An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA14-992

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

IN THE MATTER OF:

S.W. — Vance County No. 13 JA 20

Appeal by respondent from order entered 13 June 2014 by Judge J. Henry Banks in Vance County District Court. Heard in the Court of Appeals 3 March 2015.

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.

CALABRIA, Judge.

Respondent appeals from the trial court's permanency planning order, contending the trial court erred by granting the Vance County Department of Social Services' ("DSS") motion ordering her removal as a party and by failing to make sufficient and consistent findings of fact to support its order. We affirm.

I. Background

Respondent agreed to take care of S.W. ("Sean")[1] at night while Sean's biological mother ("Crystal") was working. Respondent is Crystal's first cousin, who initially returned Sean to Crystal when she would pick him up on her way home from work. Subsequently, respondent sought and was awarded temporary custody on 24 July 2009. Crystal was granted visitation. The biological father is unknown.

On 4 March 2013, DSS filed a juvenile petition. Respondent was the only "custodian" listed on the petition and DSS identified her as a "guardian." The petition alleged that Sean was neglected, for not receiving proper care, supervision, discipline, medical care, or remedial care. The petition also alleged that Sean was dependent since respondent was unable to provide for his care. In an attachment to the petition, DSS further alleged that Sean was acting out violently and sexually, and suffered from numerous mental health conditions. Specifically, Sean was diagnosed with, *inter alia*, conduct disorder, childhood-onset type; attention deficit/hyperactivity disorder; and post-traumatic stress disorder. According to DSS, Sean was not making progress in

[1] We use a pseudonym to protect the minor child's identity and for ease of reading.

therapy, yet respondent refused intensive in-home services. Sean was later involuntarily committed following recommendations made by Triumph in its Comprehensive Clinical Assessment alleging that Sean was a danger to himself and others.

DSS obtained nonsecure custody of Sean because it was not in his best interests to remain with respondent. In granting the nonsecure custody order, the trial court also found Sean was exposed to a substantial risk of physical injury or sexual abuse and in need of medical treatment. Respondent filed an answer to the petition. The trial court entered several additional nonsecure custody orders.

Since custody had been pending for at least two years and the only order entered in this matter was a temporary custody order, on 27 January 2014 (the "January 2014 order"), DSS, Sean's Guardian *Ad Litem*, respondent, Crystal, and Crystal's attorney were present for an adjudication hearing. The trial court found, *inter alia*,

> d. From November, 2012 until February, 2013, [Sean] 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 [Sean] 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.
>
> . . .
>
> 8. That the return of [Sean] to the home of [respondent] would be *contrary to his welfare*. [Sean] is currently placed with his mother and that it is not in his best interest that legal custody be granted to his biological mother until such time as the child has services in place to address his behavior.
>
> 9. [Respondent] has four other children who are in nonsecure custody of Vance County Department of Social Services at this time. [Crystal] has a biological child and there are no child protective services issues as [Crystal] did not have physical custody of [Sean] during the time in question.
>
> (emphasis added).

The trial court adjudicated Sean as neglected. In the disposition order, the trial court ordered Sean to be placed with his mother, Crystal, since her home was the safest place for Sean until another placement could be secured in a residential treatment facility. Respondent was denied visitation. The trial court ordered DSS to make reasonable efforts to implement a foster care plan and a plan to achieve a safe and permanent home for Sean. In addition, the trial court ordered that the plan for Sean was reunification with his mother. Respondent appeals.

On respondent's appeal from the January 2014 order, this Court heard the appeal on 18 November 2014 and affirmed the adjudication of neglect and the remainder of the trial court's disposition order. *In re S.W.*, ___ N.C. App. ___, 767 S.E.2d 152 (2014) (unpublished). However, this Court held that the trial court improperly classified respondent as Sean's caretaker rather than his custodian in the January 2014 order and reversed that portion of the order as well as the portion of the disposition denying respondent visitation. *Id.*

At the permanency planning hearing on 13 June 2014, both respondent and Crystal were present and represented by counsel. DSS made a motion and the trial court granted DSS's motion to remove respondent as a party. The trial court found:

> 10. There is no need for state intervention in this matter at this time as the child is thriving with his biological mother and is safe. The child is not exhibiting the characteristics he exhibited while in the care of [respondent].
>
> . . .
>
> 14. That the Court finds the conditions which led to the removal of the child from the home of the caretaker still exist and that the return of the child to the home of the caretaker would be contrary to the welfare of the child; however, that it is in the child's best interests that physical and legal custody be granted to [Crystal].

