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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-271

No. COA21-559

Filed 19 April 2022

Cleveland County, No. 20 JA 37-39

In the Matter of: L.B., J.D., C.D.

Appeal by Respondent-Mother from order entered 14 June 2021 by Judge James T. Hodges in Cleveland County District Court. Heard in the Court of Appeals 9 March 2022.

Charles E. Wilson, Jr., for Cleveland County Department of Social Services, Petitioner-Appellee.

K&L Gates, LLP, by Sophie M. Goodman, for Guardian ad Litem.

Anné C. Wright, for Respondent-Appellant Mother.

WOOD, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order placing physical and legal custody of her minor children "Lucy" and "Josh" with their father, "Jason Brown" ("Brown").[1] On appeal, Respondent argues the trial court failed to 1) consider evidence other than the Cleveland County Department of Social Services'

[1] Pseudonyms are used to protect the minor children's identities. *See* N.C.R. App. P. 42(b).

("CCDSS") and Guardian ad litem's reports, 2) make sufficient findings to support the denial of her visitation rights with Lucy, 3) specify her visitation rights with Josh, and 4) make the required findings under N.C. Gen. Stat. § 7B-906.2(d). After a careful review of the record and applicable law, we affirm in part and vacate and remand in part for a new visitation plan for Respondent with Josh.

I. Factual and Procedural Background

¶ 2 Respondent married Brown, and together the couple had two children, Lucy and Josh. Respondent and Brown later separated, but never divorced. Ultimately, Brown resided in Dayton, Ohio, and Respondent resided in North Carolina. At some point in time thereafter, Respondent began dating "Justin Duncan" ("Duncan").[2] Together, Respondent and Duncan had one child, "Chip."[3] Respondent, along with Lucy, Josh, and Chip (collectively, the "children"), resided with Duncan.

¶ 3 On April 15, 2020, CCDSS received a child protective services report alleging Duncan had sexually abused Lucy; Duncan and Respondent were using methamphetamine and marijuana; and the residence was filthy. The same day, after-hours CCDSS worker Wiltfong visited Duncan's house. When Wiltfong arrived at Duncan's house, she noticed "a lot of trash in the home and an infestation of

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[3] Pseudonyms are used to protect the minor children's identities. *See* N.C.R. App. P. 42(b).

roaches." Wiltfong then spoke with Lucy who described how Duncan would get a "big circle thing" that plugged into the wall and vibrated and rub it on top of her clothes against her vagina. When Wiltfong questioned Duncan and Respondent, they admitted to owning sex toys, but denied using any sex toys on or in the presence of the children. Respondent and Duncan asserted they kept the sex toys in a pouch out of the children's reach.

¶ 4 The next day, detectives from Cleveland County Sheriff's Department interviewed Lucy. Lucy again described the "vibrating toy" to the detectives; stated Duncan pulled down her pants on one occasion; and explained he had touched her with the "vibrating toy" on several other instances. Duncan and Respondent again denied Lucy's allegations. Duncan did tell the detectives, however, that he and Respondent had used methamphetamine previously. Duncan had been convicted for possession of methamphetamine and was currently on probation and attending a court-ordered substance abuse treatment program.

¶ 5 On April 17, 2020, Duncan was arrested for five counts of taking indecent liberties with a minor. Duncan was released on bond four days later upon the specific condition he would not be at Respondent's residence regardless of whether the children were present. That same day, law enforcement officers received a request to perform a welfare check at Respondent's residence. When the officers arrived at Respondent's residence, Duncan was present. Duncan was promptly arrested for

violating the conditions of his pre-trial release.

¶ 6 On April 23, 2020, Respondent was arrested for violating the felony child-abuse sexual act. Due to Respondent's arrest and the allegations made against Duncan, Iris Hamilton, a social worker with CCDSS, completed a Temporary Safety Resource Placement with Respondent. Respondent planned for Lucy to be placed with her maternal grandfather and for Josh and Chip to be placed with Chip's paternal grandparents. Thereafter, Duncan and Respondent were released on bond.

