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NO. COA13-160
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

IN THE MATTER OF:

K.B.G. Mitchell County
No. 09 J 32

Appeal by respondent from order entered 30 October 2012 by Judge Alexander Lyerly in Mitchell County District Court. Heard in the Court of Appeals 1 July 2013.

Hal G. Harrison and R. Ben Harrison for petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

Michael N. Tousey for guardian ad litem-appellee.

GEER, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to her daughter K.B.G. ("Kayla").¹ Although this is the second appeal in this case, we are required to reverse and remand again. On remand from the first appeal, the trial court concluded that two grounds existed

¹The pseudonym "Kayla" is used throughout this opinion to protect the identity of the minor child and for ease of reading.

to terminate parental rights: neglect and a willful failure to make reasonable progress to correct the conditions that led to the removal of the child. Because the second ground -- the failure to make reasonable progress -- was not alleged in the motion to terminate parental rights, that ground could not be a basis for terminating respondent mother's parental rights. As for the ground of neglect, we are forced to hold, as we did in the first appeal, that the trial court's findings of fact are insufficient to support the conclusions of law.

The neglect findings of fact amount to a lengthy recitation of a social worker's testimony and a summary of respondent father's testimony followed by a finding that the court found the social worker credible and Kayla's father's testimony not credible. A finding that a witness is credible is not a substitute for the specific, ultimate findings of facts necessary to support the court's conclusion that grounds existed to terminate respondent mother's parental rights based on neglect. Consequently, we reverse and remand for further findings of fact.

Facts

On 2 July 2009, the Mitchell County Department of Social Services ("DSS") filed a petition asserting that Kayla was a neglected and dependent juvenile. The petition alleged that on

17 March 2009, respondent mother and Kayla's father had engaged in domestic violence in the presence of Kayla. The petition further alleged that prior to the March 2009 incident, respondent mother had stayed in a Safe Place Shelter due to domestic violence but then returned to Kayla's father. According to the petition, on 2 July 2009, respondent mother admitted to DSS that the father had continued to cause injury to her.

DSS was granted custody of Kayla on 2 July 2009. On 20 August 2009, the trial court entered an order adjudicating Kayla to be a neglected and dependent juvenile. On 17 December 2010, DSS filed a motion to terminate respondent mother's and the father's parental rights to Kayla based on neglect. The motion alleged that, in violation of court orders, respondent mother and the father continued to have contact with each other and to engage in domestic violence.

A termination of parental rights hearing was held on 12 July 2011, and the trial court entered an order terminating respondent mother's and the father's parental rights on 16 August 2011. Respondent mother and the father both appealed that order, and this Court reversed and remanded to the trial court "for proper findings of fact and conclusions of law which are supported by those findings of fact." *In re K.B.G.*, _____

N.C. App. ____, 725 S.E.2d 474, 2012 WL 1514885, at *3, 2012 N.C. App. LEXIS 565, at *8-9 (2012) (unpublished). This Court held that the trial court failed to make "specific, ultimate findings of fact establishing that [Kayla] was a neglected juvenile," since all of the trial court's relevant findings were "nearly verbatim recitations of the allegations contained in DSS's motion to terminate [respondent mother's and the father's] parental rights." *Id.*, 2012 WL 1514885, at *2, 2012 N.C. App. LEXIS 565, at *6.

Upon remand, the trial court did not hear new evidence. On 30 October 2012, the court entered a new termination of parental rights order, in which it concluded that grounds existed to terminate respondent mother's parental rights based on neglect, N.C. Gen. Stat. § 7B-1111(a)(1) (2011), and based on respondent mother's willful action of leaving Kayla in foster care for a period of 12 months without showing reasonable progress in correcting the conditions that led to removal of the child, N.C. Gen. Stat. § 7B-1111(a)(2). The court further concluded it was in Kayla's best interest to terminate respondent mother's parental rights.² Respondent mother timely appealed to this Court.

I

²The order after remand also terminated the parental rights of Kayla's father. He is not a party to this appeal.

At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1109(f) (2011); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). This Court's review is limited to determining whether clear and convincing evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

Respondent mother first argues that the trial court erred in concluding that grounds existed to terminate her parental rights based on willfully leaving Kayla in foster care for a period of 12 months without showing reasonable progress in correcting the conditions which led to Kayla's removal under N.C. Gen. Stat. § 7B-1111(a)(2). Respondent mother contends that the court was not permitted to find that this ground for termination existed since this ground was not alleged in DSS' motion to terminate parental rights.

