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NO. COA05-21

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

IN RE:

C.G.F.,  
A Minor Child

Wilkes County  
No. 98 J 25

Appeal by respondent from an order entered 15 April 2004 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 9 January 2006.

*Paul W. Freeman, Jr. for petitioner-appellee Wilkes County Department of Social Services.*

*No brief filed by Guardian ad Litem.*

*M. Victoria Jayne for respondent-appellant.*

HUNTER, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor child. She argues the trial court erred in terminating her parental rights without appointing a guardian ad litem. As we agree that the trial court should have held a hearing as to whether respondent was entitled to a guardian ad litem, we reverse the order of termination.

Respondent is the mother of the minor child C.G.F., born 22 November 1988. The record evidence tends to show that the Wilkes County Department of Social Services ("DSS") removed C.G.F. from

respondent's home in March 1998, after two substantiated reports of neglect based upon respondent's mental and emotional instability. In fact, respondent was involuntarily committed on 11 March 1998, and the minor child was placed in foster care after being adjudicated neglected and dependent. Respondent appealed the adjudication to this Court in 1999. By unpublished opinion filed 2 November 1999, this Court affirmed the trial court's adjudication order. *In re Fausnet*, 135 N.C. App. 630, 528 S.E.2d 407 (1999).

In the Court's opinion, it was noted that after being committed, respondent was diagnosed with "an adjustment disorder with mixed emotional features superimposed on major, recurrent non-psychotic depression, elements of post-traumatic stress from previous abuse and a history of panic disorder, hypertension, recurrent gastritis and intolerance of anti-anxiety medication.'" *Id.* (slip op. 3-4). The Court also noted that though "the [trial] court found that respondent loved her son; . . . it had great concern that her non-lucid intervals had prevented her from providing proper care or supervision for C[.G.F.]" *Id.* (slip op. 4). The Court also discussed the trial court's finding that "respondent's general emotional state interfered with her ability to provide proper care or supervision for C[.G.F.]" *Id.*

When respondent subsequently failed to show the necessary progress to allow the minor child to be returned to her custody, DSS ceased reunification efforts. Respondent's lack of progress was due, in great part, to her continued mental health problems. Respondent's "irrational fear and anxiety," had an adverse effect

on [C.G.F.'s] emotional well-being, and her lack of employment made it impossible for her to attend counseling to address her mental health issues. Moreover, respondent refused to acknowledge that her mental health issues precipitated the minor child's removal from her care.

On or about 26 November 2002, DSS filed a petition to terminate respondent's parental rights, premised upon N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2). The petition alleged pertinently:

5. On or about March 30, 1998, the Honorable Michael E. Helms, District Judge, entered an order in the above matter pursuant to the terms of which C[.G.F.] was declared a neglected and dependent juvenile. The legal and physical custody of said C[.G.F.] was placed with the Wilkes County Department of Social Services for placement in foster care. The aforesaid Order was signed April 9, 1998[.]

6. C[.G.F.] has resided continuously in foster care under the care and supervision of the Wilkes County Department of Social Services since the entry of the aforesaid Order. Indeed, a temporary, nonsecure Order was entered in the above matter on March 16, 1998, by Judge Helms pursuant to the terms of which the temporary legal and physical custody of said child was placed with the Department of Social Services. . . .

7. C[.G.F.] remains a neglected juvenile with regard to the Respondents, in that:

- A. Neither Respondent has made significant effort in remedying those conditions which led to the removal of C[.G.F.] from the home of the Respondent [mother] in 1998;
- B. Neither parent has made any positive attempts to provide proper care or

supervision for the child for many years;

. . .

D. The Respondent, [mother], has failed to provide adequate support for her son, although she has the means and ability to do so;

E. Upon information and belief, it is alleged that the Respondent, [mother], is unable or unwilling to understand the reasons for the child's removal from her and has failed, or is unable, to take meaningful steps to maintain a caring relationship of parent and child with C[.G.F.] Indeed, upon information and belief, it is alleged that C[.G.F.] is more of a parent to [respondent mother] than she is to him;

. . .

G. Both Respondents are unwilling or are unable to provide a safe and nurturing environment for C[.G.F.]

8. The Respondents, and each of them have willfully left C[.G.F.] in foster care or placement outside of their respective homes for more than twelve (12) months without making reasonable progress under the circumstances to correct those conditions which led to the removal of C[.G.F.] from the Respondents in 1998.

. . .

10. It is in the best interest of C[.G.F.] for the parental rights of the Respondents to be terminated so that a permanent placement may be found for the child.<sup>1</sup>

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<sup>1</sup> Respondent father died prior to the termination hearing, and is not a party to that hearing, nor to this appeal.

