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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA25-1007

Filed 2 September 2026

Mecklenburg County, Nos. 19CVD012052-590, 19CVD012159-590

KRISTEN L. KERR, Plaintiff,

v.

STEVEN E. JENSEN, Defendant.

Appeal by Plaintiff from Order entered 21 May 2025 by Judge J. Rex Marvel in Mecklenburg County District Court. Heard in the Court of Appeals 25 March 2026.

William Trippe McKeny for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Plaintiff appeals from the trial court's Order modifying child custody. The Record on appeal tends to reflect the following:

Plaintiff Kristen L. Kerr (Mother) and Defendant Steven E. Jensen (Father) were married in 2005 and are the parents of two children: Megan, born in 2008, and

Brett, born in 2010.¹ Mother and Father divorced in 2015. In 2019 they entered into an agreement regarding child custody, visitation, and support which was incorporated into a consent order entered in Los Angeles County, California, where the parties resided at the time (the Consent Order). Both parties and the children moved to North Carolina that same year, and the Consent Order was registered in Mecklenburg County. Under the Consent Order, Mother had sole legal custody and primary physical custody of the children. Father was allowed visitation on Wednesday evenings and alternating weekends.

In October 2020, Father filed a Motion to Modify Child Custody alleging substantial changes in circumstances including Father's schedule allowing him more time to be involved in the children's lives. He also alleged significant and ongoing conflicts with Mother, both personal and regarding decisions involving the children. Mother filed a reply in March 2021, and Father filed an amended Motion and additionally moved for the appointment of a parenting coordinator. On 1 August 2022, the trial court entered an order finding this was a high conflict case and appointing a parenting coordinator. Neither parent engaged the services of the parenting coordinator.

Father filed a Second Amended Motion to Modify Child Custody in March 2023. The trial court set the case for hearing 28 August 2023. On 6 July 2023,

¹ We use pseudonyms for the minor children.

Attorney William Trippe McKeny filed a notice of appearance as counsel for Mother and moved for a continuance, which the trial court denied. On the morning of the hearing, Mr. McKeny notified the trial court he was sick and unable to proceed. The hearing was continued to 30 November 2023. Shortly prior to that date, the hearing was continued again due to Mr. McKeny's family emergency. The trial court scheduled the hearing for 21 January 2025 and instructed the parties to submit expert testimony by affidavit.

On 16 January 2025, Father's counsel served on Mother's counsel an affidavit prepared by his expert witness, William V. Fabricius (the Affidavit). Mother's counsel² moved to continue the hearing, arguing they needed additional time to review the Affidavit as well as DSS documents received the week prior, and that the case required additional time for the presentation of evidence. The trial court denied the motion.

Following these preliminary proceedings, the trial court recessed in order to interview the children outside of the presence of the parties and counsel and to allow time for counsel to review the DSS documents. After the recess, both parties testified. Father offered the Affidavit into evidence, which the trial court admitted over Mother's objection.

The trial court found substantial changes had occurred following entry of the

² Mr. McKeny, who is also Mother's appellate counsel, did not represent her at the 21 January 2025 modification hearing at issue in this appeal.

Consent Order which warranted modification. It found the children were older and more independent, with Megan having a job and driver's license, and both had expressed a desire to move to a week-on/week-off custody arrangement. Father's work schedule had changed such that he could spend substantially more time with the children, and he had entered into a long-term, serious relationship with a partner whom the children love and enjoy spending time with. It also found both parties had failed to abide by the Consent Order by placing the children in the middle of their dispute, causing them emotional strife.

The trial court found it was in the children's best interests to modify custody. It ordered the parties have joint legal custody of the children and a 50/50 physical custody arrangement on a week-on/week-off basis.

Mother filed timely notice of appeal.

Issues

The issues on appeal are whether the trial court erred by: (I) interviewing the minor children outside the presence of the parties or their counsel; (II) failing to make Findings of Fact and Conclusions of Law sufficient to support the modification; (III) allowing the introduction of the Affidavit of William Fabricius as evidence; and (IV) denying Mother's motion to continue the hearing.

