COA14-432
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF: Vance County
No. 13 JA 20

S.W.

Appeal by Respondent from orders entered 27 January 2014 by Judge J. Henry Banks in District Court, Vance County. Heard in the Court of Appeals 20 October 2014.

No brief filed for Petitioner-Appellee Vance County Department of Social Services.

Mercedes O. Chut for Respondent-Appellant.

McGuire Woods LLP, by T. Richmond McPherson, III, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent appeals from the district court's adjudication order concluding that S.W. ("the child") was a neglected juvenile, as well as the trial court's resulting disposition order. We affirm in part and reverse and remand in part.

Respondent is a first cousin of the child's biological mother, and Respondent has cared for the child since he was an infant. In 2009, Respondent filed a custody action against the child's mother and, in a temporary custody order entered on 24 July 2009, the trial court awarded Respondent custody of the child "until such final determination by this court." In three subsequent orders, the trial court continued a hearing on the matter and provided the child's mother with specific visitation schedules, but did not alter custody.

The Vance County Department of Social Services ("DSS") obtained nonsecure custody of the child and filed a petition on 4 March 2013, alleging that the child was a neglected and dependent juvenile. According to the petition, the six-year-old child had been diagnosed with conduct disorder (childhood onset type), attention deficit/hyperactivity disorder, post-traumatic stress disorder, and cyclothymia. He had been prescribed Zyprexa, Methalyn, Depacote sprinkles, and Prozac. The petition alleged that the child had been displaying dangerous and disturbing behavior, such as killing Respondent's family cats, urinating on the Respondent's children, being physically violent at school and home, and stating that he wanted to kill Respondent's boyfriend. The petition further alleged that

Respondent could not control the child, had failed to follow through with the recommendations of the child's mental health care providers and, on or about 17 January 2013, had taken the child off of his medications. Lastly, the petition alleged that the child was terminated from intensive in-home services because Respondent failed to follow through with recommended out-of-home treatment at a residential facility.

Following a hearing, the trial court entered an order adjudicating the child neglected. The adjudication was based on, *inter alia*, findings that in-home services were not effective for the child; that his mental health care provider, Triumph, had located an out-of-home placement, but that Respondent refused it because it was too far for her to drive to see the child; that Triumph terminated services with the child due to Respondent's non-cooperation; that Respondent took the child off his medications without consulting his physician; and that the child had exhibited sexualized behaviors.

In a separate disposition order, the trial court concluded that it was in the child's best interests to remain in DSS custody. The child remained with his biological mother until an out-of-home placement specializing in aggressive and sexualized behaviors could be found. Respondent appeals.

I.

Caretaker or Custodian

On appeal, Respondent first argues the trial court erred in concluding that she was a caretaker, as opposed to a custodian. N.C. Gen. Stat. § 7B-101 provides statutory definitions for "caretaker" and "custodian," in relevant part as follows:

> (3) Caretaker. – Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting.
>
> . . . .
>
> (8) Custodian. – The person or agency that has been awarded legal custody of a juvenile by a court.

N.C. Gen. Stat. § 7B-101 (2013). The distinction between caretaker and custodian is a meaningful one, as this State's juvenile code provides custodians with certain rights that caretakers do not have, including standing to appeal. *See* N.C. Gen. Stat. § 7B-1002 (2013).

In the adjudication and disposition orders in this case, the trial court concluded that Respondent was a caretaker. The trial court found that "[t]here has been no physical custody order entered in this matter other than a temporary [] custody order. The biological mother and the caretaker have had the custody order pending for at least two years." Thus, it appears

the trial court assumed that, because the custody order was intended to be temporary and was not converted into a permanent custody order, it had no legal effect. Respondent, however, argues that the custody order converted into a permanent custody order by operation of law and the passage of time. The guardian ad litem ("GAL") disputes this argument, contending that the order remained a temporary order.

We need not determine whether the order was temporary or permanent, because Respondent meets the definition of a custodian under the plain language of N.C. Gen. Stat. § 7B-101(8). The trial court entered an order on 24 July 2009 ("the 2009 order"), awarding custody of the child to Respondent. Subsequent to entry of the 2009 order, the trial court did not enter any orders that altered custody of the child[1]. The GAL has not cited to any case law that suggests temporary legal custody does not constitute "legal custody" as required in N.C. Stat. § 7B-101(8), and we have found none. Regardless of whether the 2009 order was "temporary" or "permanent," it was in effect at the time the petition was filed by DSS. Therefore, Respondent is "[t]he person . . . that has been awarded legal custody of a

[1] The trial court entered subsequent orders in the custody dispute, but the orders only addressed visitation with the child's mother.

juvenile by a court." N.C. Stat. § 7B-101(8). Accordingly, the trial court's conclusion that Respondent was a caretaker was erroneous. We reverse this portion of the 27 January 2014 adjudication order, and remand for correction.

