IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-220

No. COA20-345

Filed 18 May 2021

Pitt County, No. 18 JA 130

IN THE MATTER OF: J.C.

Appeal by Respondents from order entered 19 February 2020 by Judge Lee Teague in Pitt County District Court. Heard in the Court of Appeals 23 February 2021.

Jon G. Nuckolls for petitioner-appellee Pitt County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for guardian ad litem.

MURPHY, Judge.

¶ 1 Without evidence in the record of an extreme instance of a parent's incompetence or motion by counsel for an inquiry, a trial court does not abuse its discretion when it does not inquire into whether the parent needed a guardian ad litem.

¶ 2 When a party does not object, present argument, or otherwise raise the issue regarding a parent's constitutionally protected parental status at a permanency planning hearing that involves a guardianship determination and provides an opportunity to present evidence on that issue, the party waives review of the trial court's conclusion the party acted inconsistently with his or her constitutionally protected parental status and was unfit.

¶ 3 Despite waiver of appellate review of the trial court's conclusion of inconsistent action with a party's constitutionally protected parental status and unfitness, we address the remaining challenges to findings of fact and affirm findings of fact that are supported by competent evidence.

¶ 4 A trial court's failure to make necessary findings in a permanency planning order concerning a parent's ability to pay for supervised visitation costs requires us to vacate that portion of the order and remand for such findings.

BACKGROUND

¶ 5 J.C. ("Georges")[1] was born on 6 September 2018 with severe jaundice. Georges' pediatrician recommended hospital care for the child, and Respondent-Father ("Karl") disagreed. On 11 September 2018, Pitt County Department of Social Services ("DSS") filed a juvenile petition alleging (1) Georges was a neglected and dependent

[1] Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

juvenile, (2) Respondent-Mother ("Lisa") was Georges' mother, and (3) Karl was Georges' father. The trial court issued a nonsecure custody order on 10 September 2018, which was filed on 11 September 2018.

¶ 6 After a hearing on 11 October 2018, the trial court adjudicated the minor child neglected in its *Pre-Adjudication and Adjudication Order* ("January 2019 Order"), filed 3 January 2019, and ordered Georges remain in DSS custody. The January 2019 Order also required Lisa and Karl to "submit to a parenting capacity evaluation."

¶ 7 The trial court held another hearing on 14 February 2019 and entered its *Disposition Order* ("March 2019 Order") on 15 March 2019. The March 2019 Order required Lisa to engage in mental health treatment, "demonstrate skills learned in parenting class," and maintain sufficient housing. The March 2019 Order required Karl to "submit to a psychological evaluation to include a parental capacity evaluation[,]" "maintain sufficient and stable housing[,] . . . [and] income or employment." The March 2019 Order kept Georges in DSS custody.

¶ 8 At the time, Lisa had three children other than Georges, none of whom were in her custody, and her parental rights to the youngest of those children had been judicially terminated. She underwent a psychological examination in August 2016 after giving birth to the third child, which revealed she suffered from post-traumatic stress disorder, anxiety disorder, borderline personality disorder, seizures, and obsessive-compulsive disorder. Her first two children had been fathered by Lisa's

father, and the August 2016 examination noted she remained "indifferent to [that] sexual relationship[.]" The August 2016 examination concluded Lisa "should not be expected to parent independently" and recommended "she be appointed a Guardian Attorney to represent her interests" in light of her inability "to fully understand the complexities of court proceedings and legal matters associated with her . . . case." The trial court did not inquire into whether Lisa needed a guardian ad litem at the permanency planning hearings reviewed in this appeal.

¶ 9 Regarding Georges, the trial court conducted a permanency planning hearing on 22 August 2019 and filed a *Permanency Planning Order* ("September 2019 Order") on 23 September 2019. The trial court found Lisa and Karl had completed a parenting class, would argue and call each other names during visits with Georges, had relocated to Jacksonville, and had unrealistic expectations for Georges' development. The trial court also found Lisa expected Georges to walk at five months and get a tan. The trial court found Lisa and Karl had participated in the plan of reunification but had not made adequate progress; in particular, the trial court found Karl had not "followed through with [c]ourt ordered activities necessary to ensure the safety of [Georges]." The trial court again ordered legal custody remain with DSS, Karl "submit to a psychological evaluation to include a parental capacity evaluation" and "maintain sufficient and stable income or employment," and Lisa and Karl to "maintain sufficient and stable housing." The trial court scheduled a permanency

planning hearing for 12 December 2019.

