IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-193

No. COA20-848

Filed 4 May 2021

Wake County, Nos. 19 JA 201–204

IN THE MATTER OF:

M.Y.; N.Y.; K.E.; and A.E.

Appeal by respondent-mother from order entered 30 July 2020 by Judge V.A. Davidian, III, in Wake County District Court. Heard in the Court of Appeals 14 April 2021.

Forrest Firm, P.C., by Brian C. Bernhardt, for guardian ad litem.

Wake County Attorneys' Office, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

Parent Defender Wendy C. Sotolongo, by Kimberly C. Benton, for respondent-appellant mother.

ZACHARY, Judge.

¶ 1 Respondent-mother appeals from an adjudication and disposition order in which the trial court adjudicated her four minor children as neglected and ordered that they remain in the sole legal and physical custody of their father. After careful review, we affirm in part, vacate in part, and remand.

Background

¶ 2 Respondent-mother Firehiwot Asemaw ("Mother") and Respondent-father Yonas Asfaw ("Father") were married in 2003 and moved from Ethiopia to North Carolina in 2012. They are the parents of four minor children: "Morris," "Ned," "Kelly," and "Andrew."[1]

¶ 3 Respondents have a history of domestic discord. The family returned to Ethiopia in 2018 due to a job opportunity for Father. Father hoped that the move would help the family, but Mother's "erratic and abusive behavior towards . . . [F]ather and the children continued[,]" so he accepted another job in North Carolina and the family returned in January 2019.

¶ 4 In February 2019, Father sought, but did not obtain, an *ex parte* domestic violence protective order against Mother. On 21 February 2019, Petitioner Wake County Human Services ("WCHS") received a report of parental domestic violence in the presence of the children and alcohol abuse by Mother. That same day, Father moved out of the family residence and filed a custody action against Mother, seeking, *inter alia*, custody of their four children.

¶ 5 On 29 April 2019, Father's custody action came on for hearing in Wake County District Court. On 30 April 2019, the trial court entered a temporary custody order

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[1] The pseudonyms adopted by the parties are used for ease of reading and to protect the identities of the juveniles.

awarding, *inter alia*, temporary joint legal custody of the children to both Respondents while awarding Mother temporary physical custody of the children because Father left the minor children in Mother's care despite his fear and the allegations that he leveled against her. Then, on 3 May 2019, Mother attacked Father with a stick at the custodial exchange. Mother was arrested and spent 30 days in jail, while Father received an emergency *ex parte* domestic violence protective order and then a one-year domestic violence protective order against Mother.

¶ 6 On 15 November 2019, WCHS filed a juvenile petition alleging that the juveniles were neglected. That same day, the trial court entered an order for nonsecure custody, awarding placement authority to WCHS and approving of placement with Father. The court also set a hearing for 18 November to determine the need for continued nonsecure custody. Prior to that date, the family court coordinator filed a request for an Amharic-speaking interpreter to assist Respondents at both a child-planning conference and the hearing that would immediately follow.

¶ 7 On 18 November 2019, the Honorable V.A. Davidian, III, presided over the first hearing on the need for continued nonsecure custody. Although the interpreter attended the child-planning conference, the record is silent as to whether he also attended this first hearing. Judge Davidian determined that the children's best interests were served by continuing WCHS's placement authority, with the children placed in Father's care. The trial court set a further hearing for the following week.

The trial court also accepted Mother's and Father's affidavits of indigency on that date, approving the appointment of counsel for each.

¶ 8 On 25 November 2019, the matter came on for hearing on the need for continued nonsecure custody before the Honorable Monica Bousman. At this hearing, Mother asked the trial court "to release" her appointed counsel and allow her to represent herself.[2] After a colloquy with Mother, Judge Bousman concluded that Mother's waiver of her right to counsel was knowing and voluntary, and entered an order allowing Mother to proceed *pro se*, which Mother also signed. Judge Bousman also found that Mother did not want the services of an interpreter "in lieu of speaking/hearing English." Following this hearing, the trial court continued WCHS's placement authority and continued the children's placement with Father.

¶ 9 On 20 February 2020 and 2 March 2020, the matter came on for adjudication and disposition hearings before Judge Davidian, at which Mother proceeded *pro se*. On 30 July 2020, the trial court entered an order that, *inter alia*, adjudicated the children as neglected and, with regard to disposition, awarded permanent legal and physical custody of the children to Father, with Mother having certain visitation rights. Mother timely filed her notice of appeal.