II.

Visitation

Respondent next argues the trial court erred in its 27 January 2014 disposition order by failing to provide for visitation in accordance with N.C. Gen. Stat. § 7B-905.1 (2013). This section provides that "[a]n order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a). The trial court may, however, prohibit visitation if doing so is in the child's best interest or consistent with the child's health and safety. This Court has previously held that:

> [i]n the absence of findings that the parent has forfeited [his or her] right to visitation or that it is in the child's best interest to deny visitation[,] the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation

> rights may be exercised. As a result, even if the trial court determines that visitation would be inappropriate in a particular case or that a parent has forfeited his or her right to visitation, it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.

In re K.C. & C.C., 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (internal quotations and citations omitted). Although *K.C.* dealt with visitation between a parent and child, the holding is applicable to the present case pursuant to the plain language of N.C. Gen. Stat. § 7B-905.1(a).

In this case, the trial court made the following finding of fact regarding visitation: "[Respondent] shall not have any visits with the minor child and there is no need for a visitation plan since the child is placed with his biological mother." The trial court provided no explanation for its reason in denying visitation to Respondent. The trial court appeared to base its reasoning on the erroneous conclusion that Respondent was not entitled to visitation because she was not a parent. However, as a custodian, Respondent was entitled to visitation under N.C. Gen. Stat. § 7B-905.1, absent a finding that visitation "would be inappropriate in light of the specific

facts under consideration." *K.C.*, 199 N.C. App. at 562, 681 S.E.2d at 563; *see also In re T.W.C.*, __ N.C. App. __, __, 758 S.E.2d 706, __, 2014 WL 1384398, at *5 (2014) (citation omitted). The trial court failed to make such a finding and the order therefore failed to comply with N.C. Gen. Stat. § 7B-905.1. Consequently, we must reverse and remand this portion of the trial court's disposition order for further action in accord with N.C. Gen. Stat. § 7B-905.1 and *K.C.*, 199 N.C. App. at 562, 681 S.E.2d at 563.

III.

Compliance with N.C. Gen. Stat. § 7B-507(b)

Respondent argues that the trial court's dispositional order is in error because it fails to comply with several provisions of N.C. Gen. Stat. § 7B-507. When a trial court enters "[a]n order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services," the trial court's order is required to, *inter alia*, "contain findings as to whether [DSS] should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection

(b) of this section that such efforts are not required or shall cease[.]" N.C. Gen. Stat. 7B-507(a)(3) (2013).

In order to cease reunification efforts with a parent or custodian, the trial court must comply with certain statutory requirements. In pertinent part, N.C. Gen. Stat. § 7B-507(b) provides the following:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations

omitted). "The trial court may 'only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.'" *In re N.G.*, 186 N.C. App. 1, 10, 650 S.E.2d 45, 51 (2007) (citation omitted).

Respondent does not contest any of the trial court's dispositional findings of fact. We therefore presume they are supported by competent evidence, and consequently, are binding on appeal. *See In re M.D., N.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). Instead, Respondent argues the trial court erred by: (1) effectively ceasing reunification efforts without making an explicit finding doing so, and (2) failing to make findings of fact in support of its implicit cessation of reunification efforts. We disagree.

First, we conclude that the trial court did, in fact, cease reunification efforts in its disposition order. The trial court made the following findings of fact:

> 10. [Respondent] shall not be released in this matter at this time although [DSS] requested that she be released from the matter as *the plan is not to reunify with [Respondent]*.
>
> 11. That the Court finds that the conditions which led to the removal of the child from the home of [Respondent] still exist and that the *return of the*

> *child to the home of [Respondent] would be contrary to the welfare of the child*. (Emphasis added).

Our Supreme Court has recently stated that a trial court's findings pursuant to N.C. Gen. Stat. § 7B-507(b) need not "quote its exact language."

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." The trial court's written findings must address the statute's concerns, but need not quote its exact language.

In re L.M.T., 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013). In this case, the trial court's finding that "the plan is not to reunify with [Respondent]" was sufficient to put Respondent on notice that "the court [had directed] that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease[.]" N.C. Gen. Stat. § 7B-507(b). In addition, the trial court's finding that "return of the child to the home of [Respondent] would be contrary to the welfare of the child" is akin to a finding that such efforts "would be

inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-507(b)(1). While these findings do not track the statutory language contained in N.C. Gen. Stat. § 7B-507(b)(1), we find them sufficient to "address the statute's concerns." *See L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455.