¶ 10 After expressing objectivity concerns regarding an initial psychologist, who withdrew from the case, Karl did not complete a psychological evaluation until 16 September 2019, approximately six months after the March 2019 Order. The psychological evaluation diagnosed Karl with "Unspecified Personality Disorder with significant Turbulent, Histrionic, and Antisocial Traits." The psychological evaluation recommended weekly individual therapy and couples therapy, as well as Karl "maintain employment and housing stability[.]"

¶ 11 According to the psychological evaluation,

> [a]t this time it is improbable [Karl] is capable of sole caregiving to his child as he is in need of stable employment and individual and couples therapy. If [Karl] can make progress in therapy, maintain employment and housing stability, and improve the relationship and communication between he and his wife, it is possible he would be capable of sole caregiving to [Georges].

¶ 12 Karl was notified of these recommendations at a visit in November 2019 after DSS received the official copy of the psychological evaluation in late October 2019. Lisa and Karl missed visits, were late to visits, and cancelled visits with Georges in November and December 2019.

¶ 13 After a prior continuance on 12 December 2019 due to withdrawal of Lisa's counsel, the trial court held a permanency planning hearing on 9 January 2020, which Lisa and Karl did not attend, citing illness. In addition to not specifically

objecting to guardianship on constitutional grounds during the hearing, Lisa's and Karl's respective attorneys did not present any argument, or raise the issue, that Karl had not acted inconsistently with his constitutionally protected parental status. Further, Karl admits he had not received individual therapy or couples therapy at the time of the 9 January 2020 permanency planning hearing.

¶ 14 After the 9 January 2020 permanency planning hearing, the trial court filed its *Permanency Planning Order* ("February 2020 Order") on 19 February 2020, which found Lisa and Karl to be "unfit, [and to] have neglected [Georges'] welfare and have acted inconsistently with [their] constitutional rights"; appointed Georges' foster parents as his guardians; allowed supervised visitation for Lisa and Karl; ordered supervised visits with Georges for Lisa and Karl "at the Family Center or other location agreed upon between them and the [foster parents]"; required Lisa and Karl to "provide the costs of the visitation"; mandated "[t]he primary permanent plan for [Georges] shall remain guardianship with a [c]ourt approved caretaker with a secondary plan of reunification"; and ordered there be no further reviews in the case, pursuant to N.C.G.S. § 7B-906.1.

¶ 15 On appeal, Lisa argues the trial court had a duty to inquire into her need for a guardian ad litem pursuant to N.C.G.S. § 7B-602(c), as well as N.C.G.S. § 1A-1, Rule 17. According to Lisa, the psychological evaluator's August 2016 recommendation "she be appointed a Guardian Attorney to represent her interests" in light of her

inability "to fully understand the complexities of court proceedings and legal matters associated with her . . . case" triggered a duty for the trial court to inquire into her need for a guardian ad litem in Georges' subsequent case.

¶ 16 In their respective briefs, Lisa and Karl argue the trial court failed to make findings of fact in the February 2020 Order regarding their ability to pay the costs of visitation as required by caselaw; Karl also argues the trial court needed "to make findings of fact regarding the cost of supervision[.]"

¶ 17 Karl challenges the trial court's finding of fact he was unfit, as well as various other findings; he argues the trial court erred when it awarded guardianship because the trial court's February 2020 Order relied on findings of fact that were not supported by sufficient evidence.

¶ 18 Lisa and Karl ask us to vacate the February 2020 Order and remand for further necessary findings of fact.

ANALYSIS

A. Guardian Ad Litem Inquiry

¶ 19 "We review a trial court's determination of whether or not to appoint a [guardian ad litem] for a parent for abuse of discretion." *In re J.R.W.*, 237 N.C. App. 229, 233, 765 S.E.2d 116, 119 (2014), *disc. rev. denied*, 367 N.C. 813, 767 S.E.2d 840 (2015); *see also In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015). "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial

or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010). "Abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re J.R.W.*, 237 N.C. App. at 233, 765 S.E.2d at 120.

