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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-465

No. COA21-763

Filed 5 July 2022

Cumberland County, No. 19 JA 286

IN THE MATTER OF: K.L. Juvenile

Appeal by Respondent-Mother from Orders entered 30 June 2021 and 10 September 2021 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 11 May 2022.

*Patrick A. Kuchyt, for Cumberland County Department of Social Services.*

*Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for Respondent-Mother.*

*Matthew C. Phillips, Attorney for Guardian ad Litem*

HAMPSON, Judge.

**Factual and Procedural Background**

¶ 1 Respondent-Mother appeals from the trial court's Adjudication Order entered 30 June 2021 adjudicating Kevin<sup>1</sup> as an abused and neglected juvenile and Disposition Order entered 10 September 2021 determining it was in the best interest

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<sup>1</sup> The juvenile is referred to by the parties' stipulated pseudonym.

of the juvenile to remain in the custody of the Cumberland County Department of Social Services (DSS). The Record tends to reflect the following:

¶ 2

Respondent-Mother is the mother of Kevin. On 17 July 2019, DSS filed a Juvenile Petition (Petition) alleging Kevin was abused, neglected, and dependent as defined by N.C. Gen. Stat. § 7B-101 based on allegations Respondent-Mother had punched, slapped, and threatened to kill Kevin. The Petition also alleged Respondent-Mother suffers from a number of mental conditions and had been drinking at the time. The same day, the trial court entered an Order for Nonsecure Custody authorizing DSS to obtain custody of Kevin.

¶ 3

On 27 May 2021, approaching two years after DSS filed the Petition, the trial court conducted a hearing on the Petition. At start of this hearing, DSS requested the trial court take judicial notice of a criminal file bearing Cumberland County Superior Court file number 19 CRS 026388. Respondent-Mother did not object and the trial court agreed to take judicial notice of this criminal file. The criminal file for 19 CRS 026388 specifically reflects that as part of a plea arrangement including two other charges in other files, Respondent-Mother pleaded guilty to one count of willful or negligent child abuse committed on 12 July 2019 involving Kevin. The factual basis proffered to support the plea is not included in the record.

¶ 4

DSS called as its sole witness, a DSS supervisor [Supervisor], to testify. Supervisor explained her role in this matter was as the supervisor to the social

worker who investigated the case. Supervisor further explained she, the social worker, and an attorney were involved in drafting the petition. Supervisor then testified:

[DSS Attorney:] Can you describe what steps you took in the investigation? What had you seen?

[Supervisor:] I personally have not seen anything. It was the social worker that was assigned to the case.

[DSS Attorney:] Have you seen any documents, any reports or have you had conversations?

[Supervisor:] Yes, back in 2019.

[DSS Attorney:] Based on your investigation, what is it that happened on July 12, 2019?

[Supervisor:] The mother punched and slapped the juvenile in the face multiple times.

[Respondent-Mother's Attorney:] I'm going to object if the witness is reading from a document and not testifying based on her own personal knowledge.

THE COURT: You can't read verbatim, ma'am. But you can - you will have to lay the proper foundation, sir. Sustained. Go ahead.

¶ 5

Supervisor clarified she had reviewed the record and dictation related to the investigation within “the few minutes before I was called to be in court” and she “viewed the police report before court today also.” From her refreshed recollection, Supervisor testified:

From what I remember from July 12, 2019 was that the mother had hit the juvenile. She had threatened to kill the juvenile. The juvenile had ran to a neighbor's house. The mother had come out of the house and she had hit the porch with some kind of metal object. Law enforcement did arrive at the time. There was some admittance to drinking alcohol at the time. That's all I personally remember.

¶ 6 On cross-examination, Respondent-Mother's attorney asked:

[Respondent-Mother's Attorney:] Okay. Do you recall what evidence or information you gave to be placed in the petition?

[Supervisor:] Personally I didn't give any evidence. Just being there with the social worker to be there as a supervisor going over what is being told to our legal at the time.

