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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-858

No. COA22-529

Filed 20 December 2022

Mecklenburg County, No. 21SP828

IN THE MATTER OF:

B.J.N.

Appeal by respondent from order entered 13 January 2022 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2022.

Ewing Law Firm, P.C., by Robert W. Ewing, for respondent-appellant.

Douglas L. Hall for petitioner-appellee Mecklenburg County Department of Social Services, no brief.

GORE, Judge.

¶ 1

Respondent, B.J.N. (“Brian”)¹ was adjudicated incompetent and appointed a guardian. Brian presents two issues on appeal: (i) whether the trial court’s Order contains sufficient findings of fact; and (ii) whether the trial court’s findings of fact are otherwise sufficient to support a conclusion that he is incompetent under a clear,

¹ We use a pseudonym to protect the identity of respondent and for ease of reading.

cogent, and convincing evidence standard. Upon review, we vacate and remand for additional findings not inconsistent with this opinion.

I.

A.

¶ 2

On 3 May 2021, the Mecklenburg County Department of Social Services (“DSS”) filed a petition for an adjudication of incompetence and application for appointment of guardian or limited guardian. Following a hearing held on 1 June 2021, the Clerk of Mecklenburg County Superior Court found by clear, cogent, and convincing evidence that Brian is an incompetent adult and entered an Order on Petition for Adjudication of Incompetence naming Phoenix Counseling Center as Brian’s Guardian.

¶ 3

Brian appealed this Order to superior court and requested a de novo hearing pursuant to N.C. Gen. Stat. § 35A-1115. Following a hearing held on 29 November 2021, the superior court entered its Order on Motion for Incompetency Appeal on 13 January 2022 which concluded that Brian is incompetent and ordered Phoenix Counseling Center to continue as Brian’s guardian.

B.

¶ 4

Respondent Brian timely filed written notice of appeal to this Court on 7 February 2022. This court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 35A-1115.

II.

A.

¶ 5 “Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals.” N.C. Gen. Stat. § 35A-1115 (2022).

We review a trial court’s adjudicatory decision for the purpose of determining whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. A trial court’s finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding. The trial court’s conclusions of law are reviewable de novo on appeal.

In re A.E., 379 N.C. 177, 184, 2021-NCSC-130, ¶ 14 (*purgandum*).

B.

¶ 6 Brian argues findings of fact numbers 5, 7, 8, and 9 on the trial court’s Order are insufficient as they contain mere recitations of witness testimony, and the trial court failed to assess the credibility of the evidence presented. We agree.

¶ 7 Our North Carolina Supreme Court has routinely held that “[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible.” *In re C.H.*, 381 N.C. 745, 759, 2022-NCSC-84, ¶ 41 (quoting *In re A.E.*, 379 N.C. at 185, 2021-NCSC-130, ¶ 16). “There is nothing impermissible

about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes[.]” *In re A.E.*, 379 N.C. at 185, 2021-NCSC-130, ¶ 18 (alteration in original) (quotation marks and internal citation omitted). If the trial court fails to make an independent credibility determination upon a bare description of witness testimony, such a finding is “legally defective” and “we are compelled to disregard [those challenged portions] in evaluating the validity of the trial court’s [incompetency] order.” *In re N.D.A.*, 373 N.C. 71, 75, 833 S.E.2d 768, 772 (2019).

¶ 8 In the instant case, Brian challenges the following findings of fact:

5. Guardianship Specialist Natasha Hoyle *provided extensive testimony* regarding her professional involvement with [Brian] since June 2021. She *shared her concerns* about his inability to manage his personal affairs including medication management and healthcare decisions – as evidenced by monthly hospitalizations, involuntary commitments and/or Emergency Room visits – as well as his inability to maintain safe and appropriate shelter.

...

7. Ms. Hoyle *testified* that she, [Brian]’s family members, and [Brian]’s treating medical professionals do not feel he is capable of managing his own affairs or making and communicating important health care decisions.

8. [Brian] *testified* that he needs assistance but does not want a guardian.

9. The Guardian ad Litem *recommended* that the Respondent/Appellant be adjudicated incompetent.

¶ 9 We must disregard each of the challenged findings as mere recitations of

witness testimony unsupported by an independent credibility assessment. Upon further review, the remaining unchallenged findings of fact are insufficient to support a conclusion that Brian is an incompetent adult within the meaning of § 35A-1101(7).

¶ 10 We also note that the trial court’s conclusions of law set forth statutory standards for incompetency, but do not otherwise resolve the ultimate material dispute on the issue of whether Brian: (1) “lacks sufficient capacity to manage [his] own affairs or to make or communicate important decisions concerning [his] person, family, or property[;]” and (2) “whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.” § 35A-1101(7) (2022).

III.

¶ 11 Accordingly, we vacate the trial court’s Order and remand for further proceedings not inconsistent with this opinion. The trial court may, in its discretion, receive additional evidence on remand to support the entry of a new order containing proper findings and conclusions. *See In re N.D.A.*, 373 N.C. at 84, 833 S.E.2d at 777. Considering our resolution of this matter on this issue, we decline to address respondent’s remaining arguments.

VACATED AND REMANDED.

Judges ZACHARY and WOOD concur.

IN RE: B.J.N.

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Opinion of the Court

Report per Rule 30(e).