"While there is no requirement that the factual allegations in a petition for termination of parental rights be exhaustive or extensive, they must put a party on notice as to what acts, omissions, or conditions are at issue." *In re C.W. & J.W.*, 182 N.C. App. 214, 228, 641 S.E.2d 725, 735 (2007)

(quoting *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002)). DSS argues that the motion's "numerous allegations averring that [respondent mother] had failed to make reasonable progress" sufficiently "placed [respondent mother] on notice that DSS intended to argue that termination grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2)."

In this case, the motion expressly alleged that "both respondent parents have neglected the juvenile and have continued to neglect the juvenile as defined by N.C.G.S. § 7B-101(a)(1) [sic] and there is a likelihood of future neglect if the juvenile is returned to the parents, to wit:" Following that allegation of neglect, the motion then set out the factual allegations now pointed to by DSS as placing respondent mother on notice that DSS was proceeding under N.C. Gen. Stat. § 7B-1111(a)(2), as well as § 7B-1111(a)(1).

The petition made no express mention of N.C. Gen. Stat. § 7B-1111(a)(2) as a ground for terminating respondent mother's parental rights. And, the only factual allegations in the motion pointed to by DSS as giving respondent mother notice that DSS intended to argue for termination based on a failure to make reasonable progress were specifically set out as providing factual support only for the contention that respondent mother "neglected the juvenile." We cannot, therefore, conclude that

the motion placed respondent mother on reasonable notice that DSS intended to argue that grounds existed to terminate her parental rights based upon her failure to make reasonable progress.

Consequently, the trial court erred by finding on remand that grounds existed to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). See *In re C.W.*, 182 N.C. App. at 228-29, 641 S.E.2d at 735 (holding trial court erred by terminating respondent's parental rights based on abandonment because it was undisputed that DSS did not allege abandonment as a ground for termination). DSS asks this Court to "reconsider its holding[]" and "overrule" the Court's decision in *In re C.W.* However, it is well established that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We are bound by the holding in *In re C.W.*

II

Respondent mother next contends that the trial court's findings of fact are insufficient to support its conclusion that grounds existed to terminate her parental rights based on neglect. Specifically, respondent mother contends that the only

findings of fact in the trial court's order supporting its conclusion that the ground of neglect existed, which were set out in the trial court's finding of fact 5(a), "merely summarize[d] the testimony of the social worker" at the termination hearing and, thus, did "not represent the trial court's independent determination of the facts."

DSS, however, argues that the trial court's finding of fact 5(a), combined with the court's separate findings that the social worker's testimony was credible, that the father's testimony at the hearing was not credible, and that respondent mother did not present evidence, sufficiently supported the court's conclusion that grounds existed to terminate respondent mother's parental rights based on neglect.

Under Rule 52(a)(1) of the Rules of Civil Procedure, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law" It is well established that "'while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.'" *In re*

C.L.C., K.T.R., A.M.R., E.A.R., 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2005) (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982)), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006).

"Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quoting *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988)). The ultimate findings of fact must be "sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (quoting *Quick*, 305 N.C. at 451, 290 S.E.2d at 657).

In this case, in finding of fact 5, the trial court stated: "The respondent parents have neglected the juvenile and have continued to neglect the juvenile as defined by N.C.G.S. §101(a)(1) [sic], and there is a likelihood of future neglect if the juvenile returned to the respondent parents, to wit:" (Emphasis added.) The finding of fact then continued with subparagraph (a), which contained nothing more than a lengthy summary of the testimony of the DSS social worker. Finding of

fact 5(a) simply stated in sentence after sentence, over three and a half pages, that the social worker "testified" to various facts. In the following subparagraph (b), the trial court summarized the testimony of Kayla's father.

Finding of fact 6 then addressed the facts supporting the ground that the respondent parents had willfully failed to make reasonable progress in correcting the conditions that led to the removal of Kayla from their custody. After the two findings purporting to set out the facts supporting the two, separate grounds for termination, the court then found:

7. The Court finds the testimony of [the social worker] to be very credible, and the Court attaches significant credibility to his testimony.

8. The Court finds that respondent [mother] failed to testify in this matter. The Court further finds that the testimony of respondent [father] was not credible, was vague and did not establish any credible action or behaviors that would indicate that the juvenile would not continue to be neglected if the child was returned to their custody and care.

