NO. COA06-550

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

IN THE MATTER OF: A.A.W.,
Minor Child.

Burke County
No. 03 J 156

Appeal by respondent-appellant from order entered 4 October 2005 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 19 October 2006.

Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.

Mary R. McKay for petitioner-appellee Guardian ad Litem.

Charlotte Gail Blake for respondent-appellant.

STEELMAN, Judge.

Respondent-mother ("respondent") appeals from an order terminating her parental rights to the minor child, A.A.W. For the reasons discussed herein, we affirm.

On 18 July 2003, A.A.W. was born to fifteen year old respondent and sixteen year old father. On 18 August 2003, Burke County Department of Social Services ("DSS") filed a juvenile petition alleging that A.A.W. was an abused, neglected and dependent juvenile. The petition alleged the following: A.A.W. was abused because she was "born with cocaine, marijuana and

amphetamines in her system," neglected because respondent "did not tell her parents [she was pregnant] and did not seek any prenatal care," causing A.A.W. to be born "prematurely," and dependent because the "[respondent] is 15 years old" and intended to "remain in [high]school while [the father,] who is 16 years old, provided child care."

On 21 August 2003, A.A.W. was placed in nonsecure custody with DSS. In an order entered 28 January 2004, the trial court adjudicated A.A.W. neglected pursuant to N.C. Gen. Stat. § 7B-101(15). The trial court ordered that the custody of A.A.W. should continue with DSS and specifically approved A.A.W.'s foster care placement.

On 17 February 2005, the trial court conducted a permanency planning hearing, which resulted in an order making adoption the permanent plan for A.A.W. Father gave notice of appeal from this order on 21 February 2005. Respondent gave notice of appeal on 28 February 2005.

On 28 July 2005, DSS filed a motion to terminate respondent and father's parental rights, and alleged as grounds for termination those set forth in N.C. Gen. Stat. §§ 7B-1111(a)(1), (a)(2) and (a)(3).[1]

On 22 September 2005, the trial court entered an order appointing a guardian *ad litem* to represent respondent at the

[1] The motion for termination of respondent's parental rights was filed by DSS on 28 July 2005, which precedes 1 October 2005, the date giving effect to the rewritten statutes governing appeals of termination of parental rights proceedings. Therefore, the prior statute governs this appeal.

termination hearing, which was held on 29 September 2005. On 4 October 2005, the trial court entered an order terminating the parental rights of respondent and father.

On 5 October 2005, DSS filed a motion to dismiss the parents' appeal from the trial court's order entered 17 February 2005, making adoption the permanent plan for A.A.W. On 1 November 2005, this Court granted the motion.

On 14 October 2005, respondent gave notice of appeal from the trial court's order terminating her parental rights. Father did not appeal.

I: Permanency Planning Review Order

In her first argument, respondent contends that the trial court erred in entering orders prior to the termination order, including the permanency planning review order, containing findings of fact based on incompetent evidence. We disagree.

Respondent mother relies upon *In re D.L., A.L.,* 166 N.C. App. 574, 603 S.E.2d 376 (2004), to support her argument that the DSS and guardian *ad litem* reports were not sufficient, competent evidence upon which to base the findings of fact in the court's earlier orders, including the permanency planning review order entered on 22 February 2005. *In re D.L.* holds that:

> The only "evidence" offered by DSS was a summary prepared on 11 September 2002. "By stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports, the trial court's findings are not 'specific ultimate facts . . . sufficient for this Court to determine that the judgment is adequately supported by competent evidence.'"

Id. at 582, 603 S.E.2d at 382; (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). In the case of *In re D.L.*, respondents appealed directly from the permanency planning review order, alleging that the court based its findings upon incompetent evidence. In the instant case, respondent appeals from an order terminating respondent's parental rights, but asserts that the trial court based its findings upon incompetent evidence, not in the termination order, but rather, in orders previously entered, including the permanency planning review order.

