An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-572

No. COA21-726

Filed 16 August 2022

Wilson County, Nos. 21CVD686, 19JA30, 20JA53, 20JA54

IN RE: H.S., K.S., R.E.

Appeal by Respondent-Mother from three permanency planning orders and a juvenile court order initiating a Chapter 50 civil custody order entered 14 May 2021 by Judge Elizabeth Freshwater-Smith in Wilson County District Court. Heard in the Court of Appeals 25 May 2022.

BJK Legal, by Benjamin J. Kull, for respondent-appellant mother.

Administrative Office of the Courts, by Guardian ad Litem Appellate Counsel Matthew D. Wunsche, for Guardian ad Litem.

Beaman & Bennington, PLLC, by Jennifer K. Bennington, for petitioner-appellee Wilson County Department of Social Services.

CARPENTER, Judge.

¶ 1 Arnesha Ellis ("Respondent-Mother") seeks review of four orders, three permanency planning orders ("the Orders") and a Chapter 50 civil custody order,

entered on 14 May 2021 granting, *inter alia*, legal and physical custody of her three children to the children's godparents ("Custodians"). Respondent-Father opposed the recommendations by Wilson County Department of Social Services ("DSS") and the Guardian *ad Litem* (collectively, "Petitioners") to transfer custody to Custodians, but he does not join in Respondent-Mother's appeal.[1] After careful review, we vacate the Chapter 50 civil custody order, reverse the Orders, and remand for additional findings consistent with the applicable statutory framework.

I. Factual and Procedural Background

¶ 2 This appeal involves three distinct juvenile court actions, one for each of three children: Harmony, who was two years old at the time of the second permanency planning hearing ("the Hearing") on 28 April 2021; Kevin, who was three years old at the time of the Hearing; and Romelia, who was eight years old at the time of the Hearing.[2] Respondent-Mother is the biological mother to all three children. Respondent-Father is the biological father to Harmony and Kevin. Paternity has not been established for Romelia.

¶ 3 DSS first became involved with Respondent-Parents in May 2019, when DSS commenced an adjudication process solely for the youngest child, Harmony, when she

---

[1] We will refer to Respondent-Mother and Respondent-Father collectively as "Respondent-Parents."

[2] In accordance with N.C. R. App. P. 42(b), pseudonyms have been used to protect the identities of the minor children.

was four months old. DSS filed the first juvenile petition for Harmony on 2 May 2019, claiming Harmony was a neglected juvenile because of Respondent-Parents' failure to provide sufficient medical care. Respondent-Parents separated in August 2019, and Harmony began living with Custodians, who served as "temporary safety providers." The trial court closed Harmony's case on 12 March 2020 and ordered that legal custody remain with Respondent-Parents, even though she continued to reside with Custodians.[3]

Current Proceedings

¶ 4 The current proceedings involving all three children commenced on 24 August 2020, when DSS filed a second juvenile petition for Harmony, and the first and only juvenile petitions for Kevin and Romelia. At the time of filing, Kevin and Romelia lived with Respondent-Father and his mother, while Harmony resided with

[3] We note an apparent discrepancy in the Record between Harmony's first adjudication proceedings and the current adjudication proceedings regarding precisely when and how long Harmony resided with Custodians. In the 14 May 2021 Order in the current proceedings, the trial court found Harmony resided with Custodians since March 2019. Based on a DSS Court Report dated 12 November 2019 from the first adjudication proceedings, Harmony first started living with Custodians in September 2019 but had returned to Respondent-Mother's care by the time the case was closed in March 2020. Nevertheless, in the Juvenile Petition filed on 24 August 2020, which commenced the current proceedings involving all three children, the trial court determined Harmony resided with Custodians at the time of filing. Furthermore, Respondent-Mother notes in her brief Harmony lived with Custodians when the current Juvenile Petition was filed on 24 August 2020. Although the trial court's finding that Harmony resided with Custodians since March 2019 is not adequately explained, there is no dispute for purposes of our analysis that Harmony resided with Custodians at the time the Juvenile Petition was filed on 24 August 2020.

