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NO. COA05-1472

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

IN RE:
A.M.A.

Polk County
No. 02 J 18

Appeal by respondent father from order entered 12 April 2005 by Judge Robert S. Cilley in the District Court in Polk County. Heard in the Court of Appeals 11 May 2006.

Phillip R. Feagan, for petitioner-appellee Polk County Department of Social Services.

Charlotte Gail Blake, for respondent-appellant.

HUDSON, Judge.

In February 2004, the Polk County Department of Social Services ("DSS") filed a petition to terminate respondent father's parental rights as to minor child A.M.A. The trial court held a hearing on 8 October 2004 and filed its order terminating respondent's parental rights in April 2005. Respondent appeals and we reverse and remand.

A.M.A was born six weeks prematurely in September 2002. Shortly thereafter, DSS filed a petition alleging that A.M.A. was a dependent child. The DSS court report from October 2002 stated that both parents had a history of drug abuse, that there was domestic violence between respondents, that the living environment was unstable and the home inadequate to house an infant, and that

neither parent had stable employment and both had criminal records. The report further stated that the infant was not taken to her first doctor's appointment even though she had jaundice, that respondent father stated that he refused to comply with any DSS request, that during a DSS visit to the home respondent father became angry and screamed and cursed at the DSS workers and exposed his buttocks twice, and that during a DSS visit police were conducting a drug raid of respondents' residence. In addition, A.M.A.'s older sibling had been in DSS custody since January 2002. In December 2002, respondent parents stipulated that A.M.A. was dependent and the trial court adjudicated A.M.A. to be dependent. The court required that the parents comply with DSS recommendations, including providing safe, adequate housing, being gainfully employed, attending domestic violence counseling, and remaining drug and alcohol free. DSS allowed A.M.A. to continue to reside with her parents until they were arrested in February 2003 on drug possession and trafficking charges in South Carolina. Thereafter, DSS placed A.M.A. in foster care.

The family service case plan following A.M.A.'s removal again included the requirements that respondent father remain drug-free, abide by the law, not commit violence against A.M.A.'s mother, establish a stable home environment, and obtain and maintain employment. Respondent tested positive for drugs on numerous occasions and was convicted of several additional crimes and found to have violated probation in 2003. In January 2004, respondent began serving an active sentence for probation violations. In

February 2004, DSS filed to terminate respondent father's parental rights as to A.M.A. In June 2004, A.M.A.'s mother relinquished her parental rights. Defendant was serving an active sentence at the time of the termination hearing in October 2004.

Respondent first argues that the trial court erred in failing to appoint a guardian *ad litem* for him. At the time DSS filed its termination of parental rights ("TPR") petition, N.C. Gen. Stat. § 7B-1101 (2003) required that "a guardian ad litem *shall be appointed* in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent . . . Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(a)(6)." *Id.* (emphasis added).¹ N.C. Gen. Stat. § 7B-1111(a)(6) (2003) states that the trial court may terminate parental rights if it finds

[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

¹ In 2005, the legislature amended this statute and added N.C. Gen. Stat. 1101.1 (2005) (c), which states that "On motion of any party or on the court's own motion, the court may appoint a guardian *ad litem* for a parent if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." *Id.* However, the change became effective 1 October 2005 and applies to petitions filed on or after that date.

Id. This Court has repeatedly held that the trial court's failure to appoint a guardian *ad litem* where DSS alleges incapability for such reasons to provide proper care in the TPR petition requires reversal, even where the court terminated the parent's rights pursuant to other grounds. *In re K.R.S.*, 170 N.C. App. 643, 613 S.E.2d 318 (2005); *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005); *In re J.D.*, 164 N.C. App. 176, 605 S.E.2d 643, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). In *In re J.D.*, this Court reversed an order terminating respondent's parental rights for failure to appoint a guardian *ad litem* where the trial court terminated the respondent's parental rights based on neglect, but the petition alleged dependency and the trial court considered evidence regarding the respondents's mental health problems. 164 N.C. App. at 182, 605 S.E.2d at 646. We also reversed for failure to appoint a guardian *ad litem* in *In re K.R.S.*, where the trial court terminated parental rights based on other grounds, but the record showed "that the trial court considered respondent's ongoing substance abuse and mental illness in determining whether to terminate her parental rights." 170 N.C. App. at 649, 613 S.E.2d at 321. Similarly, in *In re B.M.*, we held that it was reversible, and not harmless, error when the trial court failed to appoint a guardian *ad litem* even though a ground other than dependency existed to terminate the respondent's parental rights. 168 N.C. App. at 359, 607 S.E.2d at 704. The Court reasoned that "[t]he same mental health issues that bear upon respondents' ability to provide proper care and supervision for their children also bears

upon whether the parents have made reasonable progress towards correcting the conditions that led to the removal of the children from their home." *Id.*

Here, DSS alleged "substance abuse and/or mental illness" of both parents as a ground for termination, pursuant to § 7B-1111(a)(6). The petition also alleged several other grounds for termination. Ultimately, the court terminated respondent's rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2003), which states, in pertinent part, that parental rights may be terminated where "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." *Id.* In its order terminating respondent's parental rights, the Court specifically found that there was insufficient evidence to support dependency due to substance abuse alone. However, the respondent's substance abuse was included as a basis for termination on the grounds of failure to make progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). The court made findings that respondent had several positive drug screens for marijuana and methamphetamine and that he refused to admit himself to court-ordered inpatient treatment, and the Court made the following specific finding in support of its conclusion that respondent had not made reasonable progress towards correcting the conditions that led to A.M.A.'s removal:

The Respondent Father was to remain free of drug and alcohol abuse. Since that

adjudication, he has had fourteen (14) positive drug screens for methamphetamine; thirteen (13) positive drug screens for marijuana; and one (1) positive drug screens for opiates. While Respondent Father has apparently remained drug free while incarcerated in prison, until the day he was sent to prison he made no reasonable progress toward this goal.

Even though the court made several findings which are arguably unrelated to respondent's substance abuse, the court based part of its conclusion that respondent failed to show reasonable progress on respondent's substance abuse, and clearly "considered respondent's ongoing substance abuse . . . in determining whether to terminate her parental rights." *In re K.R.S.*, 170 N.C. App. at 649, 613 S.E.2d at 321. We further note that substance abuse played a central role in each of the orders and court reports, incorporated by reference in the termination order here. We conclude that "some evidence . . . tend[s] to show that respondent's [substance abuse] issues" and respondent's failure to make reasonable progress "were so intertwined at times as to make separation of the two virtually, if not, impossible." *In re J.D.*, 164 N.C. App. at 182, 605 S.E.2d at 646. Because the trial court erred in failing to appoint a guardian *ad litem*, we reverse the TPR order and remand for a new hearing. Since we have remanded for a new hearing, we need not address respondent's remaining assignments of error.

Reversed and remanded.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).