guardian ad Litem.*

*Lisa Anne Wagner for Respondent-Appellant Mother.*

*J. Thomas Diepenbrock for Respondent-Appellant Father.*

McGEE, Chief Judge.

Respondent-Mother (“the mother”) and Respondent-Father (“the father”) (collectively, “the parents”) appeal from a permanency planning order ceasing reunification efforts and awarding guardianship of their child, A.P. (“the juvenile”), to court-approved non-relative caregivers. For the reasons discussed below, we vacate the order and remand for further proceedings.

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I. Background

The Johnston County Department of Social Services (“DSS”) received a report in October 2012 alleging neglect and improper care of the juvenile by the parents. Specifically, the report expressed concerns about the juvenile’s frequent doctor and emergency room visits and excessive absences from school. DSS began working with the parents but did not seek custody of the juvenile and the juvenile remained in the home of the parents. A Child and Family Evaluation completed in February 2014 concluded it was “highly probable that [the juvenile] ha[d] been the victim of serious, chronic neglect over many years by [the parents] due to their failure to expose her to appropriate social experiences, educational deprivation, possible medical child abuse and failure to obtain necessary mental health services for [the juvenile].” A subsequent psychological evaluation of the parents and the juvenile disclosed that the juvenile had a full scale IQ of 76 and suffered from verbal comprehension problems. Both parents were diagnosed with Borderline Intellectual Functioning, and the mother was diagnosed with an anxiety disorder. DSS attempted to engage the parents and the juvenile in counseling but the parents refused to participate or allow the juvenile to attend counseling.

UNC School of Medicine conducted a medical record review (“the medical record review”) of the juvenile’s medical history in October 2014 due to the mother’s

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suspected Caregiver Fabrication Illness.<sup>1</sup> At the time of the medical record review, the juvenile “had seen a primary care doctor over 188 times, an emergency room doctor over 38 times, and [had made] over 37 visits to [medical] specialists in her lifetime[.]” Examinations of the juvenile by various physicians often failed to confirm the mother’s beliefs that the juvenile had various health ailments. According to the medical record review, “the overall lack of physical findings, both with exams and diagnostics, [was] compelling for [the mother] fabricating and exaggerating symptoms for [the juvenile].” The medical record review also concluded that the parents’ “[f]ailure to provide appropriate educational opportunities for [the juvenile] ha[d] in fact led to severe educational neglect.”

DSS filed a juvenile petition on 18 December 2014 alleging that the juvenile, then age fourteen, was a neglected and dependent juvenile. The juvenile continued residing with the parents. In January 2015, the parents entered into an agreement with DSS in which they agreed to, *inter alia*, (1) attend and complete parenting classes; (2) comply with all recommendations of the school system; (3) participate in individual counseling, intensive home treatment, or therapy with a social worker and follow all recommendations of the service provider(s); (4) meet with a nutritionist regarding the juvenile’s diet and follow all recommendations of the nutritionist; and (5) allow monthly home visits by a social worker and an appointed guardian *ad litem*

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<sup>1</sup> Caregiver Fabrication Illness is also known as Munchausen by proxy.

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(“GAL”). The mother agreed to complete a psychiatric evaluation and follow all recommendations of the psychiatrist. DSS continued working with the parents for several months.

The trial court adjudicated the juvenile as a neglected and dependent juvenile on or about 1 April 2015. In its order, the court made several findings of fact based largely on a report submitted by DSS expressing concerns that the parents were not complying with their case plan agreement. DSS reported that, since the beginning of the year, the mother had taken the juvenile to the emergency room four times. During a home visit by a social worker in February 2015, the mother reported the juvenile had attended school only once, for a half day. Neither the parents nor the juvenile had attended any counseling. Later that month, DSS received a certificate of completion indicating the parents had completed a parenting program offered through DSS, but the program instructor reported that, while the parents had “‘completed’ the [parenting] program, neither parent [was] able to demonstrate anything that they learned from the program and they [were] not able to identify any of the risk issues for why [DSS was] involved.” A school administrator also reported to DSS that, after home visits at which the social worker encouraged the mother to send the juvenile to school, the mother would call the school administrator and report that the social worker “stated that [the juvenile] no longer needed to go to school[.]”