In the case of *In re O.C. & O.B.*, 171 N.C. App. 457, 615 S.E.2d 391 (2005), this Court held that the question of whether the trial court should have appointed a guardian *ad litem* for the mother in a prior proceeding was not before the court. The Court concluded that "[o]nly the order on termination of parental rights is before this Court; the order on adjudication is not." *Id.* at 462, 615 S.E.2d at 394. The Court further concluded that "[m]otions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity." *Id.* at 463-464, 615 S.E.2d at 395. (citing *In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005)).[2] The law controlling at the time of the filing of this petition was that "[e]ach termination order relies upon an independent finding that clear, cogent, and convincing evidence supports at least one of the

[2] Our General Assembly recently amended N.C. Gen. Stat. § 7B-1003 (2005) to provide that, pending disposition of an appeal, the trial court no longer continues to exercise jurisdiction over termination proceedings. *See In re A.B.*, __ N.C. App. __, __ n2, 635 S.E.2d 11, 14 n2 (2006); N.C. Gen. Stat. § 7B-1003 (2005).

grounds for termination under N.C.G.S. § 7B-1111. . . . Simply put, a termination order rests on its own merits." *R.T.W.* at 553, 614 S.E.2d at 497.

In the instant case, we decline to review the competency of the evidence supporting findings of fact in the permanency planning review order. Respondent previously appealed from this permanency planning review order, and her appeal was dismissed. The only order before this Court is the order terminating respondent's parental rights. We dismiss this assignment of error.

II: Adjudication: Sufficiency of Evidence

In respondent's second argument, she contends that the trial court erred in ordering the termination of her parental rights because the trial court's findings of fact are not supported by clear, cogent and convincing evidence. We disagree.

A termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. *See In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination under N.C. Gen. Stat. § 7B-1111(a) exists. *Id.* A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). "If a conclusion that grounds exist under any section of the statute is supported by findings of fact based on clear, cogent, and convincing evidence, the order terminating parental rights must be

affirmed." *In re Ballard*, 63 N.C. App. 580, 586, 306 S.E.2d 150, 154 (1983), *rev'd on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984). If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975) (citation omitted).

The following findings of fact in the trial court's order are unchallenged on appeal and are binding upon this Court:

> 4. The minor child was adjudicated to be neglected by the consent of the parties on January 22, 2004. The Court ordered the parents to enter into service agreements with the Department in order to address their deficiencies, but they have failed to adequately address those deficiencies. . . .
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> 6. The parents previously were ordered to obtain independent housing. They currently do not have independent housing, although they did have independent housing for a few weeks in Burke County and approximately 5-6 months in South Carolina prior to their separation. [Respondent] currently is back residing with her father. [Father] stays at various residences, either with his mother or friends. . . .
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> 8. The parents previously were ordered to attend a minimum of 2 NA/AA meetings per week, report for random drug testing as requested, and have no positive drug tests. They have not attended any NA/AA meetings or had any drug tests since their move to South Carolina. They both admit to having smoked marijuana while in South Carolina such that they would have tested positive. [Respondent] states that she found evidence of cocaine or methamphetamine use by [father] in their home in South Carolina, although [father] denies such use.

> 9. [Respondent] previously was ordered to obtain her diploma, obtain her GED or obtain employment. She currently has none of those. She does not have a driver's license. She is dependent on her father for shelter, food, clothing and transportation. . . .
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> 12. While in South Carolina, the parents used [respondent's] mother's address as their mailing address, although they lived approximately 15 miles away from [respondent's] mother. They failed to provide the Department or the guardian *ad litem* program with their physical address or their telephone number, and they failed to maintain contact with either the Department or the guardian *ad litem* program.

Because these findings are conclusive on appeal, we must determine whether they support the trial court's conclusions of law. *See, e.g., In re McDonald,* 72 N.C. App. 234, 242, 324 S.E.2d 847, 852 (1985). We hold that the uncontested findings of fact adequately support the conclusion of law that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(2).

This assignment of error is without merit.

III: Guardian *ad litem*

In her third argument, respondent contends that the trial court denied her statutory right to a guardian *ad litem* in the termination proceedings. We disagree.

"Minor parents may be held responsible for caring for their children, and the failure to do so may result in a termination of their parental rights." *In re J.G.B.*, __ N.C. App. __, __, 628 S.E.2d 450, 457 (2006) (citing N.C. Gen. Stat. § 7B-1101.1 (2005)). Nonetheless, a minor parent must be appointed a guardian *ad litem* to represent his or her interests during termination proceedings.

See Id. The statute governing this appeal provided that "a guardian *ad litem* shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent . . . [w]here the parent is under the age of 18 years."[3] N.C. Gen. Stat. § 7B-1101 (2003); *see also* N.C. Gen. Stat. § 7B-602(b) (2003); 2005 N.C. Sess. Laws ch. 398, § 14. N.C. Gen. Stat. § 1A-1, Rule 17(e) (2003) set forth the legal duties of the guardian *ad litem*:

> Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules[.] . . . After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability[.]

