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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-74

Filed: 4 February 2020

Mecklenburg County, No. 17 JA 522

IN THE MATTER OF: Z.S.

Appeal by respondent from order entered 9 October 2018 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 19 December 2019.

*Associate County Attorney Marc S. Gentile for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.*

*Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant mother.*

*Hartzog Law Group, by Michael B. Cohen, for guardian ad litem.*

DIETZ, Judge.

Respondent appeals from an order adjudicating her daughter Zelda<sup>1</sup> a neglected juvenile. As explained below, the challenged findings of fact were supported by competent evidence in the record and any error in the exclusion of the challenged trial testimony was harmless. We therefore affirm the trial court's order.

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<sup>1</sup> We use a pseudonym to protect the juvenile's identity.

### **Facts and Procedural History**

On 27 September 2017, the Mecklenburg County Department of Social Services, Youth and Family Services Division (DSS) obtained nonsecure custody of Zelda and filed a petition alleging she was a neglected and dependent juvenile. DSS presented evidence that on 19 December 2016, it received a referral about Zelda stating that Respondent had a child protective services history, was not addressing her substance abuse issues, and lacked stable housing. As of 19 December 2016, Respondent had five children in DSS custody, all of whom initially were taken into custody by the Catawba County Department of Social Services due to “extensive parenting concerns, substance abuse concerns, income concerns and lack of stable housing.” DSS later issued a case plan requiring Respondent to obtain safe and stable housing and income and participate in drug treatment court.

On 21 December 2016, Respondent was terminated from a residential substance abuse treatment program and moved with Zelda into several different sober living facilities. In early June 2017, Respondent and Zelda moved in with Respondent’s pastor and his wife. Also in June 2017, Respondent tested positive for cocaine, and in July 2017, Respondent tested positive for alcohol. On 16 August 2017, DSS learned that Respondent was pregnant. DSS was concerned that the pastor was the child’s father, creating “additional housing instability” because the pastor’s wife resided in the same home.

On 21 September 2017, the drug treatment court team terminated Respondent from the program on the ground that Respondent was no longer benefitting from their treatment program due to her sporadic attendance at treatment appointments and “spotty” compliance records after missing random drug screens in August 2017.

By the time of the petition, Respondent was unemployed and no longer receiving bus passes, monthly income, or day care vouchers because of noncompliance with the applicable social service programs. Due to her lack of progress on the requirements of her case plan for the five children already in DSS custody, Respondent also was facing termination of her parental rights to two of her other children. Because Respondent, for at least the past six months, had failed to consistently engage in needed services, obtain stable housing, obtain employment, and sustain a viable income stream, DSS alleged that she “cannot provide adequate care or supervision and/or provide for the basic needs of [Zelda]” and lacked an alternative placement for Zelda.

After a hearing, the trial court entered an order adjudicating Zelda a neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101(15) and continuing her in the legal custody of DSS. Respondent filed an untimely appeal, depriving this Court of appellate jurisdiction. But because Respondent has a right to counsel in this proceeding and has shown that she intended to appeal the trial court ruling, we

exercise our discretion to allow Respondent's petition for a writ of certiorari and address Respondent's appellate arguments on the merits. *See* N.C. R. App. P. 21(a)(1).

### **Analysis**

Respondent challenges the trial court's adjudication of neglect, arguing that the evidence presented at the adjudication hearing was insufficient to support the trial court's findings of fact and that the findings were insufficient to support the trial court's conclusion that Zelda is a neglected juvenile. We disagree.

The standard of review for a trial court's adjudication is "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). Unchallenged findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

The Juvenile Code defines a "neglected juvenile" as one

whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another

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juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15). In order for a child to be adjudicated neglected, “this 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 Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993). “[T]he trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home.” *In re T.S., III*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006), *aff’d per curiam*, 361 N.C. 231, 641 S.E.2d 302 (2007).

Here, Respondent argues that Finding of Fact 5 is not supported by sufficient evidence and fails to support the trial court’s conclusion that Zelda was neglected.