> . . .
>
> 16. There are four (4) other child[ren] in the home of [respondent] who are in the nonsecure custody of [DSS]. There is one other child in the home of [Sean's mother, Crystal] and there are no child protective services issues.

Respondent appeals.

Respondent argues the trial court erred by granting DSS's motion to remove respondent as a party finding that she was Sean's caretaker, rather than a custodian. Specifically, the trial court concluded and ordered that it is in Sean's best interests that his legal and physical custody be granted to his mother, Crystal, and that respondent be released as a party to the action since respondent was not included in the permanency plan.

II. Standard of Review

We review a trial court's order to determine "whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57–58, 641 S.E.2d 404, 408 (2007) (citation omitted). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007).

III. Caretaker vs. Custodian

As an initial matter, we acknowledge that this Court reversed the portion of the January 2014 order classifying respondent as Sean's caretaker rather than his custodian. Typically

> [w]hen an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the *same facts and the same questions*, which were determined in the previous appeal, are involved in the second appeal.

Goetz v. N.C. Dep't of Health & Human Servs., 203 N.C. App. 421, 432, 692 S.E.2d 395, 403 (2010), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 751 (2010) (emphasis added) (citations omitted).

A custodian is "[t]he person or agency that has been awarded legal custody of a juvenile by a court." N.C. Gen. Stat. § 7B-101(8) (2013). "Legal custody" is the general "right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27–28 (2006) (citing *Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000)). North Carolina's Juvenile Code, with the exception of when a court grants DSS custody, "anticipates that any person with whom the child is 'placed' shall be given custody." *In re H.S.F.*,

177 N.C. App. 193, 202, 628 S.E.2d 416, 422 (2006). In fact, "[t]he law uses the phrase 'physical custody' to refer to the rights and obligations of the person with whom the child resides." *Id.* (citation and internal quotation marks omitted). In contrast, a caretaker is "[a]ny person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting." N.C. Gen. Stat. § 7B-101(3) (2013).

In respondent's previous appeal, we reversed the trial court's determination that respondent was a caretaker rather than a custodian, as defined by N.C. Gen. Stat. § 7B-101 (2013). *S.W.*, ___ N.C. App. ___, 767 S.E.2d 152. In this appeal, respondent presents the same argument challenging the trial court's finding that respondent was a caretaker rather than a custodian in the permanency planning order. Although the question of whether respondent was a custodian remains the same, the facts in this appeal are not the same as to the facts in the previous appeal.

From the time the trial court entered the January 2014 order until the 13 June 2014 permanency planning order, Sean was placed with his biological mother and his life drastically improved. First, in the January 2014 order, the trial court removed Sean from respondent's home and DSS placed Sean with his biological

mother, Crystal, since her home was the safest place for Sean until another placement could be secured in a residential treatment facility. In the ninety-day review order entered 10 March 2014, the trial court ordered that Sean remain in his mother's custody until such time as placement could be secured in a residential treatment facility for children with sexualized and aggressive behaviors. Second, only three months later, in the 13 June 2014 permanency planning order, the trial court found that Sean was thriving in his mother's home and ordered that it was in his best interests that physical and legal custody be returned to his mother. Therefore, this Court is not bound by *Goetz* because the facts that led this Court to reverse the trial court's decision regarding respondent's role as a caretaker rather than a custodian in the first appeal are different from the facts that the trial court found in the permanency planning order that respondent appeals.

Although the trial court identifies respondent as Sean's caretaker in the permanency planning order, nothing in the record indicates that, by the time the permanency planning hearing took place, respondent had any responsibility for Sean's health and welfare because Sean had been placed with his mother. More importantly, one of the reasons Sean was removed from respondent's

custody was Sean had been involuntarily committed because he was a danger to himself and others. Therefore, respondent's status as a caretaker terminated pursuant to N.C. Gen. Stat. § 7B-101(3) and Sean's mother, rather than respondent, became Sean's custodian within the definition of N.C. Gen. Stat. § 7B-101(8).

IV. Standing

Since *Goetz* does not apply, this Court must determine whether respondent has standing. If respondent does not have standing, then the trial court properly granted DSS's motion to dismiss and properly removed respondent as a party. Respondent contends that "[a]ppellate [c]ourts have reversed orders entered under Chapter 7B where the trial court does not make findings that demonstrate a legal analysis consistent with statutory criteria." Pursuant to N.C. Gen. Stat. § 7B-401.1(g) (2013), a Juvenile Court has the power to remove a party. N.C. Gen. Stat. § 7B-401.1(g) provides

> [i]f a guardian, custodian, or caretaker is a party, the court may discharge that person from the proceeding, making the person no longer a party, if the court finds that the person does not have legal rights that may be affected by the action and *that the person's continuation as a party is not necessary to meet the juvenile's needs*.