[Respondent-Mother's Attorney:] Okay. What investigation did you do?

[Supervisor:] I personally did not do any investigation on this case.

¶ 7 After the completion of this testimony, DSS rested its case. Respondent-Mother's attorney moved to dismiss the Petition, arguing that "[w]e don't have a credible witness that has any knowledge to support any of the findings in this petition."

¶ 8 DSS argued Respondent-Mother's conviction of felony child abuse provided sufficient evidence to support the allegations found within the Petition:

The certified record that the (inaudible) of the underlying criminal case that was at a competent court of a jurisdiction of a higher burden in which the respondent mother was found guilty of felony child abuse for events that take place between July 1st and July 12th and described in that shuck. And then the social worker gave testimony as to what she recalled being discussed in that petition as being those events. Those events match up. Again, she was found guilty at a court of competent jurisdiction at a higher burden. In fact as to whether those events took place should really be judicially stopped and should be assumed as fact although it doesn't make it conclusive for this Court. So, I think there's plenty of evidence that the events that are alleged in the petition took place. That is before the Court in that criminal court proceedings we've provided.

¶ 9 The trial court denied Respondent-Mother's motion.

¶ 10 On 30 June 2021, the trial court entered its Adjudication Order. In this Order, the trial court found:

8. The Court took judicial notice of the criminal conviction filed in 19CRS062388 regarding this matter, and the criminal file was admitted into evidence without objection. The Respondent-Mother subsequently plead guilty to three counts of Class G felony child abuse/neglect inflicting serious injury.

9. Respondent-Mother's attorney made an oral motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6), inasmuch as the allegations in the Petitions do not rise to the level of abuse, neglect, or dependency. The Court finds that there is sufficient factual basis to proceed with this matter. The Court denied the motion.

¶ 11 In Finding #10 the trial court found it had "received the verified Juvenile Petition into evidence and received the sworn testimony of the social worker."

¶ 12 In Findings #11 through #23, the trial court found:

11. The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 7/13/19 concerning the safety of the juvenile.

12. That on or about 7/12/2019, while in the residence, the Respondent Mother punched and slapped the juvenile in the face multiple times and threatened to kill the juvenile.

13. That on or about 7/12/2019, the juvenile ran from the home, into the street, and to a neighbor's house.

14. That on or about 7/12/2019, the neighbor, [Name Omitted], observed the Respondent Mother come out of the house with a metal pipe in her hand, hit the pipe several times against the porch of her house, and threaten to stab the juvenile when he comes back to the house.

15. That on or about 7/12/2019, the juvenile told the neighbor, [Name Omitted], that the Respondent Mother had punched and slapped him in the face multiple times.

16. That on or about 7/12/2019, the Cumberland County Sheriff's Office responded to the incident and spoke with the juvenile. The juvenile refused to go back home and stated that he would feel safer in DSS custody.

17. That on or about 7/12/2019, the Respondent Mother told the Deputy that she had been drinking and has many medical conditions. That the Respondent Mother was shouting, cursing, and laid on the ground until medics arrived to evaluate her.

18. That on or about, 7/12/2019, the Respondent Mother voluntarily went to Cape Fear Valley Medical Center for further evaluations.

19. That on or about 7/15/2019, the Respondent Mother admitted to Social Worker [Name Omitted] that she used marijuana and alcohol.

20. That the Respondent Mother has a history of Bi-polar disorder, Schizophrenia, Obsessive Compulsive Disorder, and Post-Traumatic Stress Disorder.

21. That the Respondent Mother agreed to have her adult son and his wife act as Temporary Safety Providers for the juvenile, and the juvenile was placed with them.

22. That on or about 7/17/2019, the Respondent Mother revoked the Temporary Safety Provider agreement.

23. That Respondent Putative Father [Name Omitted] is not involved in the juvenile's life, does not provide financial support or assistance, and has had no contact with the juvenile for several years.

