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NO. COA05-744
NO. COA05-745
NO. COA05-746

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

IN THE MATTER OF:

C.A.L.,
J.J.A.L., and
M.F.A.L.,
Minor Children.

Orange County
Nos. 03 J 30
03 J 28
03 J 29

Appeal by respondent from orders entered 22 September 2004 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 26 January 2006.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee.

Annick Lenoir-Peek for respondent-appellant.

Nelson Mullins Riley & Scarborough LLP, by Lisa R. Gordon, for guardian ad litem.

GEER, Judge.

Respondent mother J.B.L. appeals from orders terminating her parental rights with respect to her three minor children: J.J.A.L. ("Jack"), age eight; M.F.A.L. ("Molly"), age five; and C.A.L. ("Cindy"), age three.¹ These three appeals were consolidated for hearing and are now consolidated for decision.

¹The pseudonyms Jack, Molly, and Cindy will be used throughout the opinion to protect the children's privacy.

This appeal involves a tragic situation: the mother was in this country illegally with the father of the children, was the victim of serious physical abuse by the father, and was unable to survive independent of the father. Ultimately, the mother was convicted and incarcerated for physically abusing Jack by scalding him with boiling water. Upon her release, the mother was deported. Although the circumstances of this case are particularly poignant – as noted by the district court – we hold that the mother has failed to present any argument on appeal warranting reversal of the trial court's order terminating her parental rights.

Before addressing the merits of the appeal, we first note that counsel for the mother has failed to comply with N.C.R. App. P. 3(b). At the time of the filing of the record on appeal and the mother's brief, that rule provided:

For appeals [involving termination of parental rights and other juvenile matters], the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).

N.C.R. App. P. 3(b). Counsel failed to mask the identifying information regarding the children in the record on appeal. We wish to stress the seriousness of this violation of the appellate

rules. It is vital that all participants in appeals such as these honor and protect the privacy of the children.

Facts

On 19 March 2003, petitioner Orange County Department of Social Services ("DSS") learned that Jack was hospitalized in the University of North Carolina Burn Unit with second and third degree burns on his arms, hands, and back. Although the mother asserted that the burns were the result of Jack's pulling a pot of boiling water off the stove, Jack's treating physicians did not find this explanation credible and instead determined that the burns were the result of Jack's being intentionally submerged in scalding water. The severity of the burns ultimately required Jack to remain in the hospital for two months.

In addition to his burns, Jack had extensive bruising on his neck, arms, face, chest, and one of his legs. Doctors concluded that the bruises demonstrated "a pattern of beatings" that were "potentially life-threatening" and that the bruising on Jack's neck was the result of an attempted strangulation.

Because of Jack's injuries, the mother was convicted of felony child abuse and incarcerated. An assessment during the mother's incarceration showed that she interacted appropriately with the children during visitation, although she showed very little emotion upon the children's arrival and departure. A psychiatric evaluation revealed that the mother had originally left Mexico for the United States to be with the children's father, who was both

regularly unfaithful and physically abusive to the mother. The mother reported that the two frequently argued and that the children's father, who drank heavily, would often pull her hair, slap her, throw her about, and otherwise abuse her. Although the mother separated herself and the children from their father for brief periods, she never became self-sufficient and always returned to him, despite repeated episodes of domestic violence. Upon her release from prison, the mother was deported to Mexico.

On 21 March 2003, DSS filed a petition alleging that Jack was an abused and neglected juvenile and that Molly and Cindy were neglected juveniles.² On the same date, the district court entered an order placing the three children in the non-secure custody of DSS. Pursuant to this order, DSS placed Molly and Cindy into foster care immediately. Jack was placed into foster care upon his discharge from the hospital. The children's maternal grandmother was subsequently permitted to intervene in the proceedings and seek custody of the children. Only Jack had ever met his grandmother before being placed into foster care. DSS permitted the grandmother to have visitation with all of the children.

On 12 May 2003, the trial court adjudicated Jack to be an abused juvenile and Molly and Cindy to be neglected juveniles. On 22 September 2004, following a motion by DSS to terminate the mother's parental rights, the trial court concluded that all three children were neglected and that both Jack and Molly were abused.