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[2] There was no electronic record of this hearing. Mother's former trial counsel provided a narrative account of the exchange as a supplement to the record on appeal, pursuant to Rule 11(c) of the North Carolina Rules of Appellate Procedure.

Discussion

¶ 10 On appeal, Mother argues that (1) the trial court erred by permitting her to proceed *pro se*; (2) the trial court abused its discretion by giving Father the authority to unilaterally modify her visitation; and (3) the trial court abused its discretion by ordering Mother to bear a portion of the cost of a supervised visitation facility. For the reasons below, we affirm the trial court's order in part, vacate in part, and remand.

I.

¶ 11 Mother first contends that the trial court erred by allowing her to proceed *pro se*. We disagree.

A. Preservation and Standard of Review

¶ 12 As a threshold matter, the guardian *ad litem* and WCHS (collectively, "Petitioners") argue that Mother waived her right to appeal the trial court's order granting her request to proceed *pro se* because she did not object to the trial court's order. *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[.]").

¶ 13 "In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2019). "A parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel only after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." *Id.* § 7B-602(a1). Here, because of her indigency, Mother qualified for appointed counsel.

¶ 14 Despite Petitioners' argument, this Court has previously reviewed challenges to a parent's knowing and voluntary waiver of their right to counsel in an abuse, neglect, or dependency proceeding, even after the parent signed a consent order. *See In re H.D.F.*, 197 N.C. App. 480, 495, 677 S.E.2d 877, 886 (2009). Indeed, in the similar context of a proceeding on the termination of parental rights, our Supreme Court recently explained that "[a] trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria," without any discussion of issue preservation. *In re K.M.W.*, 376 N.C. 195, 209, 851 S.E.2d 849, 860 (2020). Although the waiver of the right to counsel in a termination of parental rights proceeding is governed by a different statute, the governing statutes are identical. *Compare* N.C. Gen. Stat. § 7B-602(a1), *with id.* § 7B-1101.1(a1).

¶ 15 Based on these precedents, Mother has not waived appellate review of this

issue. Accordingly, this issue is properly before us.

¶ 16 We review de novo the trial court's determination that Mother waived her right to counsel. *See K.M.W.*, 376 N.C. at 210, 851 S.E.2d at 860. However, "[w]here 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." *In re J.O.D.*, 374 N.C. 797, 801, 844 S.E.2d 570, 574 (2020) (citation omitted).

B. Analysis

¶ 17 Mother asserts that the trial court did not comply with its statutory requirement to make "findings of fact sufficient to show that [her] waiver [wa]s knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). She contrasts this case with *In re A.Y.*, 225 N.C. App. 29, 737 S.E.2d 160, *disc. review denied*, 367 N.C. 235, 748 S.E.2d 539 (2013). In that case, we concluded that "the trial court's inquiry was adequate to determine whether respondent mother knowingly and voluntarily waived her right to counsel" where the court "undertook a fairly lengthy dialogue with respondent mother to determine her awareness of her right to counsel and the consequences of waiving that right." *Id.* at 39, 737 S.E.2d at 166.

¶ 18 Comparing the present case with *A.Y.*, Mother argues that "[t]here is no specific record or indication that [her] waiver of appointed counsel was knowing" and that "[t]here is nothing in the record to demonstrate she had any knowledge of the nature of the proceedings as well as the factual aspects of the case and there is no

indication that the court sought any such demonstration of knowledge." Mother's argument is based in large part upon the narrative, provided by her former counsel, of a portion of the 25 November 2019 hearing that reads in pertinent part:

> Court: [Former counsel], why does your client want a second nonsecure custody hearing?
>
> [Former counsel]: Your honor, my client wants the children placed with her but before we get to that, she has requested that I be released and that she be allowed to represent herself. I ask that the Court address that issue first.
>
> Court: Okay. Ma'am, is it true you want to represent yourself?
>
> Mother: Yes. My attorney is not doing what I ask him to do. If he's not going to do what I ask him to do, I might as well represent myself.
>
> Court: Okay. That's fine. Do you understand that if I allow you to represent yourself, neither the Court nor anyone else will help you do that?
>
> Mother: Yes, I understand. What about the interpreter?
>
> Court: No, ma'am. I'm not letting you have an interpreter and represent yourself. I need you to sign a waiver of court-appointed counsel form.
>
> [Mother then signed a waiver of court-appointed counsel.]
>
> Court: Okay, [former counsel], you are released.