"When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). The question remains, however, whether the court's findings as to credibility satisfy the requirement that it "make specific findings of the

ultimate facts." *In re C.L.C.*, 171 N.C. App. at 446, 615 S.E.2d at 708.

We find the order in this case similar to the dispositional portion of the order adjudicating a child neglected in *In re A.S.*, 190 N.C. App. 679, 661 S.E.2d 313 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). In that case, the trial court found: "'That the statements set forth in the Court Report of [the] social worker . . . are true and the statements set forth in the Court Report of guardian ad litem . . . are true'" *Id.* at 691, 661 S.E.2d at 321. With respect to that finding, this Court held that the trial court was "required to make its own findings of fact based on th[e] reports and any testimonial evidence presented" and that "[t]he trial court's bare finding that 'the statements set forth' in the reports 'are true' does not tell this Court upon which assertions in those reports the trial court was relying." *Id.* at 694, 661 S.E.2d at 322. Accordingly, this Court vacated the dispositional portion of the order and remanded with instructions for the trial court to, among other things, "specify which statements in the reports it is finding as a fact." *Id.*, 661 S.E.2d at 323.

Similarly, here, the court's finding of fact 5(a), summarizing at length the social worker's testimony, along with the credibility findings, do not, even when read together, tell

this Court upon which portions of the social worker's testimony the court was specifically relying when reaching its conclusion as to neglect. As this Court has held, "[t]here is nothing impermissible about describing testimony, *so long* as the court ultimately makes its own findings, resolving any material disputes." *In re C.L.C.*, 171 N.C. App. at 446, 615 S.E.2d at 708 (emphasis added).

In other words, it was permissible for the trial court to summarize the social worker's testimony, as it did in finding of fact 5(a), and then find that testimony credible. But, the trial court then needed to go beyond describing what the social worker "testified" and specifically find facts. For example, the trial court found:

[The social worker] testified that on 7 September 2010 an incident occurred between both respondents when respondent [father] was found in the home of respondent [mother] and domestic violence occurred. He testified that windows were broken and alcohol was present. He testified that there were physical injuries to respondent [mother] and respondent [father's] hand was cut. . . . He testified that respondent [mother] had black eyes from this incident. He testified that respondent [father] continued to exhibit violence against respondent [mother]. He testified that respondent [mother] continued to refuse to testify against respondent [father] on any criminal charges that were referred.

A proper finding of fact that would provide support for the trial court's conclusion of law would read instead:

The social worker testified regarding an incident of domestic violence that occurred on 7 September 2010. Based on that testimony, the Court finds that on that date, respondent father was found in the home of respondent mother and domestic violence had occurred. Windows were broken and alcohol was present. There were physical injuries to respondent mother and respondent father's hand was cut. Respondent mother had black eyes from this incident. Respondent mother, however, continued to refuse to testify against respondent father on any criminal charges that were referred.

Indeed, in finding of fact 6, which set out the facts supporting the failure to make reasonable progress ground, the trial court did make a proper finding of fact that referenced the social worker's testimony, but still set out the trial court's own finding of fact: "Based upon the testimony of [the social worker], the Court finds that both respondent parents failed to comply with the requirements of their Case Plan, specifically they failed to provide documentation to the Court on 3 separate occasions after the Court continued to give them additional time to make that demonstration. Both respondents continued to act in a manner consistent with the conduct that led to the removal of the child from their custody on 2 July 2009."

The guardian ad litem points to the trial court's finding of fact 6 and its subparagraphs and argues that those ultimate findings can support the conclusion that grounds existed to terminate respondent mother's parental rights based on neglect. However, the termination order is structured so that the trial court's finding of fact 5 is specifically identified as supplying, in subparagraphs, the findings necessary for neglect, while finding of fact 6 states that it is setting out, also in subparagraphs, the facts supporting the failure to make reasonable progress ground. Even though finding of fact 6 refers to continuing neglect, we still do not know what facts the trial court determined supported its conclusion that there was continuing neglect.

Accordingly, we do not believe that the trial court's findings in finding of fact 6 regarding an entirely different ground for termination can allow this Court to "review the decision and test the correctness of the judgment" with respect to the court's *neglect* determination. *In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660 (quoting *Quick*, 305 N.C. at 451, 290 S.E.2d at 657).