(emphasis added). Therefore, if respondent has standing, she also has legal rights that may be affected. If respondent does not

have standing, her continuation as a party is unnecessary to meet Sean's needs.

Assuming, *arguendo*, that respondent was a custodian for this appeal, our case law provides general guidance on the factors that indicate whether an individual qualifies as a custodian with standing in a custody dispute. In *In Matter of Kowalzek*, this Court found a couple had standing as custodians because the child had been in the respondents' physical custody, respondents had supported the child for several months, and the respondents had expressed a desire to keep the child. 32 N.C. App. 718, 721, 233 S.E.2d 655, 657 (1977). In reaching that conclusion, we noted the importance of the fact in *Kowalzek* that the child was essentially without a natural parent because he had been abandoned by his mother and his natural father had died. *Id.* at 719, 233 S.E.2d at 656.

No bright line rule exists to determine whether a third party has standing in a custody dispute with a child's natural parents. *See Ellison v. Ramos*, 130 N.C. App. 389, 394–95, 502 S.E.2d 891, 894–95 (1998) (declining to develop a bright-line rule and leaving open the question of whether some lesser relationship would also suffice to confer standing); see *In re A.P.*, 165 N.C. App. 841, 600 S.E.2d 9 (2004) (addressing the standing of a step-

grandparent). In *In re A.P.*, we held that a respondent lacked standing as a custodian because both parents had made efforts to maintain the parent-child relationship and the respondent was not a party to the action. 165 N.C. App. at 847, 600 S.E.2d at 13. In *Ellison*, we found the third party had standing in a custody action against the child's biological father because the third party took care of the child for five years, including taking him to medical appointments, school, attending teaching conferences, providing in-home medical care, and buying the child's necessities. 130 N.C. App. at 396, 502 S.E.2d at 895. However, for a parent-child relationship to exist with a third party, there must be some evidence indicating a relationship. *See Bohannan v. McManaway*, 208 N.C. App. 572, 587–88, 705 S.E.2d 1, 11 (2010) (holding there was no standing based on the single factual allegation that a child had resided with the third party and had an ongoing relationship with the third party).

In the instant case, the evidence regarding Sean's relationship with respondent was documented in a Final Child Abuse and Neglect Report completed on 31 October 2013. Sean had to be prompted to talk about the time period he spent living with respondent. Sean described respondent as "mean," because she allegedly beat him, and stated that he did not want to return to

live with respondent. Respondent herself provided evidence of the lack of a parent-child relationship with Sean when she said “I had plans to adopt [Sean] but with all this going on, I don’t think I want to.” Although Sean spent numerous years with respondent apparently no parent-child relationship existed between Sean and respondent.

At the permanency planning hearing, the trial court found, *inter alia*,

> 10. There is no need for state intervention in this matter at this time as the child is thriving with his biological mother and is safe. The child is not exhibiting the characteristics he exhibited while in the care of [respondent].
>
> . . .
>
> 14. That the Court finds the conditions which led to the removal of the child from the home of the caretaker still exist and that the return of the child to the home of the caretaker would be contrary to the welfare of the child; however, that it is in the child’s best interests that physical and legal custody be granted to [Crystal].

Therefore, the trial court found that it would be contrary to Sean’s welfare to return Sean to respondent and that respondent’s continuation as a party was not necessary to meet Sean’s needs. We hold that respondent does not have standing. Since respondent does not have legal rights that may be affected by the action,

respondent has no standing to challenge the order of the trial court. Therefore, the trial court properly granted DSS's motion to remove respondent as a party.

V. Conclusion

Since respondent is no longer Sean's custodian or caretaker, she lacked standing and lacked the legal rights to participate as a party at the permanency planning hearing. The trial court properly granted DSS's motion to dismiss respondent, made a reasoned decision, and did not abuse its discretion in denying respondent participation at the permanency planning hearing. The trial court ordered that it was in Sean's best interests to be reunified with his biological mother. Accordingly, we affirm the trial court's decision.

Affirmed.

Judge DIETZ concurs.

Judge BRYANT concurs in the result only.

Report per Rule 30(e).