²Despite repeated efforts, DSS has been unable to contact the children's father, whose whereabouts are unknown.

The court further found, with respect to the grandmother, that Jack does not want to see his grandmother, that the grandmother cannot communicate with him because Jack refuses to speak Spanish, that Molly and Cindy do not have a relationship with their grandmother, and that Molly tries to leave and Cindy cries during the grandmother's visits. The court noted that a home study with respect to the grandmother established that, if granted custody, the grandmother planned to take the children to Mexico and reunite them with their mother. Further, there was "no indication that [the grandmother] believed that her daughter had abused [Jack] and no indication that she would or could protect the children from further abuse and neglect by their mother." The court, therefore, concluded that it was in the best interests of the children to terminate the mother's parental rights. The mother timely appealed from that order.

I

The mother first argues that the trial court erred by failing to appoint her a guardian *ad litem* under N.C. Gen. Stat. § 7B-1101 (2003).³ In *In re J.A.A.*, ___ N.C. App. ___, 623 S.E.2d 45 (2005), this Court, after reviewing the prior case law, set forth the analytical framework to be applied in determining whether a trial court is required to appoint a guardian *ad litem* for a parent.

³Although the General Assembly recently amended the law governing appointment of a guardian *ad litem* for a parent, see N.C. Gen. Stat. § 7B-1101.1 (2005), those amendments are applicable only to proceedings filed on or after 1 October 2005. 2005 N.C. Sess. Laws 398, sec. 19. Since, in this case, the motion to terminate parental rights was filed 1 April 2004, we consider the mother's arguments under the prior law.

Under *J.A.A.*, a court must first review the petition or motion to terminate parental rights to determine whether it contains an allegation under N.C. Gen. Stat. § 7B-1111(a)(6) (2005) that the parent is incapable of providing proper care and support to the children, such that the children are dependent within the meaning of N.C. Gen. Stat. § 7B-101 (2005). *Id.* at ____, 623 S.E.2d at 48. According to *J.A.A.*, "[a]n allegation under N.C. Gen. Stat. § 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian *ad litem* should be appointed." *Id.* This Court has previously held that failure to appoint a guardian *ad litem* when the petition alleges dependency is reversible error. *In re Estes*, 157 N.C. App. 513, 518, 579 S.E.2d 496, 499 ("We hold that where, as here, the allegations contained in the petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian *ad litem* to represent the respondent at the termination hearing."), *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003).

If, however, the petition or motion contains no allegation of incapacity to parent, the court may nonetheless be required to conduct a hearing if the respondent parent specifically requests the appointment of a guardian *ad litem* or if "the trial court had a duty to appoint a guardian *ad litem* to represent respondent under Rule 17 of the Rules of Civil Procedure." *J.A.A.*, ____, N.C. App. at ____, 623 S.E.2d at 49. Rule 17 provides that, in civil litigation,

an incompetent person must be defended by a guardian *ad litem*, N.C.R. Civ. P. 17(b)(2), and, therefore, "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *J.A.A.*, ___ N.C. App. at ___, 623 S.E.2d at 49. "'Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge.'" *Id.* (quoting *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)).

In this case, the petition did not allege an incapacity to parent and the mother did not seek appointment of a guardian *ad litem*. Therefore, in deciding whether the trial judge abused her discretion in not *sua sponte* appointing a guardian *ad litem*, we must consider whether the circumstances brought to the judge's attention raised a substantial question as to whether the mother was competent.

While the record does contain a psychological evaluation – conducted in connection with the mother's criminal proceedings – indicating that she suffered from depression, nothing in the evaluation suggests that the mother meets the standard for legal incompetency. See N.C. Gen. Stat. § 35A-1101(7) (2005) (defining "incompetent adult" as an adult "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property").