¶ 20 Lisa's argument that the trial court abused its discretion in not inquiring into whether she needed a guardian ad litem focuses on the assessment of her cognitive abilities in the psychological evaluation, the psychological evaluation's recommendation of a "Guardian Attorney" for Lisa, and the trial court's reliance on the psychological evaluation in adjudicating Georges neglected. However, we note Lisa does not make any specific challenges to the trial court's findings of fact. "Where 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 I.T.P-L.*, 194 N.C. App. 453, 462, 670 S.E.2d 282, 287 (2008) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)), *disc. rev. denied*, 363 N.C. 581, 681 S.E.2d 783 (2009). To determine whether the trial court abused its discretion in not inquiring into whether Lisa needed a guardian ad litem, we examine the applicable

statute, caselaw, and unchallenged findings of fact.

¶ 21 According to N.C.G.S. § 7B-602(c):

> On motion of any party or on the [trial] court's own motion, the [trial] court may appoint a guardian ad litem for a parent who is incompetent in accordance with [N.C.G.S. §] 1A-1, Rule 17.

N.C.G.S. § 7B-602(c) (2019). The language of N.C.G.S. § 7B-602(c), including the internally cited N.C.G.S. § 1A-1, Rule 17, affords the trial court a high degree of discretion in whether to conduct an inquiry and appoint a guardian ad litem. According to N.C.G.S. § 7B-602(c), the trial court could have brought its own motion, or any other party could have brought a motion, for the appointment of a guardian ad litem for Lisa. *Id.* Even if such a motion occurs, the trial court is under no obligation to grant such a motion as it "may appoint" a guardian ad litem for an incompetent parent. *Id.*

¶ 22 According to our Supreme Court,

> when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not 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 Z.V.A., 373 N.C. 207, 210, 835 S.E.2d 425, 429 (2019) (quoting *In re T.L.H.*, 368 N.C. at 108-09, 772 S.E.2d at 456). In *In re Z.V.A.*, our Supreme Court declined to find an abuse of discretion when a trial court did not inquire into the respondent's

competency, despite the respondent's IQ indicating a mental disability, and noted the respondent's completion of empowerment classes in ameliorating her disability's impact. *Id.* at 210-11, 835 S.E.2d at 429. The Court reiterated the need for an extreme circumstance in order for a trial court to abuse its discretion in failing to conduct an inquiry into a parent's competence and need for a guardian ad litem. *Id.* at 210, 835 S.E.2d at 429.

¶ 23 Here, the February 2020 Order included unchallenged findings of fact that Lisa completed a parenting class, "maintained housing and maintained visitation," actively participated in a plan of reunification with Georges, and made herself "available to the [c]ourt, to [DSS] or the Guardian ad Litem." Even though these unchallenged findings of fact are binding on appeal, we note the DSS court reports and the guardian ad litem's report for the 9 January 2019 permanency planning hearing support those unchallenged findings of fact. *See In re I.T.P-L.*, 194 N.C. App. at 462, 670 S.E.2d at 287; *In re Z.V.A.*, 373 N.C. at 210-11, 835 S.E.2d at 429. Further, Lisa admitted she has a higher IQ than the respondent in *In re Z.V.A.* We also note neither of Lisa's attorneys moved for the trial court to appoint a guardian ad litem.

¶ 24 While the trial court's findings of fact note "[Lisa] struggles with mental instability and cognitive delays[,]" and the psychological evaluation recommended a

"Guardian Attorney,"[2] the discretionary nature of N.C.G.S. § 7B-602(c) and similarity of this matter to *In re Z.V.A.* support our conclusion the trial court did not abuse its discretion when it did not conduct an inquiry into Lisa's competency. N.C.G.S. § 7B-602(c) (2019); *In re Z.V.A.*, 373 N.C. at 210-11, 835 S.E.2d at 429.

B. Karl's Challenge to the Unfitness Finding

¶ 25 Karl challenges the trial court's finding he is "unfit, ha[s] neglected [Georges'] welfare and ha[s] acted inconsistently with his . . . constitutional rights." However, Karl's counsel did not object on constitutional grounds, present argument or evidence regarding Karl's constitutionally protected parental status, or otherwise raise any constitutional issue before the trial court during the 9 January 2020 permanency planning hearing.

¶ 26 We have

> stated that, to apply the best interest of the child test in a

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[2] Assuming, *arguendo*, such a recommendation could trigger a duty of inquiry under N.C.G.S. § 7B-602(c), the psychological evaluator's recommendation was not clearly for a guardian ad litem as contemplated by the statute. According to N.C.G.S. § 7B-602(d), "[t]he parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney." N.C.G.S. § 7B-602(d) (2019). The wording of the psychological evaluator's recommendation indicates Lisa's two *attorneys* filled such a role—representing Lisa's interests and assisting her in understanding the complexities of legal matters.