The narrative concludes with an explanation from Mother's former counsel that he then left the courtroom and does not know what occurred following his departure.

¶ 19 In the findings of fact of the order entered following the 25 November 2019

hearing, Judge Bousman wrote that Mother "has decided to represent herself. Additional findings are contained in a separate order regarding this issue." That separate order—the waiver signed by Mother—contains the following additional findings of fact:

> [Mother] was repeatedly told that self-representation may not be in her best[ ]interest. The Court informed her that she would be expected to know the law, the rules of evidence, and the rules regarding procedure. She repeatedly stated that she was going to represent herself. She also said that she did not want an interpreter if she had to use the interpreter in lieu of speaking/hearing English.

¶ 20 Although Mother's appeal is based in large part on the narrative filed by her former counsel, that narrative corroborates rather than challenges key findings from the trial court's orders. The narrative supports the trial court's findings that Mother decided to represent herself, that the trial court informed her that she would not receive any assistance in representing herself, and that Mother signed the waiver after the colloquy. While the narrative contrasts with the trial court's findings in some ways, we conclude that Mother has not shown that the trial court failed to "make[ ] findings of fact sufficient to show that the waiver [wa]s knowing and voluntary." N.C. Gen. Stat. § 7B-602(a1). Mother's argument is overruled.

II.

¶ 21 Mother also argues that the trial court abused its discretion by (1) improperly

delegating to Father the authority to select the facility at which her supervised visitation would take place, as well as whether to allow or deny Mother unsupervised weekend visits with the children, and (2) by ordering her to bear a portion of the costs of supervised visitation without making adequate findings of fact. We agree.

A. Standard of Review and Applicable Law

¶ 22 "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (citations and internal quotation marks omitted).

¶ 23 In a proceeding on juvenile abuse, neglect, or dependency, "[a]n order that removes custody of a juvenile from a parent . . . shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended." N.C. Gen. Stat. § 7B-905.1(a). "If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." *Id.* § 7B-905.1(c).

B. Delegation of Judicial Function

¶ 24 In addition to the statutory requirements of § 7B-905.1, it is well settled that

"a trial court may not delegate its judicial function of awarding visitation to a juvenile's custodian[.]" *In re J.M.*, ___ N.C. App. ___, ___, 847 S.E.2d 916, 923 (2020). We have repeatedly explained that

> the judicial function of awarding visitation may not be delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where, and under what circumstances a parent may visit his or her child would be delegating a judicial function to the custodian.

Id. (citation omitted).

¶ 25 In *J.M.*, we vacated an order that gave a custodian-grandmother the authority "to modify the conditions or duration of visits for either parent if there is evidence that the demeanor or conduct of either parent would cause emotional distress or harm to the children[.]" *Id.* Similarly, in *C.S.L.B.*, we vacated an order that left a parent's visitation "to the discretion of the guardians based on their 'concerns' " about the parent's use of illegal substances. 254 N.C. App. at 400, 829 S.E.2d at 495.

¶ 26 In the case at bar, the trial court awarded Father the sole legal and physical care, custody, and control of the children, while granting Mother visitation. The trial court provided the following visitation plan:

> 5. [M]other shall have secondary care, custody and control of the minor children in the form of supervised visitation until the expiration of [F]ather's [domestic violence

> protective order] against her in June 2020 and then unsupervised visits thereafter. The visitation shall be as follows:
>
> a. Prior to the expiration of the [domestic violence protective order], [M]other shall have visitation at least three times per month for up to two hours at any supervised visitation facility, where [F]ather shall pay for two of the three visits and [M]other shall pay for one. [*F*]*ather shall determine the supervised visitation facility* and each party shall be responsible for his or her own intake requirements as set forth by the facility.
>
> b. After June 2020, when the [domestic violence protective order] expires, [M]other shall have unsupervised visits with the children in the community or at her discretion for up to 8 (eight) hours every other weekend.
>
> c. *If* [*M*]*other provides proof to the satisfaction of* [*F*]*ather of suitable housing for herself and the minor children*, she shall be able to have unsupervised weekend visits every other weekend from Friday at 6:00 p.m. until 6:00 p.m. on Sunday.

(Emphases added).