Custodians. The parties stipulated to the following facts, forming the basis of the trial court's 4 November 2020 neglect and dependency adjudications. On 24 June 2020, DSS received a report alleging the Wilson Police Department found Kevin and Romelia home alone. The police found human feces tracked throughout the home and urine on the floors. The lone mattress smelled of urine, as did the children's clothing. Soiled diapers, trash, and dirty clothes littered the floor. The home previously belonged to their maternal grandmother, but she was evicted several months prior. Nonetheless, Respondent-Mother continued to live in the house with Kevin and Romelia even after her mother moved out, without the housing authority's permission.

¶ 5 After receiving the report, DSS attempted to work with Respondent-Mother to find temporary housing, but Respondent-Mother left after a few days. Respondent-Father took Kevin and Romelia to live with his mother. In September 2020, following multiple violent incidents between Respondent-Parents, Custodians agreed to be "temporary safety providers" for Kevin and Romelia "as long as needed."

¶ 6 On 21 October 2020, the trial court entered disposition orders for each child, mandating the children remain in their current placement with Custodians while Respondent-Parents retained legal custody. The disposition orders outlined a Family Services Case Plan for Respondent-Mother to follow, including that she: (1) cooperate

with DSS in scheduling appointments and identify mental health barriers that may directly impact her ability to parent; (2) initiate contact with DSS by 4 November 2020, identifying a mental health provider; (3) identify to DSS a support network of at least two people by 28 October 2020; and (4) cooperate in scheduling and meeting with DSS "to develop and assess the progress on identified activities and goals that must be met to ensure the safety of the children in her home."

¶ 7 The first permanency planning hearing regarding all three children took place on 20 January 2021. On 8 February 2021, the trial court entered orders setting primary plans for all three children as reunification with concurrent plans of custody with Custodians.

¶ 8 The Hearing regarding permanent placement for all three children took place on 28 April 2021. At the Hearing, a social worker testified Respondent-Mother completed parenting training, but she did not arrange to be observed with the children to demonstrate what she learned. The social worker overheard Respondent-Mother say she should not have to provide support for the children because Custodians took on the responsibility to care for them. The social worker also testified Respondent-Mother obtained clothing for her children but did not provide the clothing to Custodians; rather, she kept the clothes in her own home. Respondent-Mother later revealed she kept the clothes at her home because

she was "ready for [her children] to come home[,]" and it was her understanding she needed to obtain clothes at her home for DSS to agree. Respondent-Mother testified it was difficult for her to visit her children because she lacked transportation. Respondent-Mother also did not provide any financial support for her children, but she bought them Christmas gifts and diapers.

¶ 9 At the conclusion of the Hearing, the trial court indicated its intent to adopt Petitioners' recommendations, set forth below, reasoning the preeminent consideration of juvenile court is the children's need for "permanence" despite acknowledging Respondent-Mother had made "tremendous progress[.]"

¶ 10 On 14 May 2021, the court entered the Orders, which: (1) granted legal and physical custody to Custodians; (2) relieved DSS of efforts to reunify the children with Respondent-Parents; (3) set specific visitation hours for Respondent-Parents; (4) released all counsel and the Guardian *ad Litem*; (5) terminated jurisdiction of the juvenile court; and (6) opened a new, separate Chapter 50 civil custody case for all three children. That same day, the trial court entered an order placing permanent custody for all three children and transferring jurisdiction over the case for future actions from Chapter 7B to Chapter 50 of the North Carolina General Statutes.

II. Issues

¶ 11 The issues on appeal are whether the trial court erred by: (1) applying the best interests test to award custody to Custodians without first determining that Respondent-Mother had forfeited her constitutionally protected parental status; and (2) failing to make sufficient findings required by N.C. Gen. Stat. §§ 7B-911(c)(2)(b), 7B-906.2(d), and 7B-906.1(d)(3), (e)(1).[4]

III. Jurisdiction

¶ 12 Respondent-Mother asserts this Court has jurisdiction to consider her appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(4) (2021). We disagree. Respondent-Mother's notice of appeal was filed on 10 August 2021, some 88 days after the Orders were filed on 14 May 2021.