Analysis

We note at outset our review is frustrated in part by the appellate record and briefing prepared by Mother's counsel. The argument portion of Mother's appellate

brief is not double spaced as required under Rule 26(g) of our Rules of Appellate Procedure; it does not set off quotations from authority with quotation marks or block quotes, contains no paragraph breaks, and contains grammatical and spelling errors throughout. The Record on Appeal contains significant duplicative and unnecessary matter, in violation of Rule 9(b)(2). Additionally, as discussed below, Mother's counsel raises issues which were waived by failure to object at the trial court level and fails to argue Mother was prejudiced by alleged errors.

I. Testimony of Minor Children

Mother first argues the trial court erred by interviewing the children outside the presence of the parents and attorneys and, alternatively, by not having the court reporter produce a transcript of those interviews.

Following preliminary matters during the hearing, the trial court was advised that both children were present and available. The trial court determined it would hear from them privately during court recess, outside of the presence of the parents or attorneys:

THE COURT: Well, this would be an appropriate time to [hear from the children]. I will just ask if we—so the way I speak to the children, I ask that the courtroom is completely cleared. Everything will be recorded. I'll let the attorneys know generally what they're saying. I don't cross-examine them. It's mostly an open-ended kind of statement. It's the most trauma-informed way we can talk to kids in a custody case. I've never had a child up here on the stand. That's always inappropriate when their parents are on either side of an adversarial case.

After the recess, the trial court informed counsel for both parties what it had heard from the children. In its findings of fact, the trial court noted the children indicated they love both of their parents, that “there has been an emotional disturbance to them” based on the parents’ conduct following entry of the Consent Order, and that they expressed a desire to move to a week-on/week-off physical custody arrangement.

Mother did not object to this procedure, nor did she attempt to call the children to testify as witnesses. Accordingly, she has waived any argument that the trial court erred by privately interviewing the children rather than calling them as witnesses. *Stevens v. Stevens*, 26 N.C. App. 509, 510-11, 215 S.E.2d 881, 882 (1975) (holding mother had waived her right to have judge consider only evidence developed in open court when she did not object to private interview of minor child).

Mother also argues the trial court erred by not having the court reporter produce a transcript of the children’s interview. She argues in her brief:

The trial court stated that there would be a recording of the interview with the minor children. The trial court also stated that the parties would be allowed to have a recording of their statements. The trial court then told the transcriptionist that the interview need not be transcribed as it was “akin to an in chambers discussion.”

Mother’s argument conflates the recording of the interview with a written transcript prepared by the court reporter. The trial court informed the parties “the recorder will continue” and that “you’ll have a recording of their statements, and then

we can discuss what was said after they have left at 10:00.” The trial court then interviewed the children, which was recorded. Immediately afterward, the trial court discussed the interview with counsel for both parties. The record does not indicate that the recording was then provided to the parties, but no party requested a copy of the recording or noted an objection to the procedure. Failure to raise a timely objection waives the issue on appeal. N.C. Gen. Stat. §1A-1, Rule 46(b) (2025).

Following entry of the Order in this case, Mother filed notice of appeal and requested the transcript of the hearing from the court reporter. In this request, Mother’s counsel indicated his desire to include the interview in the official transcript. The court reporter requested clarification from the trial judge, who instructed in an email “I am of the opinion that the conversation with the children was akin to an in-chambers discussion which would not be transcribed.” Mother has cited no authority requiring the transcription of such interviews. No party requested the recordings at trial, and, as no party was aware of the verbatim contents of the interview, no objection was made which would preserve for appeal any issue arising therefrom. We cannot identify any way in which our review requires access to the verbatim transcript of the trial court’s conversation with the children, and Mother has not suggested any way in which her appeal is prejudiced by its absence. Mother has not demonstrated reversible error.

II. Trial Court’s Findings and Conclusions

A trial court may order a modification of a child custody order between two

natural parents “if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody.” *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (citation omitted). Our Supreme Court has summarized the analysis a trial court performs when considering a modification of a child custody order:

The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child’s welfare, the court’s examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child the court must then examine whether change in custody is in the child’s best interests. If the trial court concludes that modification is in the child’s best interests, only then may the court order a modification of the original custody order.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253.