Regardless of the psychological evaluator's intent, there was not a clear recommendation for the trial court to appoint a guardian ad litem for Lisa in the psychological evaluator's report. Even if there was such a clear recommendation, the trial court's inquiry into whether Lisa needed a guardian ad litem is a discretionary issue, and there is insufficient evidence in the Record to conclude that the trial court abused its discretion.

> 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. However, [c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. In this case, the trial court found respondent acted in a manner inconsistent with her protected status and that it was required to address the best interest of the child, and respondent did not raise an objection at trial. Consequently, respondent has waived review of this issue on appeal.

In re T.P., 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (internal citations and marks omitted). In our review of the transcript of the 9 January 2020 permanency planning hearing, neither the trial court nor the parties mentioned inconsistent action with constitutionally protected parental rights, although the hearing contained multiple references to, and an award of, guardianship. *In re T.P.*, alone, does not clearly answer whether Karl waived appellate review of this matter.

¶ 27 We have extended this waiver analysis to hearings where the party "was not afforded the *opportunity* to raise an objection at the permanency planning review hearing." *In re R.P.*, 252 N.C. App. 301, 304-05, 798 S.E.2d 428, 430-31 (2017) (emphasis added). Our holding in *In re R.P.* focused on the lack of opportunity for the respondent to object on constitutional grounds or present evidence related to the issue of guardianship. *Id.* We noted

> the trial court determined at the . . . permanency planning review hearing that it would "proceed with guardianship at

> the *next* date." . . . At the next hearing, . . . the trial court would not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing. Evidence was strictly limited to the issue of visitation. . . . Consequently, because the trial court did not hold a proper hearing, respondent was not offered the opportunity to raise an objection on constitutional grounds. Thus, we conclude that his constitutional argument was not waived.

Id. at 305, 798 S.E.2d at 431. Here, unlike in *In re R.P.*, Karl's attorney had the opportunity to present evidence regarding guardianship, as is proper in such a hearing, and had the opportunity to object on constitutional grounds.

¶ 28 We also held the following in *In re C.P.*:

> To apply the best interest of the child test in a custody dispute between a parent and a non-parent, a trial court must find that the natural parent is unfit or that her conduct is inconsistent with a parent's constitutionally protected status. This finding should be made when the [trial] court is considering whether to award guardianship to a non-parent. To preserve the issue for appellate review, the parent *must raise it in the [trial] court below*. However, for waiver to occur the parent must have been *afforded the opportunity to object or raise the issue at the hearing*. Here, although counsel had ample notice that guardianship with [the juvenile's half-brother] was being recommended, Respondent-mother *never argued to the [trial] court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis*. We conclude Respondent-mother waived appellate review of this issue.

In re C.P., 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (emphasis added) (internal citations and marks omitted); *see also In re S.R.J.T.*, 2021-NCCOA-94, ¶¶

17-18 (relying on *In re C.P.* to conclude the respondent-mother had waived the constitutional issue).

¶ 29 Under *In re T.P.*, *In re R.P.*, and *In re C.P.*, a parent waives appellate review of a trial court's finding of unfitness or inconsistent action with that parent's constitutionally protected parental status when (1) the parent had the ability to produce evidence concerning guardianship at a permanency planning hearing, (2) the parent had the opportunity to raise an objection, raise the issue, or otherwise argue against guardianship on constitutional grounds at a permanency planning review hearing, and (3) the parent does not raise the objection, issue, or argument on constitutional grounds at the hearing. *See In re T.P.*, 217 N.C. App. at 186, 718 S.E.2d at 719; *In re R.P.*, 252 N.C. App. at 305, 798 S.E.2d at 431; *In re C.P.*, 258 N.C. App. at 246, 812 S.E.2d at 192.

¶ 30 Here, the permanency planning hearing included testimonial and documentary evidence and argument regarding guardianship. Karl's attorney had the opportunity to object on constitutional grounds, or present evidence or argument regarding his constitutionally protected status as a parent, and did not. Karl waived appellate review of the trial court's finding he is "unfit . . . and ha[s] acted inconsistently with his . . . constitutional rights."