¶ 13 On 21 May 2021, Respondent-Mother filed a "Rules 59 and 60 Motion" ("the Motion") regarding only the custody order establishing the civil case pursuant to Chapter 50, making no reference to the Orders. The trial court held a hearing, orally denied the Motion on 28 July 2021, and entered a written order denying the Motion on 10 September 2021. On 10 August 2021, Respondent-Mother filed a *pro se* written notice of appeal referencing the Orders and the Chapter 50 civil custody order. DSS moved to dismiss the appeal on 20 August 2021 on the grounds the notice of appeal

[4] A third, fully briefed issue on appeal was withdrawn by Respondent-Mother's Reply Brief dated 24 February 2022.

was untimely as the deadline to appeal the Orders was not tolled by the Motion, and because the notice of appeal was not signed by counsel. On 22 September 2021, the trial court denied DSS's motion to dismiss.

¶ 14 Respondent-Mother argues that her filing of the Motion one week after the Orders were entered operated to toll the 30-day deadline for bringing an appeal. *See* N.C. Gen. Stat. § 7B-1001(b). "Under N.C. Gen. Stat. § 1A-1, Rule 59, a party may obtain a new trial either for errors of law committed during trial or for a verdict not sufficiently supported by the evidence." *Eason v. Barber*, 89 N.C. App. 294, 297, 365 S.E.2d 672, 674 (1988) (citation omitted).

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: (1) Any irregularity by which any party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; (8) Error in law occurring at the trial and objected to by the party making the motion, or (9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, R. 59(a). In order to toll the deadline for timely appeal within the meaning of Rule 3 of Appellate Procedure, a Rule 59 motion must be proper. *See Town of Apex v. Rubin*, 262 N.C. App. 148, 151–52, 821 S.E.2d 613, 616 (2018), *writ denied, rev. denied*, 372 N.C. 107, 825 S.E.2d 253 (2019) (citing N.C. R. App. P. 3(c)). A proper Rule 59 motion must do more than merely recite the appropriate rule number—it must invoke one or more of the grounds listed in Rule 59(a) and present a "proper" argument "based upon its substance." *See id.* (citation omitted) (holding a thinly veiled attempt to present "new evidence" per Rule 59(a)(4), which was "admittedly available" at the time of the initial hearing, was improper within the meaning of Rule 3(c) of Appellate Procedure).

¶ 15 Here, we are unable to review the propriety of Respondent-Mother's Motion as neither the Motion nor the transcript of the 28 July 2021 hearing is contained in the Record on Appeal. *See Town of Apex*, 262 N.C. App. at 151–52, 821 S.E.2d at 616. Having failed to establish that the Motion operated to toll the deadline for timely appeal, we conclude Respondent-Mother's notice of appeal, filed some 88 days after entry of the Orders, is untimely, meaning Respondent-Mother has forfeited her opportunity to appeal by right. *See* N.C. Gen. Stat. § 7B-1001. Alternatively, Respondent-Mother petitions this Court to issue a writ of certiorari to permit appellate review of the four orders. *See* N.C. R. App. P. 21.

¶ 16 N.C. Gen. Stat. § 7A-32(c) provides us with discretion to issue a writ of certiorari. N.C. Gen. Stat. § 7A-32(c) (2021); *see also State v. Killette*, 2022-NCSC-80, at ¶¶ 15-16. Further, under Rule 21, a writ of certiorari may be issued in appropriate circumstances to permit review of an order of the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1). Rule 21 "gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). "Though [this Court] may issue a writ of certiorari to review a trial court's order when the right to prosecute an appeal has been lost by failure to take timely action, the petition [for writ of certiorari] must show merit or that error was probably committed below[.]" *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116 ¶ 6 (internal citations and quotation marks omitted).

¶ 17 Here, all parties concede error was committed below with respect to the trial court's application of N.C. Gen. Stat. § 7B-911 to Kevin and Romelia. *See id.* In our discretion, we therefore grant Respondent-Mother's petition for writ of certiorari. *See* N.C. Gen. Stat. § 7A-32(c). Having determined this Court may properly exercise jurisdiction over Respondent-Mother's appeal, we consider the merits of her arguments in turn.

IV. Analysis

A. Constitutionally Protected Parental Status

¶ 18 Respondent-Mother first contends the trial court reversibly erred by applying the best interests of the child standard to award custody of all three children to Custodians without first determining that Respondent-Mother forfeited her constitutionally protected parental status. Petitioners assert Respondent-Mother was on notice that Petitioners would seek a change of custody at the Hearing, and by failing to raise or otherwise mount a defense on constitutional grounds at the trial level, Respondent-Mother waived appellate review of her constitutional argument. Although mooted by our resolution of this appeal in Part IV-B below, we agree with Petitioners.