Id.; see also In re Shepard, 162 N.C. App. 215, 227, 591 S.E.2d 1, 9 (2004). Consistent with the aforementioned statute, the North Carolina Supreme Court in the case of *In re Montgomery*, 311 N.C. 101, 115, 316 S.E.2d 246, 255 (1984), stated that the guardian *ad litem* is a procedural safeguard. This Court thereafter "suggest[ed,] the role of the [guardian *ad litem*]" was that of "guardian of procedural due process for th[e] parent, to assist in explaining and executing her rights." *Shepard* at 227, 591 S.E.2d at 9 (citing *Montgomery* at 115, 316 S.E.2d at 255).

In the instant case, respondent was seventeen years old at the time of the termination hearing. Respondent was married,

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[3] *See* footnote 2.

emancipated, and represented by an attorney. After DSS filed the motion to terminate respondent's parental rights, the trial court appointed a guardian *ad litem* to represent respondent pursuant to N.C. Gen. Stat. §§ 7B-602(b) and 7B-1101 (2003). On 20 September 2005, nine days before the termination hearing, DSS served the guardian *ad litem* with notice and the motion to terminate respondent's parental rights. At that time, he agreed to serve as guardian *ad litem* for respondent, and he was officially appointed as guardian *ad litem* on 22 September 2005, seven days before the termination hearing. The guardian *ad litem* appeared with respondent at the hearing on 29 September 2005. Respondent contends in her brief that the "belated appointment" of the guardian *ad litem* was tantamount to "den[ying] the mother her right, guaranteed by statute, to a guardian *ad litem*," citing *In re B.M., M.M. AN.M., & AL.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005), as authority.

We first observe that this Court has remanded orders terminating parental rights when the trial court wholly failed to appoint a guardian *ad litem* where such appointment was statutorily required. *See, e.g., In re Estes*, 157 N.C. App. 513, 579 S.E.2d 496 (2003). Furthermore, this Court has remanded orders because a guardian *ad litem* was not timely appointed where grounds for termination were based on N.C. Gen. Stat. § 7B-1111(a)(6).[4] *See,*

[4] Where grounds for termination are based on incapability of the parent, N.C. Gen. Stat. § 7B-1111(a)(6), the proper time for appointment of a guardian *ad litem* under N.C. Gen. Stat. § 7B-1101, is on the filing of the petition for termination by DSS. "Incapable" is defined by N.C. Gen. Stat. § 7B-1111(a)(6), as

e.g., *In re D.S.C.*, 168 N.C. App. 168, 607 S.E.2d 43 (2005). The case cited by respondent, *B.M.*, 168 N.C. App. 350, 607 S.E.2d 698, falls into the former category of opinions. However, the instant case is distinguishable from these decisions. Here, the trial court did not fail to appoint a guardian *ad litem*. The court appointed a guardian *ad litem* on 22 September 2005 to represent respondent. Moreover, *In re B.M.* and *In re D.S.C.* are inapplicable, because in the instant case, the grounds for termination were not based on respondent's "incapability" as defined by N.C. Gen. Stat. § 7B-1111(a)(6). Respondent does not contend, nor does the record reflect, that grounds for termination based on "incapability" existed here at all. *See B.M.*, 168 N.C. App. 350, 607 S.E.2d 698; *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).

We conclude that the requirement of N.C. Gen. Stat. § 7B-1101 (2003), that respondent be appointed a guardian *ad litem* because she was under the age of eighteen, was met. Respondent was appointed a guardian *ad litem*. Respondent does not argue that the guardian *ad litem* failed to perform his legal duties, set forth by N.C. Gen. Stat. § 1A-1, Rule 17(e) (2003). Neither does respondent argue that the guardian *ad litem* failed to be a "guardian of procedural due process[.]" *Shepard* at 227, 591 S.E.2d at 9 (2004)

"unable or unavailable to parent the juvenile" due to "substance abuse, mental retardation, mental illness, organic brain syndrome," or "other cause or condition[.]" N.C. Gen. Stat. § 7B-1111(a)(6); *see also In re D.S.C.*, 168 N.C. App. 168, 607 S.E.2d 43 (2005).

(citation omitted). Furthermore, respondent does not argue that she was, in any way, prejudiced by the delay in appointing a guardian *ad litem*. Respondent cites no authority, either statutory or common law, to support the proposition that she was effectively denied the right to a guardian *ad litem* to represent her interests.

We find respondent's argument without merit and affirm the trial court.

AFFIRMED.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).