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The parents consented to the adjudication of neglect and dependency. Following a dispositional hearing on 1 April 2015, the trial court awarded custody of the juvenile, with the parents' consent, to a married couple who attended the parents' church. The trial court ordered the parents to cooperate with DSS, follow all DSS recommendations, and participate in recommended counseling services. The parents were given one hour of supervised visitation with the juvenile every other week.

At the conclusion of a review hearing on 5 August 2015, the trial court, again with the parents' consent, changed the placement of the juvenile to the home of another couple ("the caregivers"), who were members of the same religious denomination as the parents but attended a different church.<sup>2</sup> Following a permanency planning hearing on 21 October 2015, the trial court filed an order on 31 December 2015 in which it found that the parents were actively participating in their case plan and the juvenile's needs were being properly addressed in the caregivers' home. The court determined that the most appropriate primary permanent plan was reunification with a secondary plan of custody with a relative. The court ordered DSS to continue to provide reunification services. It also ordered that the juvenile remain in the custody of the caregivers.

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<sup>2</sup> This change in placement of the juvenile was due to "drama" between the parents and the couple with whom the juvenile was first placed, who reported to DSS that there were "numerous occasions where [the wife] felt harassed by [the mother] in church and at the [supervised] visits."

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After a permanency planning hearing on 13 January 2016, the trial court entered an order on 15 March 2016 finding that the appropriate primary permanent plan remained reunification with a secondary plan of custody with a relative. The parents were given four hours of unsupervised visitation per week.

The trial court held a permanency planning hearing, conducted in three parts, on 18 May 2016, 1 June 2016, and 7 September 2016. The juvenile testified at the hearing and told the trial court she wanted to continue living with the caregivers. Social worker Traci Hedjipetrou (“Ms. Hedjipetrou”) testified that, in March 2016, DSS proposed a plan for the juvenile to have overnight visits with the parents every other weekend. According to Ms. Hedjipetrou, the juvenile “initially responded okay to that [proposal]. And then . . . [the juvenile] was actually really upset . . . once that had kind of sunk in [as] to what that had meant.” Ms. Hedjipetrou and a GAL met with the juvenile alone and the juvenile told them “she felt like weekend[] [visits with the parents] were too long, [and] that she didn’t want to go [visit the parents] every week.” Ms. Hedjipetrou told the trial court:

[The juvenile is] very afraid that, if she goes home, that things will be exactly the way they were before. She does not feel like her mother has changed. She feels like, if she goes home, that she will go back to being sick all the time and not being able to go to school and being at the doctor’s office all the time and being on all this medication and not eating what she considers real food. She’s very afraid that those things will – it will go back to that way and that she’ll lose what she has acquired, which is her youth group and her friends and her school.

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At the June session of the hearing, Ms. Hedjipetrou testified that, based on concerns expressed by the juvenile and the parents' failure "to demonstrate learned knowledge," DSS planned to change its recommendation from reunification to a permanent plan of guardianship with the caregivers once the juvenile had been in the caregivers' custody for one year.

Following the hearing session on 7 September 2016, the trial court entered an order on 14 December 2016 in which it changed the permanent plan to guardianship with a court-approved caretaker, with a secondary plan of adoption. The court found that reunification with the parents was futile because, although DSS had been continuously working with the parents since approximately 2013, neither parent "recognize[d] their responsibility in the [juvenile's] placement outside of the home." The trial court further found that the parents failed to comprehend or retain information imparted to them by DSS, the GAL, or the trial court, and that the juvenile would be at substantial risk of being neglected if returned to the parents' care. The caregivers were appointed as the juvenile's guardians and a review hearing was set for 25 January 2017. The parents appeal.