We are aware that this case has already been remanded once based upon the trial court's failure to make "specific, ultimate findings of fact establishing that [Kayla] was a neglected

juvenile." *In re K.B.G.*, ___ N.C. App. ___, 725 S.E.2d 474, 2012 WL 1514885, at *2, 2012 N.C. App. LEXIS 565, at *6. We are mindful that another remand further delays permanency for Kayla, but it is this Court's role to review orders and not decide cases in the first instance, and we cannot fill that role when, as here, the order lacks specific, ultimate findings of fact to support its conclusion that grounds existed to terminate respondent mother's parental rights based on neglect.

Accordingly, we reverse the trial court's order and remand for further findings of fact consistent with this opinion. Given our decision, we do not reach respondent mother's remaining arguments pertaining to the adjudication portion of the order.

III

Respondent mother additionally contends that, in the disposition portion of the order, the trial court failed to make required findings of fact regarding Kayla's best interests under N.C. Gen. Stat. § 7B-1110(a) (2011). N.C. Gen. Stat. § 7B-1110(a) provides: "[T]he court shall consider the following criteria and make written findings regarding the following that are relevant:" "(1) [t]he age of the juvenile"; "(2) [t]he likelihood of adoption of the juvenile"; "(3) [w]hether the termination of parental rights will aid in the accomplishment of

the permanent plan for the juvenile"; "(4) *[t]he bond between the juvenile and the parent*"; "(5) [t]he quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement"; and "(6) [a]ny relevant consideration." (Emphasis added.)

Respondent mother contends that the court erred by failing to make findings addressing Kayla's bond with respondent mother. In support of her argument, respondent mother points to the social worker's testimony that respondent mother had only missed between five and 10 scheduled monthly visits during the two-year history of the case and that visits with respondent mother "went well." She further points to evidence of an August 2009 letter from a Child Services Coordinator with the Mitchell County Health Department that tended to show a positive relationship between respondent mother and Kayla.

DSS argues, however, that the August 2009 letter was not properly in evidence and, thus, was not relevant to the court's determination. The letter is included in the record on appeal, but was not offered into evidence as an exhibit during the termination hearing. With respect to its best interests determination, however, the trial court found, in relevant part, that "all of the testimony of Petitioners [sic] witness, *together with the entire Court file[,]* establish that the

termination of parental rights of [respondent mother] and [the father] to their child [Kayla] is in the best interest and welfare of the juvenile." (Emphasis added.)

"This Court has held '[a] trial court may take judicial notice of earlier proceedings in the same cause' and that it is not necessary for either party to offer the file into evidence." *In re M.N.C.*, 176 N.C. App. 114, 120, 625 S.E.2d 627, 632 (2006) (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). In this case, although the trial court's finding indicates that it considered the "entire Court file" in making its best interests determination, the finding does not actually state that the trial court took judicial notice of the entire court file. We cannot tell, therefore, whether the letter was considered by the trial court in reaching its decision.

Nonetheless, the testimony of the social worker did establish that respondent mother had missed between five and 10 scheduled one-hour, monthly visits during the two-year history of the case. Although the social worker testified at one point that visits with respondent mother "went well," he also testified that Kayla's "[b]ehavior in the office at the end of visits, she's crawled under the table crying. She has just shut down emotionally, lied stiff [sic] either on the floor or sit [sic] in a chair and wouldn't move at the end . . . of the

visits with the parents." The trial court did not, however, make any findings of fact, apart from describing this testimony, regarding the interaction between respondent mother and Kayla.

We believe that, whether favorable to respondent mother or not, the evidence regarding visitation was relevant to the issue of the bond between respondent mother and Kayla under N.C. Gen. Stat. § 7B-1110(a)(4). The trial court was, therefore, required to make written findings of fact regarding that factor. *Id.* See also *In re J.L.H.*, ___ N.C. App. ___, ___, 741 S.E.2d 333, 338 (2012) (rejecting argument that trial court's findings were sufficient under N.C. Gen. Stat. § 7B-1110(a) as long as it was apparent that court considered all relevant factors since statute "explicitly requires the trial court to make written findings of fact on all relevant factors").

On remand, if, after making further findings of fact as to the adjudication phase, the trial court again concludes that grounds exist to terminate respondent mother's parental rights, then the court must make written findings of fact regarding each factor set out in N.C. Gen. Stat. § 7B-1110(a) on which evidence was presented, including the bond between respondent mother and Kayla.

Reversed and remanded.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).