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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-959

Filed: 6 March 2018

Orange County, No. 10 JA 06

IN THE MATTER OF: F.S.

Appeal by respondent from order entered 15 May 2017 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 15 February 2018.

Holcomb & Stephenson, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, Esq., for respondent-appellant.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

DAVIS, Judge.

T.W. (“Respondent”) appeals from the trial court’s order adjudicating her son to be a neglected and dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9), (15) (2017). After a thorough review of the record and applicable law, we reverse.

Factual and Procedural Background

Beginning in 2002, Respondent was the subject of multiple child protective services (“CPS”) reports in Orange County and Chatham County involving issues of substance abuse, unstable housing, and lack of supervision. Over the following years, she surrendered her two eldest children for adoption, and her third son was raised primarily by his father.

Respondent’s fourth child (“Finley”)¹ was born in August 2008.² Finley tested positive for cocaine at birth. Shortly after his birth, Orange County Department of Social Services (“OCDSS”) performed a CPS investigation but ultimately closed the case.

When Finley was seventeen months old, OCDSS took him into non-secure custody and filed a juvenile petition alleging neglect and dependency in January 2010. In a consent order entered 16 February 2010, the trial court adjudicated Finley dependent³ but left “pending” the issue of neglect. The order required Respondent to participate in Family Drug Treatment Court (“DTC”) and enter a residential treatment program that would allow Finley to be placed with her. She further agreed

¹ A pseudonym is used throughout this opinion to protect the privacy of the minor child and for ease of reading.

² Finley’s father is not a party to this appeal. He and Respondent never married but lived together until Finley was nine months old at which time he was deported to Mexico. Respondent was later notified that Finley’s father was deceased. OCDSS has yet to confirm the death.

³ The consent order contains no findings of fact establishing Finley’s dependent status. The order predates the statutory amendments enacted by 2011 N.C. Sess. Laws 1157, 1158-59, ch. 295, § 5, under which a consent adjudication order must contain “sufficient findings of fact.” N.C. Gen. Stat. § 7B-801(b1)(3) (2017).

to continue her mental health treatment. Finley remained in foster care until he was placed with Respondent at the Sunrise Residential Treatment Program (“Sunrise”) on 3 March 2010.

Respondent graduated from DTC on 28 February 2011 and completed her treatment at Sunrise on 3 March 2011. She transitioned into a six-month aftercare program, obtained employment with UNC Hospital Food Service, and moved into an apartment with Finley. Following a review hearing on 4 August 2011, the trial court restored Finley to Respondent’s legal custody, relieved OCDSS and the guardian *ad litem* (“GAL”) of further responsibilities, and closed the case.

On 25 December 2016, OCDSS obtained non-secure custody of Finley after Respondent was taken to Duke Hospital by an officer of the Durham Police Department at 9:53 p.m. Respondent was held at the hospital for approximately four hours for a physical exam and psychiatric assessment before being discharged at 2:12 a.m. on 26 December 2016.

On 28 December 2016, OCDSS filed a juvenile petition alleging neglect and dependency. A hearing was held on the petition before the Honorable Beverly Scarlett in Orange County District Court on 25 April 2017, and the trial court entered an order adjudicating Finley to be a neglected and dependent juvenile on 15 May 2017. The court continued Finley in OCDSS custody and ordered Respondent to refrain from drug and alcohol use, submit to random drug and alcohol screens, and

obtain substance abuse, mental health, and parenting capacity evaluations and to follow any recommendations. Respondent filed a timely notice of appeal.

Analysis

On appeal, Respondent argues that the trial court erred by adjudicating Finley as neglected and dependent. This Court reviews an adjudication of abuse, neglect, or dependency under N.C. Gen. Stat. § 7B-807 (2017) to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether the findings of fact support the conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings of fact are presumed to be supported by evidence and are "binding on appeal." *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Erroneous findings that are not necessary to sustain the adjudication are deemed to be harmless. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). The trial court's determination that a juvenile is abused, neglected, or dependent within the meaning of the Juvenile Code is a legal conclusion we review *de novo*. *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015) (citation omitted).

Respondent contends that the trial court's findings of fact do not demonstrate that Finley experienced harm or a substantial risk of harm in her care, as required to sustain an adjudication of neglect. *See, e.g., In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). She further contends the court's findings do not

support its conclusion that she was unable to care for Finley so as to render him a dependent juvenile under N.C. Gen. Stat. § 7B-101(9).

I. Findings of Fact

Respondent challenges eight findings of fact contained in the trial court's order. Although she does not contest the evidentiary basis for these findings, she asserts they are either irrelevant or "too vague and too attenuated from the events [alleged in] the petition to support the adjudication of neglect and dependency."