We also disagree with Respondent's argument that the trial court's cessation of reunification efforts was not supported by its findings of fact. In discussing the child's placement, the trial court made the following findings of fact:

> 4. . . . [The child] has sexualized behaviors that have manifested themselves while he has been in the nonsecure custody of [DSS]. [DSS] is in the process of having a child medical exam conducted on [the child] due to disclosures he has made. [DSS] had the child assessed through mobile crisis on September 24, 2013 in an effort to find him a placement in a facility for children with sexualized behaviors[.] . . . [T]here are no foster homes that would fit [the child's] needs as he cannot be placed with other children at this time. As a part of the crisis plan, [the child] is not to be left alone with any other children and is to [be supervised] at all times. At this time, his mother's home is the safest place for [the child] to be.
>
> . . . .

> 7. . . . [DSS] has made referrals for the family, . . . has worked with mobile crisis and Cardinal Innovation to find an out of home provider for the child that specializes in traumatized children who exhibit sexualized and aggressive behaviors, [and] attempted to work with [respondent] before custody to find an out of home placement after recommendations by the mental health providers[.]
>
> . . . .
>
> 12. [T]he child has experienced extreme trauma and has mental health issues that need to be addressed while he is in the nonsecure custody of [DSS][.]

These findings show that the child had severe mental and behavioral issues that required specialized treatment in an out-of-home facility. The findings also show that, due to the child's aggressive and sexualized behavior, he could not be placed in a home with other children. Respondent, however, had four children in her home. Therefore, Respondent's home was not an appropriate placement for the child. Because these findings outlined the severity of the child's condition and his placement restrictions, we find them sufficient to support a finding that reunification efforts would have been "inconsistent with [his] health, safety, and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-507(b)(1).

Accordingly, we conclude that the trial court did not err in ceasing reunification efforts with Respondent.

IV.

Compliance with N.C. Gen. Stat. § 7B-507(c)

Respondent also argues that the trial court failed to comply with the following statutory provision in N.C. Gen. Stat. § 7B-507(c):

> If the court's determination to cease reunification efforts is made in a hearing that was duly and timely noticed as a permanency planning hearing, then the court may immediately proceed to consider all of the criteria contained in G.S. 7B-906.1(e)[.] If the court's decision to cease reunification efforts arises in any other hearing, the court shall schedule a subsequent hearing within 30 days to address the permanent plan in accordance with G.S. 7B-906.1.

N.C. Gen. Stat. § 7B-507(c) (2013). In the case before us, the trial court ceased reunification efforts in a disposition order, but failed to schedule a permanency planning order within thirty days. Respondent argues that the trial court's failure to do so constitutes error. We disagree.

Our Supreme Court has held that "[m]andamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute." *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008). "The writ of mandamus is an order

from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law." *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971). "A writ of mandamus ensures that the trial courts adhere to statutory time frames without the ensuing delay of a lengthy appeal." *T.H.T.*, 362 N.C. at 455, 665 S.E.2d at 60. "In child welfare cases in which a trial court fails to timely enter an order, mandamus is not only appropriate, but is the superior remedy." *Id.*

In the present case, the trial court failed to comply with a statutory timeline. Therefore, "mandamus [was] an appropriate and more timely alternative than an appeal." *Id.*

> We hold that in appeals from adjudicatory and dispositional orders in which the alleged error is the trial court's failure to adhere to statutory deadlines, such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself. Thus, a new hearing serves no legitimate purpose and does not remedy the error. Indeed, a new hearing only exacerbates the error and causes further delay. Instead, a party seeking recourse for such error should petition for writ of mandamus.

Id. at 456, 665 S.E.2d at 61. We therefore decline to find any reversible error in the trial court's failure to schedule a

permanency planning hearing in accordance with N.C. Gen. Stat. § 7B-507(c).

V.

Neglect Adjudication

Next, Respondent challenges the trial court's adjudication of neglect. The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine "(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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary. *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

First, we address Respondent's challenges to specific findings of fact. The trial court made the following findings, contained in finding of fact number 4, to support its adjudication of neglect:

> d. From November, 2012 until February, 2013, the minor child had at least four (4) different mental health evaluations and the child was admitted to Holly Hill at one point[.]

e. The allegations in each of the mental health assessments were consistent that the minor child had killed cats and put them under the house, he had outbursts, he was physically aggressive, he urinated on [respondent's] children, he chased [respondent's] children with sticks and a bat, and let the air out of car tires and laughed about it. the child also put his head in the stove while it was on which resulted in burns to his face.