¶ 13

In Findings of Fact # 24 and # 25 the trial court found:

24. The evidence presented rises to the level of abuse pursuant to N.C. Gen. Stat. §7B-101(1) in that the juvenile[]s parent, guardian, custodian, or caretaker creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; and creates or allows to be created serious emotional damage to the juvenile.

25. The evidence presented rises to the level of neglect pursuant to N.C. Gen. Stat. §7B-101(15) in that the juveniles do not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; and the juvenile lives in an environment injurious to the juvenile’s welfare.

¶ 14

Based on these findings, the trial court concluded Kevin was an abused and neglected juvenile<sup>2</sup> as defined by N.C. Gen. Stat. § 7B-101 (1) and (15).

¶ 15

Subsequently, on 10 September 2021, the trial court entered a Disposition Order determining it was in the best interest of the juvenile to remain in the custody of DSS. On 21 September 2021, Respondent-Mother filed Notice of Appeal from the 30 June 2021 Adjudication Order and the 10 September 2021 Disposition Order.

### **Issues**

¶ 16

The dispositive issues on appeal are whether (I) the trial court’s Findings of Fact in the Adjudication Order are supported by the evidence; and (II) to the extent

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<sup>2</sup> The trial court’s order also noted DSS agreed to dismiss the allegations of dependency. However, at trial, the Court found that DSS had not met its burden and the dismissal of the dependency ground was involuntary, “[a]s to the issue of dependency, and that the Court would not find dependency as an allegation at this time.”

the Findings are supported by evidence, those Findings of Fact support the trial court's Conclusions of Law adjudicating Kevin as abused and neglected.

### **Analysis**

¶ 17 “Appellate review of an adjudication order is limited to determining (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 C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016) (quoting *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citations and quotations omitted)). Our review of a conclusion of law is de novo. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

#### **I. The Trial Court's Findings of Fact**

¶ 18 Respondent-Mother asserts the trial court erred in adjudicating Kevin as abused and neglected contending the Findings of Fact were not supported by the evidence. Specifically, Respondent-Mother challenges Findings #10 through #25 in the Adjudication Order.

¶ 19 Finding #10 states “[t]hat the Court received the verified Juvenile Petition into evidence and received the sworn testimony of the social worker.” However, there is no indication in the trial transcript that the trial court actually received the verified Juvenile Petition into evidence. Additionally, while the trial court did hear testimony from the Supervisor—who did not testify as to her credentials as a social worker—



there was no testimony offered by the social worker who actually investigated the allegations or verified the Petition. Moreover, even if the trial court had admitted the Petition into evidence or simply considered it as part of the court file before it, the Petition by itself does not support an adjudication of Kevin as a neglected and abused juvenile. *See In re I.D.*, 239 N.C. App. 172, 174, 769 S.E.2d 846 (2015)<sup>3</sup> (adjudication of neglect and abuse unsupported by evidence where DSS relied solely on the Petition as evidence and adjudication effectively constituted an improper Judgment on the Pleadings).

¶ 20

Similarly, Findings # 11 through # 23 are mere recitations of allegations found in the Petition. “[T]he trial court’s factual findings must be more than a recitation of allegations.” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). “It is ‘not per se reversible error for a trial court’s fact findings to mirror the wording of a petition or other pleading prepared by a party.... [T]his Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.’” *In re H.P.*, 2021-NCCOA-299, ¶ 23 (quoting *In re J.W.*, 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253 (2015)).

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<sup>3</sup> A Westlaw search reflects this is a table—or unpublished opinion—however this opinion appears as published in the official reporter. Indeed, this Court issued an Order on 13 February 2013 ordering this decision be published.