Evidence is relevant to this inquiry if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401.⁴ Although relevance is a legal standard subject to *de novo* review, a trial court's determinations of relevancy are accorded "great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223, *cert. denied*, 565 U.S. 1081, 181 L. Ed. 2d 529 (2011).

Under N.C. Gen. Stat. § 7B-802 (2017), "the purpose of the adjudication hearing is to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) (citation and quotation marks omitted). The trial court must determine whether the subject juvenile is abused, neglected, or dependent at the time the petition is filed. *See id.*

⁴ The North Carolina Rules of Evidence apply at the adjudicatory stage of an abuse, neglect, or dependency hearing. *See* N.C. Gen. Stat. § 7B-804 (2017).

Respondent challenges Finding Nos. 3 through 10 contained in the trial court's order, which state as follows:

3. Respondent mother has a history of substance abuse and mental health issues.
4. Respondent mother has a significant prior history with OCDSS and Chatham County Department of Social Services going back to 2002.⁵
5. Respondent mother has three sons not involved in this action that do not live with her.
6. Two of Respondent mother's other children were adopted by foster parents after Respondent mother voluntarily relinquished her parental rights, one with Juvenile Court jurisdiction and the other without. Another child resided primarily with his father while he was a minor.
7. The juvenile has resided in Orange County his entire life.
8. The juvenile tested positive for Cocaine at birth.
9. The juvenile was in the legal custody of OCDSS from 26 January 2010 to 4 August 2011 while Respondent mother successfully completed Family Drug Treatment Court and the Horizons Sunrise program.
10. OCDSS had an open in-home services case involving

⁵ We note that Respondent failed to object to the introduction of evidence regarding the adoption of her older children or her CPS history prior to 2016 as stated in Finding No. 4. Thus, she has waived appellate review of this issue pursuant to Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure with regard to this evidence. See N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

this family for several months in early 2016.

Although Respondent does not challenge the evidentiary basis for these findings of fact,⁶ she asserts that they are irrelevant to an adjudication of neglect. We cannot say that her mental health and substance abuse histories are completely irrelevant to the issues before the trial court at adjudication. In assessing Finley's status as a neglected or dependent juvenile, the court was obliged to determine, *inter alia*, whether he is exposed to a "substantial risk of [physical, mental, or emotional] impairment," *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (neglect), and whether Respondent "is unable to provide for [his] care or supervision," N.C. Gen. Stat. § 7B-101(9). To the extent Respondent's prior substance abuse or mental illness provides context for the incidents described in the petition filed 28 December 2016, we conclude such evidence meets the minimum standard for relevancy for purposes of Rule 401. Similarly, Respondent's prior CPS history, particularly with regard to Finley, bears some relevance to the issues before the trial court. "The remoteness of [this] evidence goes to its weight, not to its admissibility." *In re McDonald*, 72 N.C. App. 234, 241, 324 S.E.2d 847, 851, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985).

⁶ To the extent that Respondent argues that the findings of fact are mere recitations of the allegations contained in the juvenile petition, we reject that argument. The petition stated that "Respondent Mother has a history of mental health (anxiety, depression, PTSD) and substance abuse (alcohol and cocaine) needs and has been previously treated with the Horizon's Program." Evidence was presented to the trial court tending to support those allegations, and based on the evidence presented the trial court made the above-quoted findings of fact.

However, we agree with Respondent that the findings describing the adoption status of Finley’s older siblings are irrelevant to the instant adjudication. The fact that Respondent previously surrendered two of her children for adoption or that a third child was raised by his father — rather than Respondent — has no tendency to establish Finley’s status as a neglected or dependent juvenile under N.C. Gen. Stat. § 7B-101(9), (15). We recognize that, “[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.” N.C. Gen. Stat. § 7B-101(15). Here, however, the trial court heard no evidence and made no findings that Finley’s siblings experienced abuse or neglect in Respondent’s home. Thus, we disregard Findings 5 and 6 in reviewing the adjudications. *See In re J.R.*, 243 N.C. App. 309, 313, 778 S.E.2d 441, 444 (2015).

II. Conclusions of Law

Having determined that Findings 5 and 6 are irrelevant to the trial court’s adjudication, we now turn to Respondent’s arguments that the remaining findings of fact do not support the trial court’s adjudication of neglect and dependency.

A. Adjudication of Neglect

Respondent challenges the trial court’s adjudication of neglect as unsupported by its findings of fact and the evidence adduced by OCDSS. Specifically, she argues

the facts before the court do not establish that Finley was harmed or placed at substantial risk of harm as a result of her conduct on 25 December 2016. We agree.

The Juvenile Code defines a “neglected juvenile,” *inter alia*, as one “who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . or who lives in an environment injurious to the juvenile’s welfare[.]” N.C. Gen. Stat. § 7B-101(15). “[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline.” *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (citation and quotation marks omitted). “[T]he trial court [has] some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.” *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999).