Finding of Fact 5 states:

\*During the course of this hearing, [DSS] proffered live testimony from Rosalyn Shelton, the assigned [DSS] social worker supervisor, as well as four exhibits, *all of which were admitted into evidence without objection*. [DSS] Exhibit 1 was a certified true copy of the Catawba County Adjudication and Change Venue Order for [Zelda’s] five older siblings; [DSS] Exhibit 2 was a certified true copy of the Disposition Order for [Zelda’s] five older siblings; [DSS] Exhibit 3 was a certified true copy of the SPPH4 Order for [Zelda’s] five older siblings; and [DSS] Exhibit 4 was a certified true copy of the TPR Order for two of [Zelda’s] older siblings. No other parties offered any evidence.

[Zelda’s] five older siblings were taken into the non-secure custody of Catawba County Department of Social Services

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(CCDSS) on January 29, 2015. The five older siblings originally were brought to the attention of the Iredell County Department of Social Services in September 2014 when respondent mother left all five children unattended in her car when she went into the Iredell County Courthouse to attend a criminal court hearing. On an unknown date between September 2014 and January 29, 2015, the investigation was transferred to CCDSS. . . . [T]he placement that mother identified in September 2014, was eventually determined to be inappropriate and unsuitable. [The placement] assaulted and mistreated the children while they resided with her. . . . There were no viable alternative placements for the five older siblings so a juvenile petition was filed and non-secure custody was obtained on January 29, 2015. All five juveniles were adjudicated neglected and dependent. Upon the completion of the adjudicatory hearing, the non-secure custody of the five older siblings were transferred to [DSS]. The Dispositional hearing occurred on May 14, 2015.

\*As of May 23, 2016, mother was engaged in substance abuse treatment with CASCADE which also provided housing. She was also involved with the Family Drug Treatment Court program (drug court). From May 2016 until November 2016, mother made significant progress in addressing her substance abuse issues. While at CASCADE, she engaged in treatment and submitted to random drug screens. In late November 2016, mother relapsed on cocaine was [sic] in December 2016 was terminated from the CASCADE program which caused her to lose her housing, but she remained in drug court. Drug court ordered mother to engage in treatment with Family First and to continue to submit to random drug screens. In terms of housing, after leaving CASCADE, mother moved into Compassion House (a sober adult living facility). Mother moved out of Compassion House in mid-January 2017 and into Oxford House, another sober adult living facility. Mother lived at Oxford House from mid-January 2017 until on or about June 1, 2017 at which point she moved into the residence of her pastor . . . and his wife.

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\*On or about June 15, 2018<sup>[2]</sup>, mother provided a urine sample that tested positive for cocaine. She initially denied any usage, but later conceded that she had relapsed. In early July of 2017, mother relapsed again, but this time on alcohol. In September 2017, she missed two random drug screens. Missed drug screens are treated as positive results so mother was considered to have two positive drug screen results. She also missed all substance abuse treatment sessions after September 7, 2018<sup>[3]</sup>. On September 21, 2018<sup>[4]</sup>, the Family Drug Treatment Court team terminated the mother from their program.

\*With regard to housing, mother applied for a Section 8 voucher and was initially denied. However, [DSS] provided assistance to mother as she appealed that decision. Mother's appeal was successful and she was given her voucher in May 2017. When she was given her voucher, mother was advised that there would be no extensions and would expire in September 2017 if she had not yet signed a lease. Mother did not obtain a lease so her voucher expired on September 20, 2017. As of the date of the petition, mother continues to sleep on the sofa and *[sic]* her pastor's and pastor's wife's house. She does not have her own space or any privacy there.

\*Mother first obtained Work First benefits in May 2017. From that, she received daycare and financial assistance. In order to maintain eligibility for those benefits, mother was required to turn in supporting paperwork on a monthly basis. Mother failed to turn in supporting paperwork for

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<sup>2</sup> The transcript and record show Respondent tested positive for cocaine on or about 15 June 2017; the order's reference to 2018 is a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117–18 (2003) (defining clerical error as “[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination”).