This matter was heard by Judge Edgar B. Gregory during the 25 March 2004 session of Wilkes County District Court. After hearing the evidence and arguments of counsel, and reviewing the court file, the trial court entered an order terminating respondent's parental rights. In its order, the trial court took note of respondent's mental health history:

9. As more particularly appears from the older Orders entered in this matter, at the time that C[.G.F.] was removed from his mother's home, the mother had a history of significant emotional and psychiatric problems which prevented her from providing proper care and supervision for C[.G.F.] At or about the time of C[.G.F.]'s removal, the mother was involuntarily committed to Frye Hospital for treatment of her emotional issues. No evidence was presented that the mother has been involuntarily committed since that time.

10. [Respondent mother] is currently 49 years of age, is an honor graduate of Starmount High School, and is currently unemployed. She has had various jobs since C[.G.F.] was removed from her.

11. Despite having various jobs throughout the period of time that C[.G.F.] has been placed out of her home, and despite being ordered to pay the sum of \$140.00 per month for C[.G.F.]'s support, the mother currently has a child support arrearage of \$2,002.39. The mother was unable to accurately describe for the Court during her testimony the amount of her child support obligation, when her last payment was, or to give a just cause or excuse for her failure to pay any support since March, 2003.

12. Despite her history of emotional problems, and despite continuing to experience such problems, the mother is not taking any medication for her mental condition, nor is she under the regular care of a counselor or therapist. She has appointments to see a physician and/or a mental health provider in the future, however, she was unsure when these

appointments were or with whom she had the appointments. The mother testified that she "needed something to help me focus," but denied having any further problems with depression and/or post traumatic stress syndrome, both conditions for which she was diagnosed in years past. The mother testified that she suffers from Attention Deficit Hyperactivity Disorder and Lupus, however, she presented no medical evidence to support these claims and the Court makes no finding with regard to the existence or non-existence of these particular conditions.

13. The mother testified that she was late for Court because her car wouldn't start, but through "an act of God" a gentleman came by and jiggled the steering wheel of the car and got it started.

. . .

15. The mother has not taken any medication for her emotional problems for approximately three (3) years. This despite the fact that after C[.G.F.]'s removal from her home, she became disoriented at an Eckerd Drug Store and the police had to be called in order to restore order.

16. The mother has had no visits with C[.G.F.] since December, 2002. These visits were stopped at C[.G.F.]'s request.

17. The mother does not receive any disability benefits, and has not applied for any. She currently has no means of support except that her mother has apparently given [her] "an early birthday present", by which [respondent mother] means that her mother gave her some amount of money from an insurance settlement.

. . .

19. During the period of time that Stephanie Holbrook, formerly, Sparks, was C[.G.F.]'s Social Worker, the mother seems to have had a different attitude. Although she continued to suffer from emotional and mental problems, she was regular in her visitation, she brought C[.G.F.] presents, candy, cards,

and paid support for the child, and kept in contact with the Social Worker. Although [respondent mother] was still unable to provide a home for C[.G.F.] due to her emotional conditions, she was more interested in C[.G.F.] However, after December, 2002, [respondent mother]'s attitude changed and she lost interest in her son.

. . .

21. In June, 2003, [respondent mother] appeared at C[.G.F.]'s eighth grade graduation ceremony and caused him a great deal of embarrassment by her behavior. She presented him with cards and a letter which threatened C[.G.F.]'s adoptive family.

22. A comparison of the facts and circumstances which existed at the time that C[.G.F.] was removed from his mother in 1998 with the mother's present circumstances indicates that little, if any has changed; and that the mother has made virtually no progress in correcting those conditions which led to C[.G.F.]'s removal in 1998.

Based upon these and other findings, the trial court concluded that "clear and convincing evidence" existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2), "in that C[.G.F.] is a neglected juvenile[.]" The court specifically concluded that there was "a significant probability of repetition of neglect[.]" The trial court also concluded that "clear and convincing evidence" existed to terminate under N.C. Gen. Stat. § 7B-1111(a)(2), as "[r]espondent has not shown reasonable progress under the circumstance in correcting those conditions which led to C[.G.F.]'s removal from the Respondent's home in 1998." The trial court, therefore, determined it was in the best interest of the minor child to terminate respondent's parental rights. Respondent appeals.

The dispositive issue on appeal is whether the trial court erred in proceeding with the termination hearing without determining whether a guardian ad litem was necessary for respondent. It is well settled that a guardian ad litem must be appointed for a respondent parent if "it is alleged that [the respondent's] rights should be terminated pursuant to G.S. 7B-1111[(a)](6)<sup>2</sup>, and the incapability to provide proper care and supervision pursuant to that provision is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2003). "[T]he requirement of N.C. Gen. Stat. § 7B-1101(1) is mandatory, and . . . a respondent does not lose the right to assert an error based upon a violation of N.C. Gen. Stat. § 7B-1101(1) by failing to request a guardian *ad litem* him or herself." *In re K.R.S.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 613 S.E.2d 318, 320 (2005).