In addition to the above-quoted findings of fact that we have previously determined are relevant to this analysis, the trial court made the following unchallenged findings of fact in support of its adjudication of neglect and dependency:

12. Early in the morning of 25 December 2016, Respondent mother went to the Duke Hospital Emergency Department by ambulance with the juvenile, who was eight years old.
13. Respondent mother reported symptoms of generalized weakness, severe fatigue, arthralgias, myalgias, lymph node problems, daily vomiting, rash, headache,

Opinion of the Court

abdominal pain, nosebleeds, palpitations, and shortness of breath. As a result, the hospital ordered comprehensive blood and urine laboratory testing. Respondent mother's blood alcohol level was 350 mg/dl and her urine test was positive for Tetrahydrocannabinol (THC). In spite of the high blood alcohol level, Respondent mother did not appear clinically intoxicated upon exam, and she and the juvenile were returned by taxi to the hotel where they were staying.

14. In the evening of 25 December 2016, OCDSS initiated an assessment, meeting with Respondent mother and the juvenile at an Extended Stay hotel in Durham.
15. Respondent mother threatened to kill OCDSS social worker Pamela LeMay in the hotel room and later in the lobby of the hotel. The second time Respondent mother threatened LeMay was in the presence of a law enforcement officer with the Durham Police Department.
16. Respondent mother placed the juvenile in the care of an acquaintance in one of the other hotel rooms, but reported to OCDSS that the juvenile was with his [adult] biological brother. Respondent mother was unable to remember where she had left the juvenile, requiring OCDSS and the law enforcement officer to search for the juvenile by knocking on doors at the hotel.
17. After detaining Respondent mother in the police car, an officer with the Durham Police Department took her back to the Emergency Department at Duke Hospital where she was evaluated. Neither the officer [n]or Duke Hospital took the steps necessary to have her involuntarily committed.
18. No appropriate child care alternative to foster care could be identified.

Opinion of the Court

19. After OCDSS learned that Respondent mother would be taken to Duke Hospital, OCDSS obtained an Order for Nonsecure Custody, and the juvenile was placed in foster care.
20. Respondent mother's blood alcohol level was measured at 403 mg/dl during her second visit to the hospital.
21. Nursing staff and physicians noted changes in Respondent mother's mood and affect between the two visits.
22. Respondent mother remained at the hospital until the morning of 26 December 2016.
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26. Respondent mother testified during the Adjudication hearing. The credibility of some of her testimony was concerning; however, Respondent mother's acknowledgment that she drank way too much on 24 December 2016 was credible.

We are bound by these findings in reviewing the conclusions of law. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

The trial court concluded that Finley "is a neglected juvenile pursuant to N.C.G.S. 7B-101 (15) in that he does not receive proper care from his parents and lives in an environment injurious to his welfare."⁷ OCDSS emphasizes Respondent's

⁷ Although this language appears in the trial court's order as a finding of fact, it is in the nature of a conclusion of law and will be reviewed accordingly. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

history of alcohol abuse as evidence that the events of 25 December 2016 represent a substantial risk to Finley's well-being. We are unpersuaded.

A trial court may consider a parent's history in assessing whether a child is neglected. *See, e.g., In re T.R.T.*, 225 N.C. App. 567, 571-72, 737 S.E.2d 823, 827 (2013). Here, however, the trial court's findings show a span of more than five years separating Respondent's successful completion of substance abuse treatment and her current alcohol consumption. These facts do not depict a continuing pattern of conduct by Respondent. *See, e.g., In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (noting that "cases where 'neglect' . . . has been found shows that the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile"); *In re J.A.M.*, __ N.C. App. __, __, 795 S.E.2d 262, 266 (2016) (citing "the intervening years between the prior cases" and the current petition to "conclude the parents' past histories, coupled only with Respondent-mother's failure to inquire about an alleged incident of prior domestic violence by J.A.M.'s father," did not establish neglect), *disc. review allowed*, __ N.C. __, 799 S.E.2d 617 (2017).

Moreover, a parent's substance abuse alone cannot serve as grounds for adjudicating a child neglected absent evidence that the child suffered impairment or was exposed to a substantial risk of impairment. *In re E.P.*, 183 N.C. App. 301, 645 S.E.2d 772, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007), involved the filing

of petitions by DSS alleging the two children were neglected and dependent based on the respondent-parents' alcohol abuse, domestic violence, and eviction from two homes as a result of unpaid rent and utility bills. DSS alleged that the respondent-mother had left the children unattended while she was intoxicated and cutting her wrists in a bathroom. *Id.* at 302, 645 S.E.2d at 773.