C. Karl's Challenged Findings

¶ 31 Despite concluding Karl waived appellate review of the trial court's finding he

acted inconsistently with his constitutionally protected parental status and was unfit, we still address his remaining challenges to findings of fact from the February 2020 Order. *See generally In re T.P.*, 217 N.C. App. 181, 718 S.E.2d 716. "[A]ppellate review of a trial court's permanency planning review order is limited to whether there is competent evidence in the record to support the findings of fact and whether the findings support the conclusions of law[.]" *In re L.E.W.*, 375 N.C. 124, 129, 846 S.E.2d 460, 465 (2020) (internal marks omitted); *see also In re J.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009) (internal marks omitted).[3] "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re P.T.W.*, 250 N.C. App. 589, 594, 794 S.E.2d 843, 848 (2016). "The [trial] court may consider any evidence, including hearsay evidence[,] that the [trial] court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." *In re S.B.*, 268 N.C. App. 78, 86, 834 S.E.2d 683, 689-90 (2019); *see also* N.C.G.S. § 7B-906.1(c) (2019) ("The [trial] court may consider any evidence, including hearsay evidence as defined in [N.C.G.S. §] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the [trial] court finds

[3] Karl claims various findings of fact are not supported by clear and convincing evidence, which is the incorrect standard of review. Instead, we apply the correct standard of review. *See State v. Coleman*, 254 N.C. App. 497, 501-02, 803 S.E.2d 820, 824 (2017) (noting we apply the correct standard of review, despite a party's argument we apply an incorrect standard of review).

to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.").

¶ 32 Before addressing Karl's disputed findings, it is noteworthy Karl did not challenge Finding of Fact 29, which includes "[Karl] has not, however followed through with [c]ourt ordered activities necessary to ensure the safety of [Georges]." That unchallenged "finding is presumed to be supported by competent evidence and is binding on appeal." *In re I.T.P-L.*, 194 N.C. App. at 462, 670 S.E.2d at 287.

¶ 33 Karl challenges Findings of Fact 25, 27, 28, 31, 32, and 40. We address each finding of fact, and Karl's corresponding challenge, sequentially.

¶ 34 Finding of Fact 25 states:

> 25. Per [Karl's] psychological evaluation it is improbable that [Karl] can be a sole caregiver.

The full, relevant section of Karl's psychological evaluation states:

> *At this time* it is improbable [Karl] is capable of sole caregiving to his child as he is in need of stable employment and individual and couples therapy. If [Karl] can make progress in therapy, maintain employment and housing stability, and improve the relationship and communication between he and his wife, *it is possible* he would be capable of sole caregiving to [Georges].

(Emphasis added). Finding of Fact 25 is not an accurate restatement of Karl's psychological evaluation, because it leaves out the key phrases "at this time" and "if [Karl] can make progress . . . , it is possible he would be capable of sole caregiving to

[Georges]."

¶ 35 However, Karl admits he had not received individual therapy or couples therapy at the time of the permanency planning hearing—"he had not yet complied with the recommendations of his psychological evaluation"; Karl blames DSS for not connecting him with individual therapy or couples therapy. Karl also admitted he did not meet with a psychologist for the court-ordered psychological evaluation until 16 September 2019, approximately eight-and-one-half months after he was ordered to undergo an evaluation in the January 2019 Order and six months after a similar recommendation in the March 2019 Order.

¶ 36 While Finding of Fact 25 misstates the psychological evaluation, the finding is, at least partially, technically correct. The contingencies referred to in the psychological evaluation—Karl receiving individual therapy and couples therapy—had not occurred before the 9 January 2020 permanency planning hearing. Karl would need to attend the therapy referred to before his capability to be a sole caregiver to Georges could be considered anything other than improbable. Karl's admitted noncompliance with the psychological evaluation is competent evidence of his inability to be Georges' sole caregiver and bolsters the finding that such ability is improbable.

¶ 37 Finding of Fact 27 states:

> 27. The Court has considered [Karl's] history on [sic] non-

compliance in the rendering of this order.

¶ 38 Karl argues Finding of Fact 27 is "misleading," "inaccurate," and "not supported by the evidence in this case."