¶ 21 Here, it is evident Findings # 11 through # 23 are not supported by evidence in the Record and are, therefore, mere recitations of allegations.<sup>4</sup> The Findings go far beyond any testimony from the hearing—indeed, they go well beyond even the Supervisor’s testimony itself which was not based on personal knowledge, but was a mere summary of the Petition’s allegations of facts.<sup>5</sup> Further, there is nothing in the criminal file which supports such extensive Findings. Thus, Findings # 11 through # 23 are not supported by evidence in the Record. Therefore, in turn, they cannot support the trial court’s Conclusions of Law.

¶ 22 Respondent-Mother further challenges Findings # 24 and # 25 arguing the determinations that the evidence rises to the level of abuse and neglect, respectively, are not findings of fact and instead constitute conclusions of law and should be reviewed as such.

“Facts are things . . . that can be objectively ascertained. . . . Facts, in turn provide the bases for conclusions.” *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 892-93 (2004) (internal citations omitted). Determinations which require an exercise of judgment are more properly designated conclusions of law. *In re J.V.*, 198 N.C. App. 108, 117, 679 S.E.2d 843, 848 (2009); *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 869-70 (1985). The trial

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<sup>4</sup> Notably, in arguments to this Court, the GAL candidly effectively concedes as much.

<sup>5</sup> In any event, it is clear the trial court was not relying on the Supervisor’s testimony to make its Findings of Fact and to the extent the Supervisor’s testimony constituted either incompetent evidence on the basis of lack of personal knowledge or inadmissible hearsay “[i]n a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it.” *In re Oghekevebe*, 123 N.C. App. 434, 438, 473 S.E.2d 393, 397 (1996).

court's findings that are more appropriately designated conclusions of law are reviewed as such. See *In re N.G.*, 186 N.C. App. 1, 12-13, 650 S.E.2d 45, 52-53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

*In re H.P.*, 2021-NCCOA-299, ¶ 32. Here, the trial court's determination the evidence supported—or rose to the level—of abuse and neglect pursuant to the relevant statutory sections required the exercise of judgment and application of legal principles. See *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Thus, Findings # 24 and # 25 are more properly designated Conclusions of Law. Therefore, standing alone, Findings # 24 and # 25 are not Findings of Fact, which may be relied on to support an adjudication of abuse and neglect.

## II. The Trial Court's Conclusions of Law

¶ 23 Next, Respondent-Mother argues the trial court's remaining Findings do not support the trial court's Conclusions Kevin is an abused and neglected juvenile. Indeed, omitting the unsupported Findings, the only remaining Finding relevant to the adjudication is Finding # 8:

The Court took judicial notice of the criminal conviction filed in 19CRS062388 regarding this matter, and the criminal file was admitted into evidence without objection. The Respondent-Mother subsequently plead guilty to three counts of Class G felony child abuse/neglect inflicting serious injury.

¶ 24 Under N.C. Gen. Stat. § 7B-802 governing the conduct of adjudication hearings: "The adjudicatory hearing shall be a judicial process designed to adjudicate

the existence or nonexistence of any of the conditions alleged in a petition.” N.C. Gen. Stat. § 7B-802 (2021). “Unlike in the dispositional stage, where the trial court’s primary consideration is the best interest of the child and ‘any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court,’ evidence in the adjudicatory hearing is limited to a determination of the items alleged in the petition.” *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006).

¶ 25 Respondent-Mother concedes she did in fact plead guilty to three counts of “willful/negligent child abuse” inflicting serious physical injury on 12 November 2020. However, as an initial matter, even a cursory review of the Record reflects two of these counts are completely unrelated to any allegation in the Petition because the offense dates charged are in 2018 and have no temporal relationship to the Petition’s allegations of neglect and abuse occurring in July 2019. As such, Respondent-Mother’s guilty plea to the two 2018 offenses cannot support the trial court’s adjudication of Kevin as abused and neglected based on allegations in the Petition which are specific to July 2019.