II. Standard of Review

This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the [trial court's] findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent

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evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

*In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations and internal quotation marks omitted); *see also In re M.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 222, 224 (2016) (noting that findings of fact supported by any competent evidence are conclusive on appeal “even if the evidence could sustain contrary findings.” (citation omitted)). Unchallenged findings of fact are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

III. Analysis

A. *Best Interest Standard*

The parents first contend the trial court erred by awarding guardianship of the juvenile to the caregivers under application of a best interest standard without making the requisite findings of fact that the parents were unfit parents or acted in a manner inconsistent with their constitutional rights as parents.

“[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.” *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009); *see also In re C.P.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 801 S.E.2d 647, \_\_\_ (2017) (“While this analysis is often applied in civil custody cases . . . , it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B [of the North Carolina General



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Statutes].” (citation and quotation marks omitted)). Thus, when considering whether to award guardianship to a nonparent, a trial court should address whether the parent is unfit or the parent’s conduct has been inconsistent with the parent’s constitutionally protected status as a parent. *In re P.A.*, 241 N.C. App. 53, 66-67, 772 S.E.2d 240, 249 (2015).

In order to challenge on appeal a trial court’s failure to make the requisite finding(s), a parent must first raise the issue before the trial court. *See In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (declining to review respondent-mother’s argument that trial court erred in applying best interest standard because “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” (citation and quotation marks omitted) (alteration in original)). Notwithstanding this requirement, this Court has “decline[d] to find waiver . . . [where a parent] was not afforded the opportunity to raise an objection at the permanency planning review hearing.” *In re R.P.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 798 S.E.2d 428, 431 (2017). In the present case, the mother contends she was “prevented from objecting to the [trial court’s] grant of guardianship at the permanency planning hearing” because, “[p]rior to the oral rendition of the [trial] court’s order, [the mother] was without notice that the trial court would be granting guardianship at that hearing.” The father similarly argues he “had no real opportunity to object to the failure of the trial court to properly address the constitutional issue.” We disagree.

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The hearing was conducted over the course of three sessions, on 18 May 2016, 1 June 2016, and 7 September 2016. At the June session, Ms. Hedjipetrou testified that DSS “would likely recommend guardianship” after the juvenile had been living with the caregivers for one year, which the record showed would be 5 August 2016. This testimony was in direct response to questioning by the mother’s attorney regarding the intention of DSS to recommend guardianship with the caregivers. DSS also submitted a report to the trial court at the June session in which it requested that the primary plan be changed from reunification to “custody/*guardianship* with a court approved caretaker and the secondary plan be adoption.” (emphasis added). The parents were thus given notice that an award of guardianship to the caregivers was possible.

At the September session of the hearing, DSS filed a report in which it stated that, because the juvenile had been in the care and custody of the caregivers for more than one year, it was requesting that the trial court suspend further reviews and grant guardianship of the juvenile to the caregivers. The trial court explicitly asked each parent whether he or she wished to call witnesses, testify, or present other evidence. *Compare with In re R.P.*, \_\_\_ N.C. App. at \_\_\_, 798 S.E.2d at 431 (finding parent did not waive constitutional argument where, at hearing, trial court “*would not allow* any evidence to be presented concerning guardianship, . . . [and] [e]vidence was strictly limited to the issue of visitation.” (emphasis added)). Each parent

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declined to testify, and the mother told the court she had no witnesses who could testify specifically about “things that ha[d] happened since [the juvenile] was [living] with [the caregivers].” No additional evidence was presented by the parents.

Before closing arguments began, the trial court addressed counsel for the parents as follows: “I’m going to, time permitting, do something a little different than we normally do. So I’m going to let your clients listen to the argument[s], and then I’m going to give them a chance to add anything they want to if they believe you’ve left something out.” During closing arguments, counsel for the mother argued that “[guardianship was] not even necessary at [that] point because the [juvenile was] 16-and-a-half years old.” After hearing arguments from each parent’s respective attorney, the trial court explicitly asked both parents whether there was anything they wanted to say. No constitutional arguments or objections were raised by the parents or their attorneys.