On appeal of the dismissal of these petitions, DSS argued that the trial court erred by concluding that the respondents-parents' substance abuse records were irrelevant to the adjudication of the children as neglected and dependent. *Id.* at 303, 645 S.E.2d at 773. However, this Court held that because "the trial judge found no instances of neglect or harm to the children" and "the treatment records requested by DSS contained no evidence that actual harm to the children had occurred, or that the parents' substance abuse issues created a substantial risk of harm to the children[.]" the trial court properly dismissed the juvenile petitions. *Id.* at 307, 653 S.E.2d at 775.

In the present case, the court made no finding that Finley actually suffered any "physical, mental, or emotional impairment" as a result of Respondent's conduct on 25 December 2016 or that he was at a "substantial risk" of suffering such impairment. *See C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592. Thus, we must consider whether all of the evidence presented would have supported such a finding. *See Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340 ("Where there is no finding that

the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.” (citation omitted)).

Having reviewed the allegations contained in the petition and the evidence presented at the adjudication hearing, we conclude that OCDSS has not established that Finley suffered any physical, mental, or emotional impairment or was placed at a substantial risk of such impairment. Although the petition filed by OCDSS mentions Respondent’s history of mental health and substance abuse, the only references it makes to Finley is that he was with Respondent in the ambulance, he was “present in the hotel room” while the social worker was visiting, and he “confirmed that his mother drinks, but he reported that she doesn’t get drunk.” The petition does not describe specific allegations that Finley was ever actually harmed by Respondent’s actions or explain how her substance abuse posed a substantial risk of harm to him.

OCDSS and the guardian *ad litem* point to the events on 25 and 26 December 2016 as sufficient to establish a substantial risk of impairment to Finley. They focus on the facts that (1) Finley was present while Respondent was transported by ambulance to the hospital; (2) Finley was in the room when she threatened the OCDSS social worker at the hotel; and (3) Respondent left Finley in the care of an “acquaintance” at the hotel and then forgot his location, requiring the social worker and police officer to knock on doors to find him.

However, despite the disturbing nature of these events, none of these incidents establish that Finley has experienced a physical, mental, or emotional impairment or is at a substantial risk of such harm. Indeed, the trial court received no evidence that Finley was troubled — let alone traumatized — by this incident or his mother’s intoxication. There was no evidence presented that Finley was hungry, sleep-deprived, injured, or otherwise impaired. *See, e.g., Padgett*, 156 N.C. App. at 648-49, 577 S.E.2d at 340 (holding that adjudication of neglect was supported by findings that, *inter alia*, child appeared sleep-deprived and hungry and children were found padlocked in bedrooms without access to bathroom).

Without such evidence to suggest that Finley was adversely affected by Respondent’s conduct, we are unable to conclude under these circumstances that Finley’s brief placement with an adult known to Respondent subjected the eight-year-old to a “substantial risk” of physical, mental, or emotional harm. *Cf. In re D.C.*, 183 N.C. App. 344, 353, 644 S.E.2d 640, 645 (2007) (affirming adjudication of neglect where hotel guest reported that 16-month-old child had been left alone in room while crying continuously for at least 30 minutes at 4:00 a.m.).

Respondent’s blood alcohol levels on 25 December 2016 are worrisome particularly in light of her prior history of substance abuse and mental illness. Moreover, we are particularly troubled by Respondent’s inability to remember the specific hotel room where she had left Finley.

However, once again, the trial court made no findings of fact and OCDSS has offered no evidence establishing that Finley was actually harmed or placed at substantial risk of harm by the events alleged in the petition. Accordingly, we reverse the trial court's adjudication of neglect. *See E.P.*, 183 N.C. App. at 307, 645 S.E.2d at 775-76.

B. Adjudication of Dependency

Respondent also challenges the trial court's adjudication of dependency under N.C. Gen. Stat. § 7B-101(9). She contends OCDSS failed to "prove by clear and convincing evidence that [she] was incapable of caring for her son." Once again, we agree.

A "dependent juvenile" is defined, in pertinent part, as one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). In order to sustain an adjudication of dependency, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

The trial court concluded that Finley "is a dependent juvenile pursuant to N.C.G.S. 7B-101 (9) in that his parent is unable to provide for his care and supervision

and lacks an appropriate child care arrangement.”⁸ However, neither the evidence presented by OCDSS nor the trial court’s findings support this conclusion. At the time OCDSS filed its petition in this cause, Respondent had been out of the hospital for more than 48 hours, having spent just four hours at the hospital for an examination. OCDSS made no showing that she was presently unable to provide for Finley’s care and supervision. Because the trial court’s adjudication of dependency is unsupported by the evidence and the court’s unchallenged findings of fact, we reverse the trial court’s order.

Conclusion

For the reasons stated above, we reverse the trial court’s 15 May 2017 order.

REVERSED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).

⁸ As with the adjudication of neglect, the trial court’s determination appears in the order as both a finding of fact and a conclusion of law. We review it *de novo* as a legal conclusion. *See M.R.D.C.*, 166 N.C. App. at 697, 603 S.E.2d at 893.