¶ 26 As to the remaining conviction—reflected in file number 19 CRS 062388—the Record before us does not contain any factual basis proffered for Respondent-Mother’s guilty plea. With respect to this charge, the Information upon which Respondent-Mother waived indictment and agreed to be tried states: “the defendant did . . .

commit a willful act or omission in the care of [Kevin] that showed a reckless disregard for human life and the act or omission resulted in serious physical injury, to wit: mental injury . . . .” Further, the Information alleges the dates of offense as 7/1/2019 to 7/12/19. The transcript of plea contains no further information about the offense but lists the date of offense as 7/12/19. The criminal Judgment on the other hand lists the date of offense as 7/1/2019 but otherwise provides no additional factual detail as to the basis of the conviction. By comparison, the Petition in this case alleges very specific acts constituting abuse and/or neglect occurring on 12 July 2019, 13 July 2019, 15 July 2019, and 17 July 2019. The Petition contains no allegation of the criminal proceeding or guilty plea.

¶ 27        Simply put, the content of the criminal file alone—as reflected in the Record before us—does not establish the facts upon which Respondent-Mother pleaded guilty. In turn, then, it is likewise impossible to ascertain whether the facts giving rise to the guilty plea are the same or similar facts which constituted the factual allegations alleged in the Petition. Moreover, DSS provided no other evidence to that effect.<sup>6</sup> Critically, for purposes of this analysis, the trial court made no finding here that the offense to which Respondent-Mother pleaded guilty was based on the same

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<sup>6</sup> Trial counsel for DSS argued that the criminal proceeding adjudicated the underlying facts alleged in the Petition however: “It is axiomatic that the arguments of counsel are not evidence.” *Daly v. McKenzie*, 250 N.C. App. 611, 617, 795 S.E.2d 120, 124 (2016).

facts alleged in the Petition.<sup>7</sup> As such, we conclude Finding of Fact # 8 does not support a conclusion Kevin was abused and neglected based on the conditions alleged in the Petition.<sup>8</sup> See N.C. Gen. Stat. § 7B-802. Thus, the trial court's Findings of Fact, which are unsupported by evidence, do not support the trial court's conclusions Kevin is an abused and neglected juvenile as alleged in the Petition. Therefore, the trial court erred in adjudicating Kevin as an abused and neglected juvenile. Consequently, because the majority of the trial court's adjudicatory Findings are not supported by the evidence and the remaining Findings do not support the trial court's conclusion adjudicating Kevin as an abused and neglected juvenile, we vacate the trial court's Adjudication Order and remand this matter to the trial court to: (1) make findings based on the existing record before it that are supported by the competent evidence of record, and (2) make a new determination as to whether or not those facts support a conclusion Kevin is abused and/or neglected based on the conditions alleged in the Petition. Because of our result here, we also vacate the trial court's Disposition

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<sup>7</sup> Our analysis raises the specter of another issue—not raised, briefed, or decided here—as to whether evidence of a parent's conviction of willful or negligent child abuse in and of itself might support an adjudication of abuse or neglect under Chapter 7B absent further adjudicatory evidence and findings of fact specific to the Chapter 7B definitions of abuse and neglect.

<sup>8</sup> The evidentiary bridge from the criminal matter to the abuse and neglect adjudication would not appear to be a difficult one to traverse, however, it is a bridge that must still be constructed and upon proper footings. Here, DSS did not build that bridge.

Order.<sup>9</sup> If the trial court determines there is evidence to support an adjudication of abuse or neglect, the trial court should enter a new order addressing disposition. If the trial court determines the evidence supports neither adjudication of Kevin as abused nor neglected, it shall dismiss the Petition.

**Conclusion**

¶ 28 Accordingly, for the foregoing reasons, we vacate the trial court's 30 June 2021 Adjudication Order and 10 September 2021 Disposition Order and remand this matter for further proceedings as set forth herein.

VACATED AND REMANDED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).

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<sup>9</sup> Because of our conclusion vacating the Adjudication Order, we also do not reach Respondent-Mother's argument the trial court erred in the Disposition Order by failing to specify the frequency and duration of Respondent-Mother's visitation with Kevin.