At the conclusion of closing arguments, the trial court announced it was (1) granting the request of DSS to cease reunification efforts; (2) establishing guardianship with the caregivers; and (3) permitting visitation with the juvenile by the parents. The court granted the parents “more visitation than [DSS] recommended,” and stated it was “willing to try the overnight [visits].” The court also declared it would review the case when the juvenile turned seventeen in February 2017. When the court asked all parties if there was “[a]nything else that [it] need[ed]

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to address[.]” no party responded. Because the parents failed to assert any constitutional argument with respect to the guardianship – which they knew, as of the June session, DSS planned to request – we conclude they waived the right to raise this issue on appeal.<sup>3</sup>

*B. Guardian Verification*

The parents next contend the trial court erred by granting guardianship to the caretakers without properly verifying that the proposed guardians understood the legal significance of the appointment and that the caretakers had adequate financial resources to appropriately care for the juvenile. We agree in part.

N.C. Gen. Stat. § 7B-906.1(j) provides:

If the [trial] court determines that [a] juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to [N.C. Gen. Stat. §] 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j) (2017); *see also* N.C. Gen. Stat. § 7B-600(c) (2017). The trial court is not required to make extensive or detailed findings of fact in conducting this statutory analysis, “[b]ut the record must contain competent evidence of the

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<sup>3</sup> Even if the parents did not waive review of this issue, we note that the trial court did make an explicit finding that the juvenile “does not have a parent . . . who is a fit and proper person to have the care, custody and control of the juvenile[.]” and identified specific examples from the evidence in support of that finding.

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guardians' financial resources and their awareness of their legal obligations.” *In re J.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 780 S.E.2d 228, 240 (2015).

In the present case, the trial court's order stated the following in finding of fact number six:

The [c]ourt finds that [the caregivers] are willing to serve in the role of guardian for the minor child. The [c]ourt finds upon examination of [the female caregiver] that she understands her role and responsibility herein, and is financially able to meet the needs of the juvenile. The [c]ourt finds that no party challenges [the caregivers'] ability and qualification to serve as guardians.

In finding of fact number twelve, the court found that “[DSS] has further discussed guardianship with the current care provider[s], and their role and responsibility herein.” The parents challenge these findings as lacking evidentiary support.

1. Adequate Resources

We find sufficient evidence in the record to support the trial court's finding that the caregivers had adequate resources to care for the juvenile. *See In re E.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 790 S.E.2d 863, 872 (2016). Although the caregivers were licensed therapeutic foster parents, the juvenile was not approved for therapeutic foster care placement (and, correspondingly, foster care assistance payments). The caregivers were nonetheless “willing to provide custody . . . [because they] did not want [the juvenile] to have to go into the foster care system.” By the final session of the permanency planning hearing, the juvenile had been living with the caregivers

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for approximately thirteen months. The juvenile testified she had her own room at the caregivers' home. Reports submitted by DSS during the permanency planning hearing showed that, after moving into the caregivers' home, the juvenile began attending a private school. While living with the caregivers, the juvenile went on day and overnight trips with her church youth group, and the caregivers took her on trips to the beach and mountains. To help the juvenile practice independent living skills, the female caregiver gave the juvenile money to order food in restaurants and shop for groceries by herself. Taken together, this evidence is sufficient to support the trial court's determination that the caregivers had adequate resources to care for the juvenile. *See In re L.M.*, 238 N.C. App. 345, 347-48, 767 S.E.2d 430, 432-33 (2014).