See also *J.A.A.*, __ N.C. App. at __, 623 S.E.2d at 48 ("[T]he trial court is not required to appoint a guardian *ad litem* 'in every case where substance abuse or some other cognitive limitation is alleged.'" (quoting *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216, *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46, 603 S.E.2d 877 (2004))). Indeed, as the trial court was aware, the mother had recently been tried criminally without any question as to her competency being raised. We have found no other evidence in the record – and the mother points to none – that raises a substantial question regarding the mother's competency and her need for a guardian *ad litem* under N.C.R. Civ. P. 17.

We can see no basis for holding that the trial court was required to appoint a guardian *ad litem sua sponte* and thereby "divest the parent of [her] fundamental right to conduct . . . her litigation according to [her] own judgment and inclination." *J.A.A.*, __ N.C. App. at __, 623 S.E.2d at 48. This assignment of error is, therefore, overruled.

II

The mother next argues that, given the medical testimony regarding Jack's burns, any probative value of photographs of those burns was substantially outweighed by the danger of unfair prejudice under N.C.R. Evid. 403, and the trial court, therefore, erred in admitting the photographs. Whether to exclude evidence under Rule 403 is a matter within the discretion of the trial judge, and an "abuse of that discretion will be found on appeal only if the ruling is manifestly unsupported by reason or is so

arbitrary it could not have been the result of a reasoned decision." *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (internal quotation marks omitted), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779, 119 S. Ct. 2376 (1999).

Initially, the trial judge stated that she would wait to see how the evidence developed before deciding whether to view the photographs. In the course of the hearing, Jack's treating physician from the UNC Burn Unit, Dr. Michael Peck, testified regarding Jack's injuries. Dr. Peck explained that the burns could not have been accidental because of their "confluence," lack of "splatter marks, run marks, drip marks," and an "absence of the unevenness in burn depth distribution that [is] typically see[n] with accidental scalds." Subsequently, the trial judge asked whether the mother was willing to admit that Jack's burns were not accidental. When the mother's counsel was unwilling to make this concession, the trial court announced that she would review the photographs "to see in what ways they corroborate and illustrate the testimony of Dr. Peck with respect to specific indications of markings on this child which go to the fact that the injuries were not accidental."

We can perceive no abuse of discretion in the trial court's decision. While Dr. Peck's testimony was cogent and explanatory, the pictures illustrated that testimony in a non-inflammatory way and provided important support for Dr. Peck's opinion that the characteristics of the burns suggested a non-accidental source for the burns and for DSS' position that other injuries revealed in the

photographs indicated that the scalding was not the only instance of physical abuse. Further, any prejudice arising from the photographs was due to the seriousness of the injuries and thus does not constitute unfair prejudice in this case. By being able to view the actual nature of the injuries, the trial judge was in a better position to assess the seriousness of any abuse – a relevant consideration in deciding whether to terminate the mother's parental rights. We, therefore, hold that the trial judge's decision to view the photographs was reasonable. This assignment of error is overruled. See *State v. Chapman*, 359 N.C. 328, 351, 611 S.E.2d 794, 813 (2005) (finding no abuse of discretion in admission of autopsy photographs because they "tended to explain and support" the medical examiner's testimony as to cause of death).

III

The mother next argues that the trial court erred in concluding that Molly was abused when DSS' petition regarding Molly alleged only neglect and not abuse. We disagree.

In *In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005), the respondent mother challenged a trial court's termination of her parental rights on the ground of neglect "because the petition failed to allege that respondent had neglected the child." *Id.* at 709, 612 S.E.2d at 644. This Court rejected that argument, noting that DSS' "factual allegations were sufficient to give respondent notice

regarding the issue of neglect," irrespective of whether the petition specifically alleged neglect. *Id.*, 612 S.E.2d at 645.

In this case, DSS' motion in the cause regarding Molly specifically described the physical abuse of Jack and alleged that this severe abuse, in combination with the domestic violence committed against the mother, "subjected [Molly] to the risks of physical and emotional harm and created an environment injurious to her welfare." See N.C. Gen. Stat. § 7B-101(1)(b) (defining abused juveniles as including any juvenile whose parent creates or allows to be created "a substantial risk of serious physical injury to the juvenile by other than accidental means"). These factual allegations were sufficient to give the mother notice regarding the issue of abuse in relationship to Molly. This assignment of error is, therefore, overruled.