¶ 39 As analyzed above, Karl admitted to at least partial non-compliance with the psychological evaluation and delayed his compliance in obtaining the court ordered evaluation. The psychological evaluator's recommendations were not court orders, but the evaluation itself was court ordered. Karl did not contest Finding of Fact 27 in the September 2019 Order—"[Karl] has not, however followed through with [c]ourt ordered activities necessary to ensure the safety of [Georges]." Further, Karl's delay in obtaining the court ordered psychological evaluation was self-inflicted; he initially stated he would find his own evaluator, but later requested DSS assistance in June 2019. The Record contains competent evidence of Karl's delayed compliance with components of the trial court's orders and non-compliance with the psychological evaluator's recommendations of individual therapy and couples therapy.

¶ 40 Finding of Fact 28 states:

> 28. [Lisa and Karl] have not made adequate progress within a reasonable period of time under the plan. While both parties have maintained housing and maintained visitation, [Lisa] continues to be unable to independently care for the Juvenile. [Lisa] has demonstrated a lack of understanding of child development in that she has unreasonable expectations for the Juvenile. [Karl] has only recently completed a psychological evaluation which recommended extensive individual therapy. [Karl] has

> also previously been found not to be an appropriate support person for [Lisa].

¶ 41 Karl claims Finding of Fact 28 is at least partially a conclusion of law, particularly the first sentence, and also claims it is not supported by the evidence. "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re T.R.M.*, 208 N.C. App. 160, 162, 702 S.E.2d 108, 110 (2010); *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted) (holding "any determination requiring the exercise of judgment, or the application of legal principles is more properly classified a conclusion of law"). The trial court's classification of its own determination as a finding of fact or conclusion of law does not govern our analysis. *Id.*

¶ 42 However, according to N.C.G.S. § 7B-906.2(d),

> [a]t any permanency planning hearing under . . . this section, the [trial] court shall make written *findings* as to each of the following, which shall demonstrate the degree of success or failure toward reunification: [including w]hether the parent is making adequate progress within a reasonable period of time under the plan.

N.C.G.S. § 7B-906.2(d), (d)(1) (2019) (emphasis added). The statutory terms appear to contemplate findings regarding adequate progress as findings of fact, and we have previously treated those findings as findings of fact. *See In re D.C.*, 852 S.E.2d 694, 696, 698 (N.C. App. 2020) (deeming a trial court's finding that "[the parents] have not made adequate progress within a reasonable period of time under the plan" as a

finding of fact).

¶ 43 As analyzed above, Karl had not participated in individual therapy or couples therapy. Karl left his job in Pitt County, and Lisa and Karl moved from their home in August 2019. Lisa and Karl have not challenged the evidence or findings of fact that they have only participated in ten of the last twenty visit opportunities with Georges; they also have not challenged the evidence or findings of fact that Lisa is no longer receiving mental health therapy despite mental instability, "[Karl] has historically found [Lisa's] ability to provide independent care to be appropriate[,]" Lisa has unrealistic parenting expectations of Georges, "[Lisa] does not trust [Karl,]" and "[Lisa's] parenting issues still exist" despite Lisa and Karl completing a parenting class. Finding of Fact 28 is supported by competent evidence.

¶ 44 Findings of Fact 31 and 32 state:

> 31. [Lisa and Karl] continue to act in a manner inconsistent with the health and safety of the Juvenile based on the foregoing findings.
>
> 32. It is not possible for the Juvenile to be returned home to [Lisa and Karl] within the next six months because: [Lisa] continues to be unable to independently care for the Juvenile. [Lisa] has demonstrated a lack of understanding of child development in that she has unreasonable expectations for the Juvenile. [Karl] has not completed the recommendations of his psychological evaluation and has previously been found not to be an appropriate support person for [Lisa].

¶ 45 Karl challenges these findings of fact as at least partial conclusions of law and

also claims they are not supported by the evidence. These findings of fact track the required findings of fact in N.C.G.S. § 7B-906.2(b) and N.C.G.S. § 7B-906.1(e)(1), respectively. N.C.G.S. § 7B-906.2(b) (2019); N.C.G.S. § 7B-906.1(e)(1) (2019). The statutory terms contemplate findings regarding parents acting in a manner inconsistent with the health and safety of the juvenile and the possibility of the juvenile returning home within six months as findings of fact, and our courts have previously treated those findings as findings of fact. *See In re L.E.W.*, 375 N.C. 124, 132-33, 846 S.E.2d 460, 466-67 (2020) (portraying a trial court's findings tracking with the requirements of N.C.G.S. § 7B-906.2 as findings of fact and ultimate findings); *see also In re L.G.*, 851 S.E.2d 681, 686-87 (N.C. App. 2020) (internal marks omitted) (holding "N.C.G.S. § 7B-906.1(e)(1) requires the trial court to enter findings of fact regarding, *inter alia*, whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests").