. . . .

g. Triumph began in-home services with the child in the home of [respondent]. Those in-home services were not effective and as a result of the child's behaviors, Triumph recommended that the child be placed in an out-of-home placement.

h. Triumph located an out of home placement for the child in Matthews, North Carolina. The out of home placement also had a bed ready for the child. This was remarkable provided that many times, a child can be approved for an out of home placement but due to the demand for beds for children, the waiting list can be long and finding a provider can be extremely difficult.

i. The day before the child was to go to the out of home placement, [respondent] refused to allow the child to go saying the placement was too far for her to drive to see the child although [respondent] knew from the planning phases of this process of the distance. [Respondent] does have transportation and has stated to [DSS] that she is a

travelling nurse who travels throughout the state of North Carolina as well as Virginia for her job. [Respondent] allowed the planning process to proceed and then refused when the placement was identified and accepted.

j. Triumph then terminated the services with the child due to noncooperation of [respondent].

. . . .

l. The minor child was on several medications and [respondent] took the child off his medication that he needed every day and kept the child on medication that he did not need on a daily basis. She placed the child on a "medication holiday" without consulting the child's doctor.

m. the child's doctor, after becoming aware of the "medication holiday," warned [respondent] of the importance of the child being on his medication.

n. [Respondent] then elicited the services of Reaching Your Goals for the child, yet another mental health provider and subjected the child to yet another mental health assessment.

. . . .

p. After numerous recommendations that the child needed to be placed in an out of home placement, [respondent] refused to do so and did not actively pursue treatment for the child.

q. the child is extremely sexual in nature and has exhibited sexualized behaviors since coming into foster care which is

> of grave concern to all parties involved.
>
> r. the child also had behavioral concerns at school and the school attempted to address the concerns with [respondent] and [she] would not follow through with the recommendations from the school either.

Respondent first challenges findings of fact 4(i) and (p) which pertain to her refusal to place the child in an out-of-home facility in Matthews, North Carolina. First, Respondent argues that she objected to the placement in Matthews based only on its distance, but did not object to an out-of-home placement outright. We are not persuaded.

Respondent essentially argues that the trial court should not have discredited her reason for rejecting the placement and should not have placed much weight on this particular piece of evidence. However, it is not our duty to re-weigh the evidence and substitute our judgment for that of the trial court. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). Furthermore, the majority of the factual findings in

4(i) and (p) are supported by the testimony of the DSS social worker who investigated the child's case, as well as the testimony of Respondent.

Respondent also argues that the portion of finding of fact 4(i) stating that Respondent "had a job as a traveling nurse" was "irrelevant." However, even without this portion of finding of fact 4(i), the trial court's findings of fact are sufficient to support an adjudication of neglect. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (citation omitted) ("When . . . ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error."). Therefore, even assuming this portion of finding of fact 4(i) constituted error, it does not constitute reversible error. We find no error in the remaining portions of findings of fact 4(i) and (p), as discussed above.

Second, we turn to Respondent's challenge to finding of fact number 4(r), regarding the child's behavioral problems at school. Respondent again argues that this finding of fact is lacking in evidentiary support. We agree, in part. The record is replete with evidence demonstrating that the child had behavioral concerns at school and that school officials

attempted to address those concerns. However, based on our review, the record does not support the second sentence of number 4(r) – that Respondent failed to follow through with recommendations purportedly made by school officials. Nonetheless, this portion of the finding is not necessary to support an adjudication of neglect. We again find that any error is harmless, *see id.*, and we find no error as to the remaining portion of finding 4(r).

Respondent challenges two additional findings of fact – numbers 4(k) and (o). Neither of these findings is necessary to sustain the adjudication of neglect and we, therefore, need not address them. *See id.*

VI.

Findings of Neglect

Next, we address Respondent's argument that the findings of fact do not support the conclusion that the child was a neglected juvenile. A neglected juvenile is defined as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; 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 who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Respondent also invokes this Court's longstanding requirement "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) (citations omitted). Respondent again argues that she only disagreed with one placement for the child and did not deny the child treatment outright. Respondent also argues that the findings regarding the child's "medication holiday" are not specific enough to establish any impairment because the findings do not show any time frame or describe how the "medication holiday" affected the child.

The findings listed above demonstrate that the child exhibited dangerous and uncontrollable behavior due to behavioral and psychiatric disorders. The findings establish that the child needed specialized treatment to address his condition, and that Respondent rejected an appropriate out-of-home placement for him, despite the scarcity of such placements. As a result of Respondent's failure to cooperate, the child's service provider terminated services. Additionally, the findings show that Respondent took the child off his medications

without consulting the child's physician. Given the severity of the child's condition, the trial court was justified in concluding that the child did not receive proper care and proper medical care from Respondent. The findings also support the conclusion that, as a consequence of the lack of care, the child suffered mental or emotional impairment, or was subjected to a substantial risk of impairment. Accordingly, we affirm the trial court's conclusion that the child was a neglected juvenile.

Affirmed in part; reversed and remanded in part.

Judges HUNTER, Robert C. and ELMORE concur.

Report per Rule 30(e).