¶ 19 The liberty interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests flowing from the Fourteenth Amendment Substantive Due Process Clause. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L. Ed. 2d 49, 56 (2000). "[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994).

"[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48, 102 S. Ct. 1388, 1391–92, 71 L. Ed. 2d 599, 603 (1982)).

> In a custody dispute between a natural parent and a non-parent third-party, only after the trial court has determined by clear and convincing evidence that the natural parent has lost her paramount right as a result of unfitness or acting in a manner inconsistent with her constitutionally-protected status may the trial court proceed to the "best interest of the child" analysis.

Dunn v. Covington, 272 N.C. App. 252, 263, 846 S.E.2d 557, 566 (2020). "[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982).

¶ 20 Previously, there was a panel split among this Court as to whether and under what circumstances a parent may properly preserve a constitutional argument for appellate review when the issue is not raised at the trial level in the first instance. *Compare In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (to preserve the issue of whether a parent was unfit or acted inconsistently with her constitutionally protected parental status, a parent with the opportunity to object or

otherwise raise the issue must do so at the trial level), *with In re B.R.W.*, 278 N.C. App. 382, 2021-NCCOA-343 ¶ 41 (by presenting evidence and opposing the recommendation of guardianship, a parent properly preserved the constitutional issue despite no formal objection on constitutional grounds where the trial court's written findings and conclusions were issued months after the hearing). Our Supreme Court's recent decision, *In re J.N. & L.N.*, resolved this issue. 381 N.C. 131, 2022-NCSC-52.

¶ 21 "[T]he existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal." *Id.* at ¶ 7 (citations omitted). In *J.N.*, the respondent "did not argue or otherwise contend that the evidence failed to demonstrate he was an unfit parent or that his constitutionally-protected right to parent his children had been violated." *Id.* at ¶ 3. The respondent's "sole argument to the trial court was that reunification should remain the primary plan." *Id.* The Court ultimately held "[d]espite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, respondent failed to do so. Therefore, respondent waived the argument for appellate review." *Id.* at ¶ 10.

¶ 22 The Court reasoned "respondent failed to assert his constitutional argument in the trial court[,]" even though "[he] was on notice that DSS and the Guardian *ad Litem* were recommending that the trial court change the primary permanent plan in this case from reunification to guardianship." *Id.* at ¶ 9. Both DSS and the Guardian *ad Litem* in *J.N.* filed court reports recommending guardianship be granted to someone other than the respondent, and the Guardian *ad Litem* reasserted their recommendation during closing arguments of the permanency planning hearing. *Id.*

¶ 23 Here, Respondent-Mother was on notice that Petitioners were recommending custody of the children be granted to Custodians. *See id.* The Guardian *ad Litem* testified during the Hearing, and Petitioners each filed court reports recommending the trial court remove reunification as the primary plan, grant custody of the children to Custodians, and transfer the case to Chapter 50 civil court. Despite sufficient notice of Petitioners' recommendation to transfer custody, like the respondent in *J.N.*, Respondent-Mother failed to raise a constitutional argument during the Hearing or subsequent trial court proceedings. *See id.* at ¶ 10.

¶ 24 Respondent-Mother instead asked "that [the trial court] deny the request[s] to change the plan, to close the plan and to give permanent custody . . . to [Custodians]." Because Respondent-Mother failed to assert or articulate why granting custody to Custodians would be inappropriate on constitutional grounds,

despite the opportunity to do so, we conclude, consistent with our Supreme Court's holding in *In re J.N. & L.N.,* Respondent-Mother waived the constitutional argument for appellate review, and if the issue were not mooted we would dismiss her appeal. *See id.*

B. Insufficient Statutory Findings

¶ 25 Next, Respondent-Mother asserts that the trial court reversibly erred by failing to render sufficient findings of fact to justify its conclusions terminating juvenile court jurisdiction and transferring legal and physical custody of all three children to Custodians. We agree. *See In re D.C.*, 275 N.C. App. 26, 29, 852 S.E.2d 694, 696 (2020).