On appellate review, we examine the trial court’s findings of fact to determine whether they are supported by substantial evidence, and whether those findings support its conclusions of law. *Id.* at 474-75, 586 S.E.2d at 253-54. If the trial court’s findings of fact support conclusions that a substantial change of circumstances has affected the welfare of the child and that modification was in the child’s best interests, “we will defer to the trial court’s judgment and not disturb its decision to modify an existing agreement.” *Id.*

Mother argues the trial court failed to establish a “base line” of circumstances existing at the time the consent order was entered. Because a modification order requires a finding of change in circumstances, the trial court must “look back at the facts surrounding the best interests of the child” at the time of the original order in order to compare with the child’s current circumstances. *Balawejder v. Balawejder*, 216 N.C. App. 301, 309, 721 S.E.2d 679, 684 (2011). Where a prior permanent custody order includes findings of fact as to the circumstances existing at the time of the order, a modification order may not be required to include findings looking back to the former circumstances. *Id.* However, when, as in this case, the prior order is a consent order that does not include such findings, the trial court was required to “make appropriate findings in order to provide a baseline before it could determine if there had been a substantial and material change in circumstances that would warrant a modification in child custody[.]” *Id.*

“There is no set minimum threshold for the number, content, or specificity to guide the trial court in making these findings. There only needs to be sufficient findings to establish a base line of events at the time the initial custody order was entered.” *Henderson v. Wittig*, 278 N.C. App. 178, 181, 862 S.E.2d 369, 372 (2021) (citation omitted). In *Henderson*, the trial court sufficiently established a base line when it found:

[S]ince the 2016 consent order the parties needed a court-appointed parenting coordinator to help resolve disagreements, the 2016 consent order’s vacation system

has led to several disagreements, disagreements surrounding school issues arose after the minor child started kindergarten, and the Plaintiff-Appellee has remarried and moved to a new home since the 2016 consent order was entered. Further, finding of fact 22 specifically states, “That since the entry of the 2016 Order, there have been several substantial changes in circumstances. In October 2016, the minor child was not quite three years of age and attending daycare In October 2016, both the parties were single, and the [Plaintiff-Appellee] was traveling for work frequently.” We find these findings are sufficient to create a baseline of the circumstances at the time of the 2016 consent order.

278 N.C. App. at 181, 862 S.E.2d at 372.

Here, the trial court found the following substantial changes in circumstances since the entry of the Consent Order:

- a. The parties and the minor children have relocated from California to North Carolina;
- b. The children were 9 and 11 years old when the Consent Order was entered; they are now 15 and 17 years old. Both children have more independence now than when the Consent Order was entered. They have the ability to make decisions about their lives. [Megan], being 17 years old, has real and significan[t] independence, works at Defendant/Father’s restaurant and has a North Carolina Driver’s License;
- c. Both parties have failed to abide by the Consent Order in disparaging the other party to the minor children and having the children relay messages to the other parent, placing the children in the middle of the parties’ dispute;
- d. The parties have caused the minor children emotional strife in involving them in their disputes with each other and disparaging the other parent to them;

- e. The parties do not effectively communicate with each other;
- f. Defendant/Father's work schedule has changed such that his schedule is more flexible and he has the ability to spend substantially more time with the children; and
- g. Defendant/Father is in a long-term, serious relationship with Diane Ritz who the children love, respect, and enjoy spending time with.

These findings are analogous to those we found sufficient in *Henderson*: the trial court found the parties had moved, the children are older, conflicts have arisen under the custody arrangement provided by the Consent Order, and that Father is more available to spend time with the children and is now in a relationship with a partner with whom the children are comfortable. The trial court's findings of fact sufficiently establish a base line and support the trial court's conclusion there was a substantial change in circumstances.

Mother additionally argues the trial court failed to make findings relating to the effect this change in circumstances had on the children. Unless the effect of the change on the children is "self-evident," the trial court must find sufficient evidence of a nexus between the change in circumstances and the welfare of the children. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. For example, in *Henderson*, although the trial court properly found a substantial change in circumstances, its findings of fact failed to "directly link" that change with its effect on the minor child and thus could not support modification:

The substantial change in circumstances in the present case include extensive disagreements between the parents regarding the minor child's schooling and healthcare, an overall lack of communication, difficulties in exchanges of the minor child, disagreements over vacation time, and changes in the parents' living arrangements. The trial court's findings focus on the parents' role in these changes. In contrast to the findings in *Carlton*, the trial court's findings do not address the effect the parents' communication difficulties had on the minor child's welfare and does not discuss the effect the disagreements pertaining to the minor child's medical treatment had on her welfare.