¶ 7 Hamilton contacted Brown on April 28, 2020, to discuss the situation with Lucy. Brown explained he had not cared for Lucy since she was 3 nor had any contact with her within the past 2 years. Brown did, however, "express[] a desire to obtain custody of . . . [Lucy] as he wants her to come live with him in Ohio." On May 1, 2020, CCDSS filed a petition alleging the children were abused and neglected juveniles. CCDSS explained it had conducted a thorough review of Lucy's maternal grandfather and discovered he had "extensive criminal convictions[,]" and thus, did not request Lucy to be placed with him. CCDSS requested nonsecure custody of the children, which was granted promptly. Lucy was placed in a licensed foster home, and Josh and Chip remained in the custody of Chip's paternal grandparents.

¶ 8 An adjudication and disposition hearing was held on September 9, 2020. The trial court adjudicated all three children to be neglected juveniles and, additionally, adjudicated Lucy to be an abused juvenile. The trial court ordered Lucy to be placed

in Brown's custody, and Josh and Chip to be placed in Chip's paternal grandparents' custody. Brown was granted "regular monitored telephone or video contact" with Josh and a "a minimum of six hours" of unsupervised visitation on specific days. The trial court ordered Respondent to complete a parenting education program, a psychological evaluation, a court-approved By-Standers' treatment program; submit to random drug testing; obtain a substance abuse assessment; sign the necessary releases for DSS to obtain information; and establish and maintain safe and stable housing. Due to Respondent's pending criminal matters, the trial court recognized Respondent would be unable to comply with "certain dispositional recommendations."

¶ 9 Thereafter, Respondent completed an intake packet for the Abuse Prevention Council; partially completed an Inner Healing Solutions' assessment; and submitted to a drug screening which tested positive for methamphetamine and amphetamine. Respondent otherwise failed to comply with the trial court's order. This case again came before the trial court for an initial review hearing on November 18, 2020. Following this hearing, the trial court entered an order finding the daily contact between Josh and Brown "has gone well[,]" and placed Josh in Brown's custody.

¶ 10 Pursuant to N.C. Gen. Stat. §§ 7B-906.1 and 906.2, a permanency planning hearing was held on May 26, 2021. Respondent, Brown, and Duncan did not attend the hearing. At the hearing, Sharina Camp, a social worker for CCDSS, testified. On June 14, 2021, the trial court entered an Order Following Permanency Planning

Hearing, granting physical and legal custody of Lucy and Josh to Brown. Respondent filed timely notice of appeal of the permanency planning order as it pertains to Lucy and Josh on July 13, 2021.

II. Discussion

¶ 11 Respondent raises several issues on appeal; each will be addressed in turn.

A. Consideration of Evidence

¶ 12 Respondent first contends the permanency planning order must be vacated because the trial court only considered the written reports of the guardian ad litem and CCDSS. We disagree.

¶ 13 We review a permanency planning order to determine "whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.T.S.*, 268 N.C. App. 61, 67, 834 S.E.2d 637, 642 (2019) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)); *see In re A.C.*, 247 N.C. App. 528, 532, 786 S.E.2d 728, 733 (2016). Any unchallenged finding of fact is "deemed to be supported by the evidence and . . . [is] binding on appeal." *In re A.C.*, 247 N.C. App. at 533, 786 S.E.2 at 733 (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

¶ 14 When a trial court is deciding "an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 . . ., the juvenile's best interest are paramount." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015). At a permanency planning hearing, the

trial court

> may consider any evidence, including hearsay evidence as defined in [N.C.] G[en]. S[tat]. [§] 8C-1, Rule 801, or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-906.1(c) (2021); *see also In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) ("Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court . . . . Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.")