1. Chapter 50 Civil Custody Order – N.C. Gen. Stat. § 7B-911(c)(2)(b)

¶ 26 All parties agree the trial court failed to make findings required by N.C. Gen. Stat. § 7B-911(c)(2)(b). N.C. Gen. Stat. § 7B-911 governs transfers from Chapter 7B juvenile court to Chapter 50 civil court. *See* N.C. Gen. Stat. § 7B-911. Section 7B-911(c)(2)(b) requires the trial court to make the following finding:

> At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911(c)(2)(b) (2021).

¶ 27 Here, the trial court made no finding in accordance with § 7B-911(c)(2)(b) regarding Kevin and Romelia. In fact, it was a chronological impossibility under this timeline. *See Sherrick v. Sherrick*, 209 N.C. App. 166, 171, 704 S.E.2d 314, 317 (2011). The trial court made custody part of the permanent plans for Kevin and Romelia on 8 February 2021 and entered the transfer to Chapter 50 civil court on 14 May 2021 just over three months later, which was approximately three months premature. *See* N.C. Gen. Stat. § 7B-911(c)(2)(b). DSS filed juvenile petitions for the children on 24 August 2020, when neither Kevin nor Romelia lived with Custodians. The statute sets forth a six-month minimum duration a trial court must wait to transfer jurisdiction from Chapter 7B court to Chapter 50 court, and the trial court failed to comply.

¶ 28 Petitioners each contend this error necessitates only a narrow remand for entry of a substantially similar order now that six months have passed since the trial court made custody with Custodians part of the permanency plans for Kevin and Romelia. We disagree. Although Respondent-Mother does not raise the issue of whether the trial court lacked subject matter jurisdiction to enter the Chapter 50 civil custody order, "it is necessary for us to address this issue first." *Sherrick* at 168, 704 S.E.2d at 316. "The determination of subject matter jurisdiction is a question of law

and this Court has the power to inquire into, and determine, whether it has jurisdiction and to dismiss an action . . . when subject matter jurisdiction is lacking." *Id.* at 168, 704 S.E.2d at 316–17 (quoting *In re S.T.P.*, 202 N.C. App. 468, 471, 689 S.E.2d 223, 226 (2010)).

¶ 29 "[T]he trial court must exercise its jurisdiction only in accordance with [N.C. Gen. Stat. § 7B-911]." *Sherrick* at 170, 704 S.E.2d at 317. "N.C. Gen. Stat. § 7B-911(c) explicitly provides that 'the court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding *only if*' the court enters an order in compliance with N.C. Gen. Stat. § 7B-911(c)(2)." *Id.* at 171, 704 S.E.2d at 318 (emphasis in original) (citing N.C. Gen. Stat. § 7B-911(c)). In *Sherrick*, this Court vacated two orders because the juvenile court "never terminated its jurisdiction" and the trial court, "acting under its Chapter 50 jurisdiction, had no subject matter jurisdiction to enter these orders." *Id.* at 172, 704 S.E.2d at 319. Further, the Court noted "upon remand, this case remains within the jurisdiction of the juvenile court unless and until the juvenile court terminates its jurisdiction in compliance with N.C. Gen. Stat. § 7B-911[.]" *Id.*

¶ 30 Here, the trial court erred by prematurely terminating juvenile court jurisdiction as to Kevin and Romelia since only three months had passed since custody with Custodians was added to their permanency plans on 8 February 2021.

Accordingly, we vacate the Chapter 50 civil custody order as to Kevin and Romelia as the trial court lacked subject matter jurisdiction to terminate juvenile court jurisdiction. *See id.* Since Harmony resided with Custodians when the current proceedings were initiated, the trial court properly exercised subject matter jurisdiction to terminate juvenile court jurisdiction in her case, s*ee* N.C. Gen. Stat. § 7B-911(c)(2)(b); however, her Order merits further discussion below.

2. Permanency Planning Orders ("the Orders")

¶ 31 We next consider the sufficiency of the findings of fact in the Orders filed 14 May 2021, which are each supported by substantially similar, if not identical, findings of fact.