Our Court has extended the application of N.C. Gen. Stat. § 7B-1101(1) to certain instances in which a respondent parent's rights are terminated under a provision other than N.C. Gen. Stat. § 7B-1111(a)(6) -- instances in which the respondent parent's

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<sup>2</sup> N.C. Gen. Stat. § 7B-1111(a)(6) provides for the termination of a respondent parent's rights upon a finding that 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." N.C. Gen. Stat. § 7B-1111(a)(6) (2003). That incapability "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the [respondent] unable or unavailable to parent the juvenile and the [respondent] lacks an appropriate alternative child care arrangement." *Id.*

mental health issues and the circumstances supporting termination are "so intertwined at times as to make separation of [the parent's mental health issues and the condition leading to termination] virtually, if not, impossible." *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). In *K.R.S.*, the respondent mother argued that the trial court erred in failing to appoint a guardian ad litem before terminating her parental rights. *K.R.S.*, \_\_\_ N.C. App. at \_\_\_, 613 S.E.2d at 320. In that case, the petition to terminate the respondent mother's parental rights alleged that sufficient grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (6) and (7). *Id.* At the termination hearing, however, DSS proceeded only under subsections (a)(1) and (a)(7). *Id.* On appeal, DSS contended that "prior to trial, it informed both the trial court and respondent that it would not proceed with termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6)." *Id.* This Court reversed the order of the trial court terminating the respondent's parental rights based upon neglect and leaving the minor child in foster care for twelve months, and remanded the matter for the appointment of a guardian ad litem for the respondent mother. *Id.* at \_\_\_, 613 S.E.2d at 321. The Court noted that the record tended to show that the trial court considered respondent's ongoing substance abuse and mental illness in determining whether to terminate her parental rights, and therefore, the Court held that the trial court erred in failing to

appoint a guardian ad litem to represent the respondent mother. *Id.*

Earlier in *In re J.D.*, the Court held similarly. In that case, much like in *In re K.R.S.*, DSS alleged dependency as a grounds for termination in the petition to terminate respondent mother's rights, but chose not to pursue those grounds during the termination hearing. *In re J.D.*, 164 N.C. App. at 179, 605 S.E.2d at 644-45. Instead, DSS proceeded on the allegation of neglect under N.C. Gen. Stat. § 7B-1111 (a)(1). *Id.* at 179, 605 S.E.2d at 645. This Court, however, reversed the order terminating the respondent mother's parental rights based upon abuse and neglect. The Court stated:

While neglect was the ground [DSS] pursued during the termination hearing and ultimately found by the trial court as a basis for terminating respondent's parental rights, there was nevertheless some evidence that tended to show that respondent's mental health issues and the child's neglect were so intertwined at times as to make separation of the two virtually, if not, impossible.

*J.D.*, 164 N.C. App. at 182, 605 S.E.2d at 646.

In the instant case, the minor child was previously adjudicated dependent and neglected. At that time, the court specifically noted respondent's mental health issues, which interfered with and prevented her from providing proper care and supervision for C.G.F. Moreover, in affirming the trial court's adjudication, this Court found the lower court's findings binding and conclusive since they were supported by clear and convincing evidence. At the time that DSS filed its petition to terminate respondent's parental rights, it is uncontroverted that her mental

state had not changed. The testimony of DSS's own witnesses tended to show that respondent's mental state was at all times a major concern to DSS. Indeed, respondent's own testimony during the termination hearing resonates with periods of unresponsive rambling, minimal understanding of what is required of her, and irrational acts. Significantly, the petition notes that respondent "is unable or unwilling to understand the reasons for the child's removal from her and has failed, or is unable, to take meaningful steps to maintain a caring relationship of parent and child with C[.G.F.]" The trial court's findings in the termination order are very clear -- they emphasize the true nature of respondent's mental illness, and the inextricable way it affects her ability to care for the minor child. As in *In re J.D.* and *In re K.R.S.*, the record evidence tends to show that "respondent's mental health issues and the child's neglect 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. Accordingly, we conclude that the trial court erred in failing to hold a hearing to determine whether respondent was entitled to appointment of a guardian ad litem in this case.

In light of our conclusion in this regard, the court's order terminating respondent's parental rights is reversed and this matter remanded to the trial court for a hearing regarding appointment of a guardian ad litem for respondent and a new trial.

Reversed and remanded.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).