278 N.C. App. at 181, 862 S.E.2d 369.

Unlike in *Henderson*, the trial court in this case found the parties' disagreements caused the children "emotional strife" and that they have experienced emotional disturbance as a result of the parents' behavior. *See Durbin v. Durbin*, 388 N.C. 55, 64, 918 S.E.2d 832, 839 (2025) (trial court's finding that Father's sharing of potential changes in custody with the children caused distress to the children showed effect of change of circumstances on children). Additionally, the effect of Father's increased availability as well as his relationship with a partner whom the children "love, respect, and enjoy spending time with" is self-evident and therefore these facts do not require an express finding linking them to the children's welfare. *Lang v. Lang*, 197 N.C. App. 746, 751, 678 S.E.2d 395, 399 (2009). The trial court's findings thus sufficiently link the change in circumstances with effects on the minor children and support its conclusion that modification is in the children's best interests.

III. Affidavit of Expert

Mother argues the trial court erred by allowing Father to introduce the affidavit of an expert as evidence without calling the witness to testify.

Both parties filed notice of intent to introduce expert testimony. While calendaring the case, the trial court set the hearing for 21 January 2025, and Mother's counsel argued the parties required additional time to present expert testimony. The trial court instructed the parties to provide affidavits prepared by their experts. Father submitted to the trial court an affidavit prepared by William V. Fabricius, a child development researcher. The Affidavit was provided to Mother's counsel on 16 January 2025. Mother filed a motion in limine seeking to exclude the Affidavit, as well as a motion to continue the hearing in order to review the Affidavit and retain a rebuttal expert. Father introduced the Affidavit at the hearing, and the trial court overruled Mother's objection to its admission.

Mother argues the trial court erred by admitting the Affidavit as evidence without providing an opportunity to cross-examine Dr. Fabricius as to its contents. When a party to a custody hearing objects to the introduction of evidence by affidavit, "affidavits should not be received, at least not without affording an opportunity for cross-examination." *In re Custody of Griffin*, 6 N.C. App. 375, 380, 170 S.E.2d 84, 87 (1969). However, in addition to showing the trial court erred by admitting evidence, Mother must also show she was prejudiced by the admission. *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000). Assuming the trial court erroneously admitted the Affidavit, Mother has not demonstrated prejudice.

The Affidavit provides a generalized summary of aspects of Dr. Fabricius's research, which he did not apply to the specific facts of the case. Instead, the Affidavit states generally that children with equal parenting time have higher "emotional security" with both parents and lower distress about parent conflict, and that the best arrangement for children in "high parent conflict families" is equal parenting time.

Mother argues she was prejudiced only due to an "unfair tactical advantage" provided by the timing of the Affidavit's production and does not allege any of the trial court's findings were based upon erroneously admitted evidence. "In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings." *Huff*, 140 N.C. App. at 301, 536 S.E.2d at 846 (citation omitted). "Where there is competent evidence in the record supporting the trial court's findings, we presume that the court relied upon it and disregarded the incompetent evidence." *Id.* Here, the trial court's findings of fact were specific to the children's circumstances and adequately supported by competent evidence. It concluded it was in their best interests for the parents to split physical custody with equal parenting time due to changes in circumstances including the children's ages, Father's availability, and ongoing conflict placing the children in the middle of the parents' disputes. The Order does not refer to the Affidavit, incorporate its language, or make any factual findings supported by Dr. Fabricius's statements. Accordingly, Mother has failed to demonstrate she was prejudiced by the admission of the Affidavit.

IV. Motion to Continue

Mother finally argues the trial court erred by denying her motion to continue the hearing. She argues her right to due process required the case be continued to allow additional time for the presentation of evidence, and that the trial court should have continued the case to allow her counsel an opportunity to review materials received the week prior to the hearing.

A. *Due Process*

At the outset of the modification hearing, the trial court asked the parties how much time would be required to hear the case. Mother requested five days and Father requested two. The trial court allowed one day. Mother argued in her Motion to the trial court that the hearing should be continued to allow additional time for the parties to present evidence, as the single day provided by the trial court “is so inadequate that it constitutes a violation of Mother’s right to due process of law.”