¶ 32 "[R]eview of a 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 H.A.J.*, 377 N.C. 43, 2021-NCSC-26 ¶ 14 (quoting *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re J.H.*, 373 N.C. 264, 267, 837 S.E.2d 847, 850 (2020) (quoting *In re L.M.T.* at 168, 752 S.E.2d at 455). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact

support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.* at 268, 837 S.E.2d at 850 (citations omitted). "The failure to make statutorily-mandated findings constitutes reversible error." *In re D.C.*, 275 N.C. App. at 29, 852 S.E.2d at 696.

a. N.C. Gen. Stat. § 7B-906.2(d)

¶ 33 Respondent-Mother contends the trial court failed to make sufficient findings required by N.C. Gen. Stat. § 7B-906.2(d) in the Orders entered on 14 May 2021. With respect to N.C. Gen. Stat. § 7B-906.2(d)(1)-(3), we agree.

> 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 and safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2021) (emphasis added). "Under our statutes, reunification whenever possible is the goal of juvenile court. The trial court may cease reunification efforts only upon supported findings 'that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.'" *In re J.M.*, 276 N.C. App. 291, 2021-NCCOA-92 ¶ 24 (quoting N.C. Gen. Stat. § 7B-906.2(b) (2021)) (other citations omitted).

> The focus of [N.C. Gen. Stat. § 7B-906.2(d)] is on the actions *of the parents*. While the trial court is not mandated to use the precise language of 906.2(d), the order must embrace the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or inconsistent with the juvenile's health, safety, or need for a safe, permanent home within a reasonable period of time.

Id. (citing *In re K.R.C.*, 374 N.C. 849, n.7, 845 S.E.2d 56, n.7 (2020)) (emphasis added).

¶ 34 While N.C. Gen. Stat. § 7B-906.2(b) emphasizes the juvenile's health and safety, and § 7B-906.2(c) states "[t]he court shall make a conclusion about whether efforts to finalize the permanent plan were reasonable to timely achieve permanence for the juvenile[,]" each subsection in § 7B-906.2(d) emphasizes the fact the trial court "shall" consider the parents' actions and progress to determine the "degree of success or failure toward reunification." Sections 7B-906.2(b) and (c) express the importance of health, safety, and permanence for the children, but § 7B-906.2(d) highlights the

importance of simultaneously considering the parents' efforts towards reunification over time.

¶ 35 Here, the trial court made multiple findings regarding Respondent-Mother's progress. The trial court found Respondent-Mother "completed her mental health evaluation . . . with Carolina Outreach" and "reportedly meets virtually with . . . her therapist at Carolina Outreach and has completed DV Assessment tool with [a social worker]." The trial court also found Respondent-Mother bought clothes for her children and obtained and furnished a three-bedroom apartment through Wilson Housing Authority, "which has adequate room for the children." Respondent-Mother participated in parenting education through DSS and obtained a certificate, even though she failed to complete a parenting observation session to showcase what she learned. Despite the extent of findings tending to show Respondent-Mother's progress, the trial court failed to make any qualitative finding regarding the "adequa[cy]" of her progress. *See* N.C. Gen. Stat. § 7B-906.2(d)(1).

¶ 36 During the ruling at the conclusion of the Hearing, the trial court stated,

> the mother's made *tremendous progress* . . . but the problem is these children have had their lives up in the air for an extended period of time and that's why we have this court, it's for permanence for the children. And, you know, *it's not about the mom and how much she's done*. And it's not about the dad and how much he's done. It's not about how much they love their children. It's about permanence for the children.

(emphasis added). As this Court stated in *In re J.M.*, the focus of N.C. Gen. Stat. § 7B-906.2(d) "is on the actions of the *parents*[,]" and "reunification whenever possible is the goal of juvenile court." *See In re J.M.* at ¶ 24 (emphasis added). While health, safety, and permanence of the children are undoubtedly important considerations in juvenile court proceedings, as demonstrated by N.C. Gen. Stat. §§ 7B-906.2(b) and (c), the trial court's inquiry must not stop there. Rather, the trial court must simultaneously evaluate the parents' conduct and progress over time to draw conclusions about the "futil[ity] or inconsisten[cy]" of reunification between the parents and the children. *See id.*

¶ 37 Despite several findings tending to show Respondent-Mother's progress, the trial court failed to make any findings regarding the adequacy of Respondent-Mother's "progress within a reasonable period of time under the plan" and how this affected reunification efforts and the health and safety of the children. *See* N.C. Gen. Stat. § 7B-906.2(d)(1).