IV

Finally, the mother challenges the trial court's conclusions of law that Jack and Molly were abused and that all three children were neglected. A termination of parental rights proceeding is conducted in two phases, an adjudication phase and a disposition phase. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The mother contests the trial court's conclusions of law in the adjudication phase only.

In her assignments of error, the mother stated solely that each conclusion of law "is not supported by competent evidence." She specified no other basis for challenging the conclusions of law. Although she also specifically assigned error to many of the

findings of fact forming the basis for the conclusions of law, the mother did not bring those assignments of error forward in her brief. The Appellate Rules provide that "[a]ssignments of error not set out in the appellant's brief . . . will be taken as abandoned." N.C.R. App. P. 28(b)(6).

Since the mother abandoned her assignments of error regarding the findings of fact, those findings are binding on appeal and ordinarily our review would be "limited to determining whether the trial court's findings of fact support its conclusions of law" *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 405 (2005). The mother has not, however, asserted in any assignment of error or argued in her appellate brief that the findings of fact fail to support the conclusions of law. We are, therefore, precluded from reviewing that issue. See *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

The mother argues in her brief instead that the conclusion of law determining that Jack and Molly were abused under N.C. Gen. Stat. § 7B-101(1) "mistates [sic] the current law" and "just finds that two of the children are abused without concluding that the ground for termination has been proven." With respect to the conclusion regarding neglect, the mother argues that it is "not tailored to address the facts presented in this case" and "just finds that the children are neglected without specifics as to how they were neglected." The mother asserts that the conclusions of

law "do not reference the proper statute and are a mere repetition of the language of the statute."

Since these arguments are not the subject of an assignment of error, they are not properly before us. See N.C.R. App. P. 10(a) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10."). Even if, however, the arguments contained in the mother's brief were the subject of an assignment of error, we would still uphold the decision below.

While the conclusion of law regarding abuse inexplicably does cite to the law applicable prior to 1 July 1999, it also specifically concludes that "[t]he minor children, [Jack and Molly], have been abused by the Respondent/Mother within the meaning of N.C.G.S. 7B-101," the current applicable statute. Regardless, the trial court also concluded that all three children were neglected and recited the proper definition of neglect. See *In re C.L.C.*, 171 N.C. App. 438, 447, 615 S.E.2d 704, 709 (2005) (holding that since one of the grounds for termination relied upon by the trial court was valid, the validity of the other two grounds was immaterial), *aff'd per curiam in part, disc. review improvidently allowed in part*, ___ N.C. ___, ___ S.E.2d ___, No. 467A05, 2006 N.C. LEXIS 37, 2006 WL 1195808 (May 5, 2006). We nonetheless urge parties and trial courts to be careful to ensure that they are citing and discussing the applicable statutory law –

especially given the numerous amendments to the Juvenile Code adopted over the years by the General Assembly.

In addition, although the trial court failed to specifically state that grounds for termination existed, its conclusion that "[t]he minor children have been neglected by the Respondent/Mother within the meaning of N.C.G.S. 7B-101" is a sufficient conclusion of law. Section 7B-1109 of the North Carolina General Statutes mandates that the trial court "adjudicate the existence or nonexistence of *any of the circumstances* set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2005) (emphasis added). The conclusion that the children have been neglected is a sufficient adjudication of the existence of circumstances set forth in N.C. Gen. Stat. § 7B-1111(a) (1) (providing that the court may terminate parental rights upon a finding that "[t]he parent has abused or neglected the juvenile"). Further, while the neglect conclusion of law goes on to recite the statutory definition of neglect under N.C. Gen. Stat. § 7B-101(15) and includes language inapplicable to this case, the factual detail that the mother contends is missing regarding the nature of the neglect is supplied by the findings of fact that have not been challenged on appeal. The mother has, therefore, presented no basis for overturning the trial court's conclusions of law.

Affirmed.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).