The Due Process Clause of the Fifth and Fourteenth Amendments entitles a person to some degree of notice and an opportunity to be heard before a state actor may deprive her of a recognized property interest. *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 47-48 (2010) (citing U.S. Const. Amends. V, XIV; N.C. Const. art. I, § 19). Significant restriction on a party’s time to present evidence can constitute a violation of the right to an opportunity to be heard. *Price v. Biggs*, 272 N.C. App. 315, 321, 846 S.E.2d 781, 786 (2020).

“Ordinarily, a motion to continue is addressed to the discretion of the trial

court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (citation omitted). Likewise, when the trial court determines how much time to afford the parties in a hearing "[t]he manner of the presentation of evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986). However, "when the motion to continue is based on a constitutional right and asserted before the trial court, the motion presents a question of law, and the order of the court is reviewable." *Conroy v. Conroy*, 291 N.C. App. 145, 158, 895 S.E.2d 418, 427 (2023) (cleaned up). Mother's written Motion to Continue filed with the trial court raises due process concerns. However, her counsel did not address any constitutional issues when arguing the Motion before the trial court. Regardless of which standard of review applies, Mother has not demonstrated a violation of her right to due process.

In her argument, Mother cites only our decision in *Price v. Biggs*, 272 N.C. App. 315, 846 S.E.2d 781. In that case, the mother was given an hour and forty minutes to present evidence regarding modification of child support at an earlier hearing, which was continued. At the subsequent hearing, the trial court allowed each party twenty-five minutes to present evidence. We held, under the circumstances of that case, that this constituted an abuse of the trial court's discretion. The trial court's ruling appeared motivated by an assumption the father had undermined a previous

settlement agreement, but nothing in the record indicated this was the case and the trial court made no oral findings to that effect. 272 N.C. App. at 321. Additionally, the record did not show why the matter could not have been continued to another time, or why the mother was entitled to half of the limited time allotted by the court given the time she had received at the previous hearing. *Id.* The trial court's feeling that the parties were wasting the court's time "was not a rational basis upon which to deny defendant adequate time to present evidence," and we therefore held the trial court abused its discretion. *Id.*

None of the facts that indicated a due process violation in *Price* exist in this case. Here, the parties were given a full day to present evidence, with testimony beginning at 10:00 am and concluding at 5:00 pm. The matter had already been continued multiple times due to the unavailability of Mother's counsel. There is no indication one party received an inordinate amount of time to present evidence relative to the other. And Mother does not indicate what, if any, evidence she would have presented if allotted additional time. She argues only that:

The parties had numerous contempt motions filed as well, some of which were provided on the record on this appeal. The contempt actions should have been heard in that they could have affected the trial court's ruling, the trial court could have had the opportunity to determine who had not followed the order that was in place with a tremendously larger volume of evidence.

The Record and transcript do not indicate that Mother moved to hear the contempt matters at the time of the modification hearing. Moreover, contempt

motions are separate matters from the modification motion before the trial court. During a modification hearing, the trial court is tasked with determining if a substantial change affecting the children has occurred and whether a modification is in the children's best interests. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. The parties had ample opportunity to provide any evidence relevant to that determination. Mother's right to due process of law was not violated.

B. Time to Review Materials

Mother also argues the trial court should have continued the hearing to allow time for her counsel to review certain DSS documents as well as the Affidavit of William Fabricius, both of which were received the week prior to the hearing. As noted above, when no constitutional right is at issue, we review the denial of a motion to continue for abuse of discretion. *A.L.S.*, 374 N.C. at 516-17, 843 S.E.2d at 91.

Following preliminary matters, the trial court recessed to allow counsel an opportunity to review the DSS documents, and Mother does not argue on appeal that this was an inadequate accommodation, nor does she allege she was prejudiced by any unfamiliarity her counsel may have had with the documents. As discussed above, the trial court did not rely on the Affidavit and, assuming it was admitted erroneously, Mother was not prejudiced by its admission and therefore was not prejudiced by her counsel's unfamiliarity with the document. The trial court did not abuse its discretion in denying the Motion to Continue.

Conclusion

KERR V. JENSEN

Opinion of the Court

Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges STROUD and CARPENTER concur.

Report per Rule 30(e).