The present case is distinguishable from *In re P.A.*, in which this Court found insufficient evidence in the record to support the trial court's finding that a proposed guardian had adequate resources to care for a juvenile. In *In re P.A.*, the juvenile had resided with the proposed guardian for two separate and brief periods of time, and "the evidence indicated that, even in providing a residence, [the proposed guardian] had moved several times and had lived with friends or roommates." 241 N.C. App. at 65, 772 S.E.2d at 248. In that case, the DSS and GAL reports submitted to the trial court focused primarily on the resources of the juvenile's father. The only evidence regarding the resources of the proposed guardian presented at the hearing consisted of (1) a social worker's testimony that the proposed guardian "ha[d] . . . been

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able to provide for all of [the juvenile's] medical, dental, and financial needs[;]" and (2) the proposed guardian's unsworn testimony expressing "[her] own opinion of her [financial and emotional] abilities [to support the juvenile]." *Id.* at 62-65, 772 S.E.2d at 246-48; *see also In re J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240 (2015) (finding conclusory statements by DSS and GAL that proposed guardians had been meeting the juvenile's medical needs and well-being were alone insufficient to demonstrate proposed guardians had adequate resources to care for juvenile.).

The present case is more akin to *In re E.M.*, in which this Court found that

direct, specific evidence support[ed] the [trial] court's finding that the [proposed guardians] ha[d] adequate resources to care appropriately for [the juvenile]. Competent evidence support[ed] the findings of fact that (1) the [proposed guardians had] their own home, . . . where [the juvenile] ha[d] been residing for the past sixteen months; (2) [the juvenile] ha[d] his own bedroom and play area in the home and a playset and outside toys in the yard; and (3) all of [the juvenile's] medical, dental, vision, and developmental needs [were] being met such that "[the juvenile] lack[ed] for nothing[.]"

*In re E.M.*, \_\_\_ N.C. App. at \_\_\_, 790 S.E.2d at 872. The proposed guardians had also given the juvenile a birthday party and had taken the juvenile on trips to Disney World and the mountains. *Id.* We concluded this evidence was sufficient to support the trial court's determination that the proposed guardians had adequate resources to care for the juvenile. *Id.*

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Similarly, in the present case, competent evidence supports the trial court's findings that the juvenile's placement with the caregivers was "ensuring the juvenile's needs [were] being properly addressed" in that, *inter alia*, (1) the caregivers were ensuring the juvenile regularly attended school, therapeutic appointments, and visitations with the parents; (2) the juvenile was participating in extra-curricular activities and church programs; (3) the placement "allowed the juvenile to travel out of state to visit recreational parks[;]" (4) since being in the caregivers' home, the juvenile no longer displayed any illness or medical symptoms; and (5) the caregivers had hosted overnight sleepovers for the juvenile's friends. The trial court therefore did not err in finding the caregivers had adequate resources to care for the juvenile.

2. Legal Significance of Guardianship

We are unable to conclude, however, that the trial court's determination that the caregivers understood the legal significance of their role as guardians was supported by sufficient evidence. *See In re J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240 (noting that a trial court "cannot make a determination that a potential guardian understands the legal significance of a guardianship unless the trial court receives evidence to that effect." (citation omitted)).

Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship,



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and testimony from a social worker that the potential guardian was willing to assume legal guardianship.

*In re E.M.*, \_\_\_ N.C. App. at \_\_\_, 790 S.E.2d at 872 (citation omitted). In the present case, while we agree with DSS and the GAL that the record “demonstrate[s] [the caregivers’] understanding of the role of a parent and caregiver to meet the tangible needs of a child[,]” and that the juvenile made significant progress while in their care, this does not amount to evidence that the caregivers understood the legal significance of guardianship as required by our precedent.

In *In re L.M.*, this Court held a trial court properly verified one proposed guardian but not the other. In that case, a DSS caseworker testified “that the foster father was willing to accept guardianship[,] and when the foster father was directly questioned whether he was willing to continue to provide care to [the juvenile], the foster father replied ‘I want to take guardianship of [the juvenile].’” 238 N.C. App. at 348, 767 S.E.2d at 433. The foster father also executed a form indicating he “appeared before the [trial] court and ‘acknowledged to assume the responsibility of [the juvenile] . . . without the assistance of [DSS.]’” *Id.* By contrast, “the foster mother did not testify and did not sign a guardianship form.” *Id.* Because “the evidence before the trial court . . . relate[d] to the foster father’s role in raising [the juvenile] and his desire to continue doing so; [but] there was no evidence that the foster mother accepted responsibility for [the juvenile][,]” the trial court improperly verified the foster mother as a guardian. *Id.* at 348-49, 767 S.E.2d at 433.