¶ 46 In light of our previous analysis, including, *inter alia*, Lisa and Karl's failure to engage in appropriate counseling and attend visits with Georges, Lisa's unrealistic parenting expectations, and unchallenged Finding of Fact 29 regarding Karl's failure to follow "through with [c]ourt ordered activities necessary to ensure the safety of [Georges,]" Findings of Fact 31 and 32 are supported by competent evidence and unchallenged findings of fact.

¶ 47 Finding of Fact 40 states:

> 40. [DSS] is making reasonable efforts effectuating the plan in this case and in preventing or eliminating the need for placement with DSS, to reunify the family and to implement a permanent plan. These efforts are specifically the following: maintaining contact with the Juvenile, his caregiver, [Lisa], [Karl]; the paternal grandmother and professional collaterals; providing referrals for services; facilitating visitation; arranging for parenting classes; providing bus passes and requesting a home study of the paternal grandmother.

¶ 48 Karl challenges Finding of Fact 40 as at least a partial conclusion of law and also claims, to the extent it is a finding of fact, it is not supported by the evidence. He argues DSS did not inform him of the psychological evaluator's recommendations until November 2019. Finding of Fact 40 tracks the required finding in N.C.G.S. § 7B-906.1(e)(5), which states:

> At any permanency planning hearing where the juvenile is not placed with a parent, the [trial] court shall additionally consider the following criteria and make written findings regarding . . . [w]hether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

N.C.G.S. § 7B-906.1(e), (e)(5) (2019). Our courts have previously treated this required finding as a finding of fact. *See In re H.J.A.*, 223 N.C. App. 413, 415-17, 735 S.E.2d 359, 361-62 (2012) (characterizing the N.C.G.S. § 7B-906.1(e)(5) finding as a finding of fact, specifically when "the trial court made the . . . factual finding[] [that] . . . DSS

has not made reasonable efforts to implement the permanent plan for the juvenile"); *see also In re Harton*, 156 N.C. App. 655, 659, 577 S.E.2d 334, 336-37 (2003) ("[T]he trial court is required to consider certain criteria and make written findings of fact on" criteria including "[w]hether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile").

¶ 49 According to the DSS court report for the 12 December 2019 permanency planning hearing, which was continued to 9 January 2020, DSS made

> [t]he following efforts . . . to reunify the family and/or find a safe and permanent home within a reasonable period of time for [Georges]: Weekly visits with [Georges;] Weekly visits with the foster parents[;] Weekly visits with [Lisa;] Weekly visits with [Karl;] Contact with the ECU Pediatrics[;] Contact with the Guardian ad Litem office and [guardian ad litem;] Contact with Quality Inn Hotel in Jacksonville, NC[;] Contact with Onslow County Department of Social Services[;] Attempted to contact with [Lisa's] therapist[;] Permanency Planning Meetings[.]

¶ 50 The trial court also reviewed evidence of Onslow County DSS completing a home study of the paternal grandmother at DSS' referral. DSS also submitted evidence of continued attempts in November and December 2019 to establish visitation between Lisa and Karl and Georges, despite Lisa and Karl's cancellations of, lateness to, and absence without notification from visits with Georges. However, the trial court heard DSS testimony regarding receiving the official copy of the

psychological evaluation at the end of October 2019 and communicating its recommendations to Karl at the next visit in November 2019. Despite the delay in DSS communicating the recommendations to Karl, his delays in obtaining the psychological evaluation were at least partially responsible for the lateness in receiving the psychological evaluation's recommendations. Further, this DSS delay does not negate the reasonableness of its other efforts described above. The Record contains competent evidence to support Finding of Fact 40.

¶ 51 Competent evidence supported the trial court's findings of fact in the February 2020 Order, and the findings of fact supported the award of guardianship.