¶ 38 With regard to N.C. Gen. Stat. §§ 7B-906.2(d)(2) and (3), the Orders were silent as to Respondent-Mother's participation or cooperation with the Guardian *ad Litem* and the case plan directive that Respondent-Mother "identify to DSS a support network of at least two people by 28 October 2020[.]" Furthermore, the trial court's findings do not evaluate Respondent-Mother's "[availability] to the court, the

department, and the Guardian *ad Litem*" for the children. *See* N.C. Gen. Stat. § 7B-906.2(d)(3).

¶ 39 We find no error, however, in the findings under N.C. Gen. Stat. § 7B-906.2(d)(4), which require the trial court to make a written finding as to whether "the parent is acting inconsistent[ly] with the health and safety of the [children]." The trial court's findings regarding "barriers to reunification" alone sufficiently address the concerns of § 7B-906.2(d)(4) and are supported by the evidence.

¶ 40 Nevertheless, the trial court failed to make sufficient findings mandated by N.C. Gen. Stat. § 906.2(d)(1)-(3) before ceasing reunification efforts. We therefore reverse the Orders and remand for a new permanency planning hearing and entry of new permanency planning orders which address the applicable statutory provisions and sufficiently support the trial court's conclusions of law. Having reversed and remanded Harmony's Order under 19JA30, which terminated juvenile court jurisdiction and initiated Chapter 50 civil jurisdiction, we likewise vacate the Chapter 50 civil custody order as to Harmony.

b. N.C. Gen. Stat. §§ 7B-906.1(d)(3) and (e)(1)

¶ 41 In order to provide further clarification to the trial court upon remand, we next consider Respondent-Mother's contention that the trial court failed to make findings pursuant to N.C. Gen. Stat. §§ 7B-906.1(d)(3) and (e)(1). We agree.

¶ 42 N.C. Gen. Stat. § 7B-906.1(d) states,

> the court shall consider the following criteria and make written findings regarding those that are relevant:
>
> . . .
>
> (3) Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time. The court shall consider efforts to reunite regardless of whether the juvenile resided with the parent, guardian, or custodian at the time of removal.

N.C. Gen. Stat. § 7B-906.1(d)(3) (2021). Implicating similar concerns, N.C. Gen. Stat. § 7B-906.1(e) states,

> [a]t any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:
>
> (1) 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.

N.C. Gen. Stat. § 7B-906.1(e)(1) (2021).

¶ 43 "The trial court's order is required to 'make [it] clear that [the judge] considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.'" *In re K.L.*, 254 N.C. App. 269, 274, 802 S.E.2d 588, 592

(2017) (quoting *In re L.M.T.*, at 167–68, 752 S.E.2d at 455 (2013)). "The trial court's written findings must address the statute's concerns[.]" *In re L.M.T.*, at 168, 752 S.E.2d at 455. In *K.L.* this Court explained,

> [t]o subsequently remove reunification as a concurrent permanent plan requires properly admitted evidence to support findings of fact to allow the court to conclude "efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time[]"

before reversing the trial court's order to cease reunification efforts. *In re K.L.* at 275–76, 802 S.E.2d at 592 (quoting N.C. Gen. Stat. § 7B-906.1(d)(3)). N.C. Gen. Stat. §§ 7B-906.1(d)(3) and (e)(1) focus on the feasibility of reunification in the near future, which is particularly relevant when a trial court considers relieving DSS of reunification efforts. *See id.* at 275–76, 802 S.E.2d at 592; *see also* N.C. Gen. Stat. § 7B-906.1(e).