<sup>3</sup> This appears to be a clerical error. A review of the transcript and record demonstrates that Respondent failed to appear at her substance abuse treatment sessions after 7 September 2017, not 7 September 2018.

<sup>4</sup> The transcript and record show that Respondent was terminated from drug treatment court on 21 September 2017, not 21 September 2018. Again, we find the order contains a clerical error.

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August 2017 so her benefits were terminated in September 2017. Mother had no other means of income.

\*. . . [O]ne of [Zelda's] five older siblings, was placed in the legal and physical custody of her father . . . in February 2017 because mother failed to make adequate progress.

In the months leading up to [Zelda's] juvenile petition, mother had an overall lack of progress in a number of areas including substance abuse and housing and a significant history of substance abuse and criminal conduct related to substance abuse, all of which led to a risk for [Zelda] that she would not receive proper care and supervision and would reside in an injurious environment.

Respondent first challenges the portion of this finding concerning her various substance abuse and housing issues. She contends that there was insufficient evidence presented to support the trial court's findings that she relapsed on cocaine in November or December 2016; that she was terminated from a residential substance abuse program; that she missed drug screens or substance abuse sessions in September 2017; and that she was forced to sleep on the sofa at her pastor's house.

When reviewing a trial court's adjudication of neglect, this court examines the findings of fact to determine whether they are "supported by clear and convincing evidence." *In re T.H.T.*, 185 N.C. App. at 343, 648 S.E.2d at 523. Applying this standard, the court's findings of fact are readily supported by the record, including testimony from DSS witnesses and a termination order from a case involving one of Respondent's other children that was introduced into evidence in this case.



Respondent acknowledges that the bulk of the trial court's findings are supported by fact findings in that termination order, but she contends that the order was inadmissible because it was not entered until after DSS filed the petition in this case. Thus, Respondent argues, that termination order was inadmissible "post-petition evidence." We reject this argument for several reasons.

First, the trial court did not rely on any "post-petition evidence" as that term is used in our jurisprudence. Because "the purpose of the adjudication hearing is to adjudicate the existence or nonexistence of any of the conditions alleged in a petition," we have held that "post-petition evidence" is inadmissible because it does not concern the conditions at the time of the petition. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006). But this bar against the use of post-petition evidence applies only to facts arising *after* the petition is filed, not to evidence that documents facts that existed *before* the petition is filed. *See In re V.B.*, 239 N.C. App. 340, 344, 768 S.E.2d 867, 870 (2015). Here, the trial court based its findings on events documented in the termination order that took place well before DSS filed the petition at issue here.

Second, to the extent that Respondent challenges the admissibility of the termination order itself, Respondent waived this argument. "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.” N.C. R. App. P. 10(a)(1). Here, Respondent did not object to the termination order when it was introduced into evidence. Respondent later argued that the trial court should not consider that termination order, but solely based on her claim that it involved “post-petition evidence.” Accordingly, any remaining challenges to the admissibility of the termination order are waived.

Respondent next argues that the trial court improperly relied solely on what occurred to Respondent’s other children, based on facts from the termination order and from other, related juvenile cases. Again, we reject this argument.

“A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. . . . [T]he clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile.” *In re J.A.M.*, \_\_ N.C. \_\_, \_\_, 822 S.E.2d 693, 698 (2019). Thus, although evidence concerning Respondent’s other children was relevant, the court also must make findings concerning current circumstances affecting Zelda. *Id.*

Here, the trial court’s neglect adjudication was not based solely on facts involving Respondent’s older children. To be sure, the trial court considered those facts, but the court also found many facts directly impacting Zelda. For example, although Respondent’s substance abuse issues and her inability to obtain and maintain stable housing and income were present when her five older children were

adjudicated neglected, there was no evidence that those conditions later improved after Zelda's birth. Moreover, the trial court found that in the months before DSS filed this petition, Respondent tested positive for cocaine, was terminated from the drug treatment court program, and missed drug screens and substance abuse treatment sessions. The court also found that Respondent allowed her housing vouchers to expire, did not have stable housing, and had no means of income.