¶ 15 Notwithstanding this generally inclusive standard for evidence, we have concluded insufficient evidence exists to support a permanency planning order's findings when no testimony was presented at the permanency planning hearing. *See In re J.T.*, 252 N.C. App. 19, 21, 796 S.E.2d 534, 536 (2017) ("Because the trial court did not hear evidence at either of the permanency planning hearings, the findings in the court's orders were unsupported by competent evidence, and its conclusions of law were in error."); *In re D.Y.*, 202 N.C. App. 140, 143, 688 S.E.2d 91, 93 (2010) (holding findings based solely on the "written reports of DSS and the guardian *ad litem*, prior court orders, and oral arguments by the attorneys" are not considered to

be supported by competent evidence); *In re D.L.*, 166 N.C. App. 574, 583, 603 S.E.2d 376, 382 (2004). While testimony is required to support an order's findings, the trial court does not need multiple oral testimonies. In *In re J.C.S.*, we held the permanency planning order's findings of fact were supported by competent evidence when the trial court had before it a "detailed DSS report" and "the guardian *ad litem*'s testimony" and some of the trial court's findings were "supported by the several adjudication, disposition, review, and permanency planning orders entered at earlier stages in this case." *In re J.C.S.*, 164 N.C. App. 96, 107, 595 S.E.2d 155, 161 (2004), *overruled on other grounds by In the Matter of R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005).

¶ 16 We find this case indistinguishable from *In re J.C.S.* At the permanency planning hearing, the trial court heard oral testimony from CCDSS's child permanency worker, Sharina Camp. We note that although the court's order states that the parents' attorneys waived an evidentiary hearing, the transcript reveals that Camp verified the authenticity of the information contained in her report and testified directly to the issues pertaining to Lucy and Josh at the permanency planning hearing. The guardian ad litem also was present at the hearing and was heard as to her recommendations for Lucy and Josh at the hearing. Additionally, the trial court received and considered the written reports and addendums from the guardian ad litem and CCDSS. The trial court's findings "the juveniles were

adjudicated to be neglected juveniles" and "the Court has also determined that . . . [Justin Duncan] and . . . [Kari Williams][4] are responsible individuals" were adopted from previous, unchallenged decrees from the court orders entered in this case. Camp's oral testimony, coupled with the other evidence before the trial court, provided sufficient competent evidence to support the trial court's findings. *See id.* Accordingly, we hold the permanency planning order's findings were supported by competent evidence.

B. Visitation with Lucy

¶ 17 Respondent next argues the trial court did not make specific findings of fact to support its denial of her visitation rights with Lucy. We disagree.

¶ 18 N.C. Gen. Stat. § 7B-905.1 requires the trial court to "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation" when an order otherwise removes custody of a child from the parent or places the child outside of the home. N.C. Gen. Stat. § 7B-905.1(a) (2021). A parent's visitation right with his child "is a natural and legal right" and should not be easily disturbed. *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). However, a trial court may revoke a parent's visitation right when "the parent has by conduct forfeited the right" or "the exercise of the right would

[4] Pseudonyms are used to protect the minor children's identities. *See* N.C.R. App. P. 42(b).

be detrimental to the best interest and welfare of the child." *Id.*; *see Paynich v. Vestal*, 269 N.C. App. 275, 278, 837 S.E.2d 433, 436 (2020).

¶ 19 The guiding principle to be used by the trial court when determining a parent's visitation right is the best interest and welfare of the child. *Payinch*, 269 N.C. App. at 278, 837 S.E.2d at 436; *see Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967) ("[T]he welfare of a child is always to be treated as the paramount consideration . . . ."); *see also Routten v. Routten*, 374 N.C. 571, 578, 843 S.E.2d 154, 159 (2020) ("[T]he trial court must apply the 'best interest of the child' standard to determine custody and visitation questions . . . ."). This Court reviews a trial court's "determination as to the best interest of the child for an abuse of discretion." *In re J.H.*, 244 N.C. App. at 269, 780 S.E.2d at 238 (quotation omitted). "An abuse of discretion 'is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Payinch*, 269 N.C. App. at 278, 837 S.E.2d at 436 (quoting *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002)).