¶ 27 Mother maintains that the trial court gave Father "unilateral authority to select the supervised visitation facility where [her] supervised visitation would take place[.]" Petitioners defend the trial court's order by arguing that the court complied with its statutory mandate, as it "specified both the minimum frequency and length of [Mother]'s visits and whether those visits needed to be supervised." While this much is true, Petitioners also claim that the trial court did not give Father "the authority to decide when, where, or under what circumstances [Mother] might visit

the children." In this, Petitioners are incorrect. The trial court gave Father the unilateral authority to "determine the supervised visitation facility" at which Mother would exercise visitation. In so doing, the trial court improperly delegated to Father the judicial function of deciding "when, *where*, and under what circumstances [Mother] may visit" her children. *J.M.*, ___ N.C. App. at ___, 847 S.E.2d at 923 (emphasis added) (citation omitted). Accordingly, "we must vacate and remand this provision" of the trial court's order. *Id.* at ___, 847 S.E.2d at 924.

¶ 28 Mother also argues that the trial court erred by giving Father the "unilateral authority to allow or deny unsupervised weekend visits when it ordered that [her] unsupervised weekend visits with the children [would] be conditioned on her providing proof satisfactory to [F]ather that her housing was suitable for that purpose." Petitioners respond that the trial court did not err in so doing because this condition applied solely to *additional* visitation beyond the minimum established in the order. This distinction does not change our analysis.

¶ 29 In *In re J.D.R.*, the trial court entered an order that provided a custodial father with "substantial discretion" over a mother's additional visitation beyond the minimum established in the order, while also providing for other "conditional expansions of [the m]other's visitation rights that effectively [we]re contingent on [the f]ather deciding that [the m]other [had] complied with the trial court's directives." 239 N.C. App. 63, 75, 768 S.E.2d 172, 179 (2015). In that case, we concluded that

"[t]he trial court effectively turned [the f]ather into [the m]other's case worker and also gave [the f]ather the authority to determine whether [the m]other complied with the trial court's directives" and remanded for revision of the findings and conclusions concerning the mother's visitation rights. *Id.* at 76, 768 S.E.2d at 180.

¶ 30 We are unable to distinguish between the provisions at issue in *J.D.R.* and the provisions Mother challenges here. "[T]he trial court impermissibly delegated its judicial function to Father[,]" *id.*, when it delegated to him the authority to determine whether Mother provided proof of suitable housing "to [his] satisfaction" before she could have unsupervised weekend visits. Accordingly, we remand for "findings and conclusions relating to visitation rights that comport with this opinion." *Id.*

C. Cost of Supervised Visitation

¶ 31 Lastly, Mother argues that the trial court erred when it ordered her to bear a portion of the cost of a supervised visitation facility without making sufficient findings of fact. We agree.

¶ 32 Our Supreme Court has remanded for additional findings of fact where the trial court "made no findings [about] whether respondent mother was able to pay for supervised visitation once ordered." *In re J.C.*, 368 N.C. 89, 89, 772 S.E.2d 465, 465 (2015) (per curiam). Our Supreme Court reasoned that, "[w]ithout such findings, our appellate courts are unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at respondent

mother's expense." *Id.* Applying *J.C.*, this Court has vacated the visitation portion of a trial court's order and remanded for additional findings of fact where, *inter alia*, "the trial court did not determine what costs, if any, would be associated with conducting supervised visitation[.]" *In re Y.I.*, 262 N.C. App. 575, 582, 822 S.E.2d 501, 506 (2018).

¶ 33 In this case, the trial court found that Mother "has the ability to pay for at least one supervised visit per month with her children through June 2020." However, the trial court made no findings as to "what costs, if any, would be associated with conducting supervised visitation[.]" *Id.* On remand, the trial court shall make additional findings of fact regarding the cost of the supervised visitation and Mother's ability to pay such cost, consistent with this opinion and our precedents.

Conclusion

¶ 34 The trial court did not err by allowing Mother to proceed *pro se*. However, "the trial court impermissibly delegated its judicial function to Father in determining Mother's visitation plan[,]" *J.D.R.*, 239 N.C. App. at 76, 768 S.E.2d at 180, and in failing to ascertain the costs of the supervised visitation facility, *Y.I.*, 262 N.C. App. at 582, 822 S.E.2d at 506.

¶ 35 For the foregoing reasons, the trial court's order is vacated in part and remanded for the entry of new visitation provisions consistent with this opinion. "The trial court may, in its discretion, hold additional hearings in this matter to address

these issues. The remainder of the trial court's order is affirmed." *Id.*

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).