In short, this case is analogous to others in which the trial court considered facts concerning a respondent's other children, but also relied on facts directly impacting the juvenile at issue. *See In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167 (2004); *In re C.G.R.*, 216 N.C. App. 351, 717 S.E.2d 50 (2011). Accordingly, we reject this argument.

Finally, Respondent argues that the trial court erred by excluding testimony that DSS "had no information that Zelda was living in an environment injurious to her welfare." This argument concerns the following testimony during the cross-examination of the DSS supervisor who oversaw Respondent's case:

[COUNSEL FOR RESPONDENT]: You didn't receive any information that [Zelda] was living in an environment that was injurious to her welfare?

A. No, ma'am.

[COUNSEL FOR DSS]: Objection. That calls for a legal conclusion.

THE COURT: Sustained.

Respondent contends that, although the supervisor’s response “indirectly went to the ultimate issue for adjudication,” it was admissible pursuant to Rule 704 of the North Carolina Rules of Evidence because the terms “environment,” “injurious,” and “welfare” are commonly known terms and the witness’s answer would have been helpful to the court as trier of fact.

Even assuming this discretionary, evidentiary ruling was error, that error was harmless. Errors in the admission of evidence amount to reversible error only if there is a reasonable possibility that, but for that error, the result of the proceeding would have been different. *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015). When this answer is viewed in context of the surrounding questions, the excluded testimony was duplicative and could not reasonably have had any impact on the trial court’s factual findings:

Q. . . . [Y]ou testified that a referral was received in December, 2016. Is that correct?

A. Yes, ma’am.

Q. And even after the referral was received, which indicated issues about substance abuse and lack of stable housing, [Zelda] was allowed to remain in the mother’s custody. Is that correct?

. . . .

Q. And when I say “the mother’s custody,” that means that [Zelda] was living in [Respondent’s] physical custody as well as in her legal custody. Correct?

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A. Yes, ma'am.

Q. Okay. And when you also talk about whether or not she participated or completed the FIRST drug treatment program, [Zelda] remained in her custody. Is that correct?

A. Yes, ma'am.

Q. With regards to whether or not [Respondent] had privacy in the home of [her pastor], was that the only concern the Department had?

A. That was the only one we had at that time; yes, ma'am.

....

Q. And throughout the time period up until [Zelda] was placed into the legal and physical custody of the Department, you didn't receive any information that [Respondent] had left [Zelda] unattended?

A. No, ma'am. I don't remember there being a situation of that.

Q. You didn't receive any information that [Respondent] had abandoned [Zelda]?

A. Abandoned, no, ma'am.

Q. You didn't receive any information that she's refusing to provide [Zelda] with any necessary medical or remedial care that [Zelda] may need?

A. No, ma'am.

*Q. You didn't receive any information that [Zelda] was living in an environment that was injurious to her welfare?*

*A. No, ma'am.*

*[COUNSEL FOR DSS]: Objection. That calls for a legal conclusion.*

*THE COURT: Sustained.*

Q. Did you receive any information that [Zelda] was in a home where wires were sticking out of the walls and she could touch them?

A. No, ma'am.

Q. Did you receive any information that [Zelda] wasn't being fed?

A. No, ma'am.

Q. Did you receive information that [Respondent] had placed [Zelda] for adoption in violation of the law?

A. No, ma'am.

(Emphasis added.)

As the surrounding context indicates, Respondent's other questions addressed the substance of the excluded evidence and thus any error here was harmless. Moreover, the trial court's neglect adjudication was based both on the "injurious environment" factor and the separate "proper care and supervision" factor in the applicable statute. N.C. Gen. Stat. § 7B-101(15). There is no reasonable possibility that the excluded testimony would have impacted the trial court's findings concerning this separate ground for the neglect adjudication and, thus, there is a second, independent reason why any error here was harmless.

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**Conclusion**

We affirm the trial court's order.

AFFIRMED.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).