¶ 20 We note that "a trial court's discretionary authority is not unfettered." *Id.* (quotation omitted). N.C. Gen. Stat. § 50-13.5 mandates that

> [i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation

> rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2021); *see Routten*, 374 N.C. at 578, 843 S.E.2d at 159.

¶ 21 In the case *sub judice*, we hold the permanency planning order's revocation of Respondent's visitation rights with Lucy was supported by the findings of fact therein. The trial court found Lucy was a neglected and abused juvenile; the permanent plan for Lucy had already been achieved; Lucy had been living with her father for the past eight months and thriving; Respondent had pending criminal charges related to the action concerning Lucy, and due to these charges is not entitled to visitation or contact with Lucy; and Respondent failed to comply with any court-ordered assessment or treatment services since the last court order. Therefore, we conclude the trial court did not abuse its discretion by denying Respondent visitation. Although the trial court could have articulated more precisely findings as to why Respondent was an "unfit" parent, we conclude the totality of the findings were sufficient to support the conclusion Respondent is not entitled to visitation or contact with Lucy. Thus, the trial court did not abuse its discretion by denying Respondent visitation rights with Lucy.

C. Visitation with Josh

¶ 22 Next, Respondent argues the trial court erred because it failed to set out the parameters required under N.C. Gen. Stat. § 7B-905.1 for visitation with Josh. We agree.

¶ 23 Concerning Respondent's right to visitation with Josh, the trial court found "[t]hat the Court will sanction a visitation plan for the respondent mother to have reasonable telephone or facetime contact with the juvenile . . . Josh." The trial court's permanency planning order did not find Respondent was an unfit person to visit Josh or that Josh's best interest was served by denying Respondent visitation rights. *See* § 50-13.5(i). When a trial court neither finds that a parent has forfeited the right of visitation nor that "the exercise of the right would be detrimental to the best interest and welfare of the child, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised." *In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849; *see In re C.P.*, 181 N.C. App. 698, 706, 641 S.E.2d 13, 18 (2007).

¶ 24 Under North Carolina law,

> (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 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 court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a),(c) (2021). Under Section 7B-905.1(c), a trial court is not required to "include in its order the particular time or place for such visitations[,]" but instead it must "provide a framework for such visitations." *In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 570 (2015). On appeal, this Court reviews a trial court's "dispositional orders for visitation for an abuse of discretion." *In re J.R.*, 2021-NCCOA-491, ¶39 (quoting *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007)).

¶ 25 We have previously held an order permitting visitation is deficient if the visitation order grants out-of-state visitation but fails to direct visitation should a respondent be unable to travel out-of-state. In *In re J.D.M.-J.*, the trial court ordered that, "[i]f the Respondent were to return to live in Arizona, that visitation between Respondent . . . [and the children would] occur weekly for a minimum of 2 hours." *In re J.D.M.-J.*, 260 N.C. App. 56, 69, 817 S.E.2d 755, 763 (2018) (internal brackets omitted). On appeal, we remanded to the trial court, holding it did not comply with Section 7B-905.1(c) because "it fail[ed] to provide any direction as to the frequency or length of Respondent's visits in the event that she does *not* return to live in Arizona." *Id.* at 69, 817 S.E.2d at 763-64. Likewise, in *In re E.P.-L.M.*, the trial court awarded

primary custody of the child to the father, a Georgia resident, and granted Mother, a North Carolina resident, electronic visitation rights and supervised visitation rights if she was able to travel to Georgia. *In re E.P.-L.M.*, 272 N.C. App. 585, 587, 602, 847 S.E.2d 427, 431, 440 (2020), *disc. review denied,* 376 N.C. 674 (2021). On appeal, we vacated and remanded the visitation provision, finding it "fail[ed] to provide any direction as the frequency or length of Mother's visit in the event she does not go to Georgia." *Id* at 603, 847 S.E.2d at 440 (internal brackets omitted) (quotation omitted).