D. Visitation Payment Finding

¶ 52 Lisa and Karl argue caselaw adds a required finding to N.C.G.S. § 7B-905.1 for the February 2020 Order continuing Georges' placement outside their home; specifically, Lisa and Karl argue caselaw required the trial court to make specific findings concerning their ability to pay for visitation costs. *See* N.C.G.S. § 7B-905.1(a), (c) (2019); *In re J.C.*, 368 N.C. 89, 772 S.E.2d 465 (2015) (per curiam). Both the GAL and DSS argue the February 2020 Order complied with N.C.G.S. § 7B-905.1(c) and any error is harmless.

¶ 53 When an "argument presents a question of statutory interpretation, full review is appropriate, and the conclusions of law are reviewable de novo." *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011) (internal marks omitted).

¶ 54 In the February 2020 Order, the trial court ordered the following regarding visitation:

> 12. [Lisa and Karl] shall have supervised visits with [Georges] at least once a month for two hours at the Family Center or other location agreed upon between them and the [guardians]. The guardians shall have discretion to increase the visits. [Lisa and Karl] must provide their own transportation. [Lisa and Karl] shall give the [g]uardians at least 24 hours' notice of their intent to visit [Georges].
>
> 13. [Lisa and Karl] as well as the [guardians] shall contact the Family Center to arrange their visits. [Lisa and Karl] shall provide the cost of the visitation.

¶ 55 According to N.C.G.S. § 7B-905.1:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The [trial] court may specify in the order conditions under which visitation may be suspended.
>
> . . .
>
> (c) 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. The [trial] court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C.G.S. § 7B-905.1(a), (c) (2019). N.C.G.S. § 7B-905.1 does not contain an express requirement for the trial court to include findings regarding a parent's ability to pay

for supervised visitation.

¶ 56 However, our Supreme Court characterized a trial court's failure to make "findings whether [a parent] was able to pay for supervised visitation" as rendering "our appellate courts [] unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at [the parent's] expense." *In re J.C.*, 368 N.C. at 89, 772 S.E.2d at 465; *see also In re E.M.*, 249 N.C. App. 44, 57, 790 S.E.2d 863, 873-74 (2016) (vacating "the portion of the [trial court's] order requiring that the visitation be at [the parent's] expense" and remanding "for entry of a new order containing the required findings of fact" when the trial court's order required the parent to pay for supervised visit costs but contained no findings of fact regarding whether the parent could pay those costs). The trial court in *In re J.C.* ordered "[the respondent-mother] [was] to have a supervised visit every other week for one hour via a supervised visitation center, at her expense." By its terms, the respondent-mother in *In re J.C.* was required to bear some cost to travel to a supervised visitation center.

¶ 57 While such a mandatory cost is not necessarily present here, as the trial court's order provided the parties could agree on an alternate location, the Guardians and Lisa and Karl could conceivably be unable to agree on an alternate location for supervised visitation. In such an instance, Lisa and Karl would be required to travel from Onslow County to the Family Center in Pitt County and pay for the visitation

expenses. According to *In re J.C.*, trial courts must include findings regarding a parent's ability to pay visitation costs to allow appellate courts to adequately review the order for abuse of discretion in the visitation order. *In re J.C.*, 368 N.C. at 89, 772 S.E.2d at 465. Despite the flexibility in the trial court's order here compared to the inflexible language at issue in *In re J.C.*, the trial court did not include the required findings whether Lisa and Karl were able to pay for supervised visitation in the February 2020 Order.

¶ 58 We vacate "the portion of the [trial court's] order requiring that the visitation be at [Lisa and Karl's] expense" and remand "for entry of a new order containing the required findings of fact" regarding whether Lisa and Karl can pay for the costs of supervised visitation. *In re E.M.*, 249 N.C. App. at 57, 790 S.E.2d at 874.

CONCLUSION

¶ 59 The trial court did not abuse its discretion when it did not inquire into whether Lisa needed a guardian ad litem. Karl's attorney did not object, present argument, or otherwise raise the issue of Karl's constitutionally protected parental status at the 9 January 2020 permanency planning hearing. As such, Karl waived review of the trial court's finding in its February 2020 Order that he acted inconsistently with his constitutionally protected parental status and was unfit. Karl's other challenged findings from the February 2020 Order were supported by competent evidence in the Record and unchallenged findings of fact.

¶ 60 However, the trial court did not make necessary findings concerning Lisa and Karl's ability to pay for supervised visitation costs. We vacate that portion of the February 2020 Order, remand for findings consistent with this opinion, and affirm the remainder of the order.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge STROUD and Judge GRIFFIN concur.

Report per Rule 30(e).