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In *In re E.M.*, this Court vacated an award of legal custody where

the husband in the custodial couple did not testify, and there [was] no evidence to indicate that he understood the legal significance of taking custody of [the juvenile]. Further, although the wife [in the custodial couple] testified at the hearing, she never testified regarding her understanding of the legal relationship [of guardianship], and the court never examined her to determine whether she under[stood] the legal significance of the relationship. The report submitted by DSS contain[ed] no statement that either of the custodians understood the legal significance of guardianship.

*In re E.M.*, \_\_\_ N.C. App. at \_\_\_, 790 S.E.2d at 872; *see also In re J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240 (holding “trial court failed to verify that the [proposed guardians] understood the legal significance of guardianship, because the [proposed guardians] did not testify at the permanency planning hearing and neither DSS nor the GAL reported to the court that the [proposed guardians] were aware of the legal significance of guardianship.”).

In the present case, although the trial court specifically found that “*upon examination* of [the female caregiver], . . . she understands her role and responsibility herein[,]” neither caregiver testified during the permanency planning hearing. *Compare with In re P.A.*, 241 N.C. App. at 59-60, 772 S.E.2d at 245-46 (concluding evidence supported trial court’s finding that proposed guardian was aware of the legal significance of her appointment as legal guardian, where proposed guardian “was present in court and the trial court directly addressed [her] at the hearing” regarding

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“the nature and legal significance” of becoming a permanent guardian and her willingness to assume that role). The transcript indicates the female caregiver was present at the September hearing, and had two brief exchanges with the trial court, but her comments were neither sworn nor related to the legal significance of guardianship.

The trial court’s finding that DSS “ha[d] further discussed guardianship with the current care provider[s], and their role and responsibility herein[.]” was also unsupported by the evidence. Although Ms. Hedjipetrou testified during the June hearing that DSS intended to recommend a plan of guardianship with the caregivers after the juvenile had been with them for one year, DSS did not present any evidence showing that the caregivers had been advised of the responsibilities of guardianship or that they understood, and were willing to accept, those responsibilities. The final DSS report, submitted to the trial court on 7 September 2016, likewise did not detail any conversations with the caregivers about the proposed guardianship. At most, the DSS reports stated that, *prior to the placement* of the juvenile in the caregivers’ home, “[the female caregiver] was willing to provide custody of [the juvenile][.]” The report submitted by the GAL at the September session urged the trial court to consider guardianship and indicated that the caregivers “ha[d] expressed that they are more than willing to *provide a home* for [the juvenile] and continue to help her mature into a well-rounded and adjusted adult.” (emphasis added).

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During closing arguments, in requesting guardianship with the caregivers, counsel for DSS stated: “Ms. Hedjipetrou testified at the last hearing, and I would tender to the [c]ourt [the female caregiver] who is here, that she has gone over their role and responsibility as guardians and what they expect.” However, in reviewing the transcript of all three sessions of the hearing, we have found no testimony by Ms. Hedjipetrou to that effect, and “the arguments of counsel are not evidence.” *Daly v. McKenzie*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 795 S.E.2d 120, 124 (2016) (citation and quotation marks omitted). Because these findings by the trial court were not supported by the evidence, we must vacate the trial court’s order and remand for further proceedings on this issue.