¶ 44 Here, the trial court concluded as a matter of law that "return to the care of the parents would be contrary to the [children]'s welfare, safety, and best interest" and removed reunification as a concurrent permanency plan. The trial court stated "*[a]t this time*, if the [children] were to return home, it would be contrary to the [children]'s health, best interest, and safety." (emphasis added). Again, neither the conclusion nor the finding addresses the "juvenile's health or safety and need for a

safe, permanent home *within a reasonable period of time*[,]" a relevant consideration when the court weighs eliminating reunification as a concurrent plan. *See In re K.L.* at 275–76, 802 S.E.2d at 592; *In re K.P.*, 278 N.C. App. 42, 48, 2021-NCCOA-268 ¶ 19; *see also* N.C. Gen. Stat. § 7B-906.1(d)(3) (emphasis added). In a court report prepared for the Hearing on 28 April 2021, a DSS social worker checked a box "no" in response to the question "[a]t this time, would efforts to reunite the [children] with either parent be futile, unsuccessful, or inconsistent with the [children]'s health and safety and the [children]'s need for a safe permanent home within a reasonable time?"

¶ 45 The trial court similarly failed to determine whether the children could be placed with a parent "within the next six months and, if not, why such placement is not in the [children]'s best interests." *See* N.C. Gen. Stat. § 7B-906.1(e)(1). On the same court report referenced above, the DSS social worker checked a box "yes" in response to the question "[i]s it possible for the [children] to be placed with a parent within the next six months?" and added,

> [i]f [Respondent-Parents] complete their domestic violence education, provide safe and stable housing, and demonstrate an ability to protect the [children] from danger, the [children] may be able to return home. [Respondent-Mother] participated in a mental health assessment on January 11, 2021, is actively participating in parenting education with the Department, and is working with her mother as her trusted payee.

Despite these seemingly inconsistent responses on the DSS court report, DSS still recommended custody be granted to Custodians. The trial court neither explained this contradiction nor made any written findings forecasting the feasibility of future reunification efforts or the future best interests of the children, which are relevant considerations when the trial court contemplates removing reunification as a concurrent plan. *See In re K.L.* at 275–76, 802 S.E.2d at 592.

¶ 46 In its brief, the Guardian *ad Litem* contends the findings address the substance of N.C. Gen. Stat. §§ 906.1(d)(3) and (e)(1) and support the Orders, even though the findings do not contain the exact language of the statute. *See In re A.P.W.*, 378 N.C. 404, 2021-NCSC-93 ¶ 22 ("Although the trial court did not use the precise language of N.C. [Gen. Stat. §] 7B-906.1(d)(3) . . . in its findings, the court addressed the substance of [the] statute['s] concerns."). The Guardian *ad Litem* refers our attention to the trial court's finding that Respondent-Mother failed "to demonstrate an ability and understanding of the [children's] needs, and [has] failed to show [she is] able to provide the [children] with appropriate care and supervision or meet the [children]'s well-being needs." The Guardian *ad Litem* further asserts the trial court's findings are supported by its "unsuccessful history of working with" Respondent-Mother. We are not convinced how the trial court's findings sufficiently considered the potential

for returning custody to Respondent-Mother in the near future, as required by statute. *See* N.C. Gen. Stat. §§ 906.1(d)(3), (e)(1).

¶ 47 Consequently, the trial court failed to sufficiently address the concerns of N.C. Gen. Stat. §§ 906.1(d)(3) and (e)(1) regarding the viability of future reunification before ceasing reunification efforts without adequate explanation.

V. Conclusion

¶ 48 Here, all four 14 May 2021 orders under review suffered from fatal, albeit procedurally different, flaws. The trial court's directives relieving DSS of reunification efforts before purporting to transfer jurisdiction from juvenile court to Chapter 50 civil court are hereby vacated. Furthermore, we hold the trial court's failure to render sufficient statutory findings in the Orders amounted to an abuse of discretion given the requirements of the relevant statutes in Chapter 7B. Accordingly, we vacate the Chapter 50 civil custody order as to all three children, and reverse and remand the Orders entered 14 May 2021 for further proceedings consistent with this opinion.

¶ 49 Upon remand, we note jurisdiction remains with the juvenile court until such time as the trial court properly terminates juvenile court jurisdiction pursuant to N.C. Gen. Stat. § 7B-911. *See Sherrick* at 172, 704 S.E.2d at 319. Additionally, the trial court's findings of fact must sufficiently address the substantive concerns of the

relevant statutory provisions, whether or not the findings utilize the precise language of the statutes. *See In re A.P.W.*, 378 N.C. 404, 2021-NCSC-93 ¶ 22.

VACATED IN PART, REVERSED AND REMANDED IN PART.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).