¶ 26 In the present case, the trial court ordered the following visitation schedule between Respondent and Josh,

> 2. That the Court will sanction a visitation plan for the respondent mother to have reasonable telephone or facetime contact with the juvenile . . . [Josh]. The Court will grant the recommendation of the Guardian ad Litem and reduce the frequency of these calls to once per week. These weekly calls should occur by an established schedule as agreed upon by the father . . . [Jason Brown], and should not occur later than 7:00 p.m. . . . [Josh] should be permitted to call his mother at additional times as he desires. In the event Ms. . . . [Williams] is able to travel to Ohio, she shall be entitled to supervised visitation with . . . [Josh], to be supervised by . . . [Jason Brown] and scheduled for a minimum of one hour per week.

Although the permanency planning order's visitation provision provided for reasonable electronic visitation; the length and frequency of electronic visitations; and supervised visitations if Respondent traveled to Ohio, it failed to provide any

direction as to the frequency of the supervised visitation. It further failed to provide for visitation in the event the Respondent is unable to travel to Ohio or to state any reason why visitation should only occur in Ohio.

¶ 27 In order to ensure parental rights are safeguarded, a trial court must provide for a visitation plan should the parent be unable to travel out of state. We hold the trial court abused its discretion because it did not direct an alternative visitation plan if Respondent was unable to travel to Ohio. Accordingly, we vacate the permanency planning order's provision setting out visitation between Respondent and Josh and remand to the trial court for new findings and a visitation plan that complies with N.C. Gen. Stat. § 7B-905.1(c).

D. N.C. Gen. Stat. § 7B-906.2

¶ 28 Lastly, Respondent argues the trial court erred by not making the required findings of fact under N.C. Gen. Stat. § 7B-906.2(d). We disagree.

¶ 29 This court reviews an appellant's argument the trial court failed to follow a statutory mandate *de novo*. *In re J.C.-B.*, 276 N.C. App. 180, 2021-NCCOA-65, ¶ 50. N.C. Gen. Stat. § 7B-906.2(d) states:

> At any permanency planning *hearing under subsections (b) and (c)* of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2021) (emphasis added). In order for subsection 7B-906.2(d) to be applicable, a permanency planning hearing must fall under subsection (b) or (c). Subsection 7B-906.2(b) provides, *inter alia*, "[r]eunification shall be a primary or secondary plan *unless* the court made written findings under [N.C.] G[en]. S[tat]. 7B-901(c) or [N.C.] G[en]. S[tat]. 7B-906.1(d)(3), *the permanent plan is or has been achieved* in accordance with subsection (a1) of this section . . . ." § 7B-906.2(b) (2021). S*ee In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶20. Similarly, under subsection 7B-906.2(c), the trial court is required to "make a finding about whether the reunification efforts . . . were reasonable" unless "reunification efforts were previously ceased . . . ." § 7B-906.2(c).

¶ 30 In this case, a concurrent plan was not necessary. The trial court found "permanence has been achieved for the juveniles . . . [Lucy] and . . . [Josh], and a secondary permanent plan is no longer required." Because the trial court found that permanency for Lucy and Josh had been achieved, neither N.C. Gen. Stat. § 7B-906.2(b) or (c) were implicated. As such, the trial court was not required to make the

findings enumerated in Section 7B-906.2(d). Therefore, we hold the trial court did not violate N.C. Gen. Stat. § 7B-906.2(d).

III. Conclusion

¶ 31 We hold the trial court's permanency planning order was supported by competent evidence. The trial court's findings, in turn, supported its ultimate conclusion Respondent was not entitled to visitation with Lucy. Moreover, the trial court was not required under Section 7B-906.2(d) to make written findings concerning reunification efforts as Lucy's and Josh's permanency plans had been achieved. However, the trial court erred by failing to provide for visitation between Respondent and Josh in the event Respondent is unable to travel to Ohio. Thus, we vacate the portion of the permanency planning order that pertains to Respondent's visitation with Josh and remand to the trial court to enter a visitation schedule as required by N.C. Gen. Stat. § 7B-905.1(c).

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).