*C. Other Findings of Fact*

In addition to the above arguments, the mother asserts that the following findings of fact are unsupported by the evidence: (1) finding of fact number four, which states in part that the juvenile “was placed in foster care and subsequently placed in the care of non-relatives[;]” (2) finding of fact number nine, which states in part that the juvenile “was removed from the custody of the parent[s] . . . pursuant to an Order to Assume Custody and was placed: initially in foster care with subsequent placement in the care of non-relatives[;]” and (3) finding of fact number eighteen, which states in part that the trial court “determined that the juvenile ha[d] been in the custody of [DSS] for 12 of the last 22 months[.]” The mother further submits that

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these findings are contradicted by finding of fact number ten, which states in part that “reasonable efforts to prevent removal were made as: the juvenile was not removed from the parent[s] . . . prior to the Disposition hearing. The juvenile, with the consent of the parties, was placed in the custody of family friends at the conclusion of the Disposition hearing.” Although the mother fails to explain why she contends these findings are unsupported by the evidence, we surmise it is because, technically speaking, the juvenile was not removed from the parents’ home pursuant to an Order to Assume Custody; was never placed in foster care; and had been in the custody of the caregivers, not DSS, for a period of months preceding the trial court’s order.

We conclude that while parts of the contested findings of fact “may not be technically correct, any deficiency is immaterial when viewed in light of [other competent evidence]” in the record, including prior court orders. *See Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 309, 663 S.E.2d 322, 327 (2008). “[A] court may take judicial notice of earlier proceedings in the same cause.” *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985); *see also In re M.N.C.*, 176 N.C. App. 114, 121, 625 S.E.2d 627, 632 (2006) (holding trial court was not required to expressly state it was taking judicial notice of prior orders in the cause, although “the better practice would be [for the court] to explicitly give all parties notice by announcing in open court that it is taking judicial notice of matters contained in the court file.”). Although the findings could have been more precisely worded, we do not find them

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inconsistent. The common thread of the findings is that the juvenile was removed from the home of the parents by DSS due to the parents' failure to provide proper care, and the juvenile was placed with non-relative caregivers as agreed upon by the parties. This argument is overruled.

*D. Appointment of Guardian Ad Litem*

The mother contends the trial court erred by failing to conduct a hearing to determine whether it should have appointed a GAL for her. This argument is without merit.

Appointment of a GAL for a parent is governed by N.C. Gen. Stat. § 7B-602(c), which provides that “[o]n motion of any party or on the [trial] court’s own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.” N.C. Gen. Stat. § 7B-602(c) (2017). “[T]rial court decisions concerning both the appointment of a [GAL] and the extent to which an inquiry concerning a parent’s competence should be conducted are reviewed on appeal using an abuse of discretion standard.” *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015). “A ruling committed to a trial court’s discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “[W]hen the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not

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incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence." *In re T.L.H.*, 368 N.C. at 108-09, 772 S.E.2d at 456.

Our General Statutes define an "incompetent adult" as

an adult . . . who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2017). In the present case, the mother appears to argue that the trial court was required to consider her need for a GAL due to "cognitive limitations" related to her low IQ. However, evidence in the record demonstrates the mother was able to handle her own affairs and the affairs of her family. Ms. Hedjipetrou testified the parents had been fully compliant with the DSS case plan. Counsel for the mother told the trial court that the mother had "dealt with every problem . . . very appropriately to satisfy whatever DSS told [the mother] to do." Counsel for the mother also told the court that, after the parents lost their home, they "found another place. [The parents] function quite well, and they're very responsible people in that regard." The transcript indicates that, at the hearing, the mother understood questions asked of her and answered appropriately, and that she understood her rights in the legal proceedings. After direct questioning by the trial

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court, the mother stated several times she did not wish to testify, and told the court she had no witnesses who could provide specific testimony about the period of time the juvenile had been living with the caregivers. The same trial judge presided over multiple hearings in this case, from the initial adjudication to the appointment of guardians, and thus had numerous opportunities to observe the mother and evaluate her competency. Under these circumstances, we find no abuse of discretion.

IV. Conclusion

Because the trial court failed to verify that the proposed guardians understood the legal significance of guardianship, we vacate the permanency planning order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).