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NO. COA10-539

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

IN THE MATTER OF:

M.I.M.

Lee County
No. 09 JA 71

Appeal by respondent from adjudication and disposition orders entered 15 February 2010 by Judge Robert Dale Stubbs in Lee County District Court. Heard in the Court of Appeals 30 September 2010.

W. Dale Talbert for petitioner Lee County Department of Social Services.

Richard Croutharmel for respondent mother.

ELMORE, Judge.

Respondent appeals from adjudication and disposition orders adjudicating her son, M.I.M., dependent and ordering custody of M.I.M. to continue with the Lee County Department of Social Services (DSS).

DSS became involved with M.I.M. on 28 August 2009 when hospital staff reported to DSS that M.I.M. had been born marijuana-positive. The report stated that respondent had informed staff that she suffered from "permanent brain damage from inhalant use in the past" and that respondent was "bipolar, which has been treated for the last twelve years." Hospital staff also reported that respondent "left the baby on the first day in the mother's room to

go outside to smoke. Leaving the baby unattended is against their . . . policy." DSS social worker Ray Tobin (Tobin) went to the hospital to investigate the report. Upon arriving at the hospital, Tobin discovered M.I.M. was still at the hospital, but respondent had gone home. Tobin subsequently interviewed respondent and M.I.M.'s maternal grandmother. Respondent told Tobin that she did not know who M.I.M.'s father was and that she did not smoke marijuana.

On 2 September 2009, DSS filed a juvenile petition alleging that M.I.M. was a dependent juvenile in that respondent was unable to provide for M.I.M.'s care or supervision and lacked an appropriate alternative child care arrangement. DSS attached a one-page addendum to support the allegations that M.I.M. was a dependent juvenile. In the addendum, DSS stated that "[a]gency records reflect" that respondent was convicted of felony child abuse in Lee County in 2004; that respondent voluntarily placed her child D.C., born in 2002, with the maternal grandmother in 2002; and that DSS removed her child Z.C., born in 1996, and placed him with the maternal grandmother in 2004. DSS also stated that, in an interview on 28 August 2009, the maternal grandmother told DSS that respondent "cannot take care of herself, much less a baby." The maternal grandmother also informed DSS that she could not be a placement option for M.I.M.

In the addendum, under the heading entitled "Mental health history/Cognitive deficits," DSS detailed respondent's mental health history as follows: (1) Dorothea Dix notes dated 12 February

2002 stated that respondent had a "history of violence, including stabbing a girlfriend when she was 14 years old and physically abusing her husband," and that respondent "endorses paranoid ideation"; (2) a Good Hope Hospital discharge summary dated 21 September 2002 stated that respondent suffered from major depressive disorder and had abused cocaine, alcohol, and marijuana, and that respondent had been involuntarily committed by her husband after she threatened to kill him and their four-year-old son; (3) respondent "occasionally sees Craig Shore (Daymark) and is prescribed Seroquil by Dr. Wilson (for bipolar)"; (4) a Lee County DSS Adult Services Assessment dated 7 June 2009 noted that respondent "forgets the day she is in, and states that she has memory problems;" and (5) respondent "has a Lee County DSS payee to handle her SSI monthly disbursements."

By a nonsecure custody order filed 2 September 2009, DSS assumed custody of M.I.M. On 20 October 2009, the trial court held an adjudication hearing. Respondent was at the hearing and represented by counsel. The trial court heard testimony from DSS social worker Tobin and DSS social worker Jackie Morin (Morin), who entered into a service case plan with respondent and monitored visitation between respondent and M.I.M. After hearing arguments from counsel, the court determined that M.I.M. was a dependent juvenile.

Before proceeding to disposition, the following colloquy occurred:

[DSS Attorney]: Yes, Your Honor and uh one second please, uh it might be appropriate for

the Court to consider whether a GAL should be pointed in this case. It's our recommendation that that occur.

COURT: There is some evidence of drug use, particularly at birth and uh continues monitoring substance abuse and she's in substance abuse treatment. I think that this is one criteria and I've heard some evidence that there is some mental health issues so I think the court be inclined to appoint a guardian ad litem under those.

[Respondent's Attorney]: I haven't spoken with [respondent] and I would agree with Ms. Morin's assessment that the last week or so, she's much different behavior.

COURT: Well certainly she's showing improvement then.

[Respondent's Attorney]: Right, but I don't think we oppose a GAL.

COURT: All right. Then the Court will appoint a GAL, do you have the next person or how - All right the Court would appoint uh Monica Magnusson as the guardian ad litem for [respondent]. Monica Magnusson. She is the next attorney on the list. She practices for Ms. Fare and she was here earlier today.

The case was held open until guardian ad litem Monica Magnusson arrived for disposition. At the disposition hearing, DSS questioned respondent about the identity of M.I.M.'s father. Respondent testified that she was drunk during M.I.M.'s conception, that she did not know the identity of M.I.M.'s father, and that she did not have a boyfriend at the time.

By adjudication order filed 15 February 2010, the trial court adjudicated M.I.M. a dependent juvenile. In its disposition order filed the same day, the trial court found that DSS had made efforts to prevent or eliminate the need for placement with DSS by

providing services to respondent and evaluating possible relative placement. The trial court concluded that return to respondent's home would be contrary to M.I.M.'s best interest and ordered custody of M.I.M. to continue with DSS. Respondent appeals.

Respondent contends that the trial court abused its discretion by not appointing her a guardian ad litem for the adjudication hearing. Appointment of a guardian ad litem for parents is governed by N.C. Gen. Stat. § 7B-602, which provides:

On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, 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. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-602(c) (2009).

"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*." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "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.* (quotations and citation omitted; alteration in original).

An incompetent adult is defined as

an adult or emancipated minor *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 whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2009) (emphasis added). Furthermore, this Court has defined "diminished capacity" in the juvenile context as a "lack of ability to perform mentally." *In re M.H.B.*, 192 N.C. App. 258, 262, 664 S.E.2d 583, 585 (2008) (quotations and citations omitted).

Here, there is evidence of circumstances that raise a substantial question as to whether respondent is incompetent or has diminished capacity: The juvenile petition dedicates a whole subheading to respondent's "Mental health history/Cognitive deficits." The juvenile petition specifically alleges respondent is "bipolar, which has been treated for the past twelve years"; "has been hospitalized for psychiatric disturbances"; "endorses paranoid ideation"; has abused cocaine, alcohol, and marijuana; has been diagnosed as having "major depressive disorder"; "is prescribed Seroquil" for her bipolar; "forgets the day she is in"; and "has memory problems." DSS further alleged that respondent receives DSS Adult Services and, in the words of her own mother, "[respondent] cannot take care of herself, much less a baby." More importantly, the petition alleges that respondent "has a Lee County DSS payee handle her SSI monthly disbursements." Thus, DSS had already determined, prior to filing the juvenile petition, that

respondent was unable to manage her affairs by appointing her a payee. We conclude that the allegations in the juvenile petition raise a substantial question as to respondent's competency. Accordingly, we hold that the trial court abused its discretion by not appointing a guardian ad litem for respondent, and we reverse the trial court's adjudication and disposition order and remand to the trial court for new adjudication and disposition hearings.

Because we reverse the trial court's adjudication and disposition orders, we do not address respondent's argument that the trial court erred in concluding M.I.M. was a dependent juvenile.

Reversed and remanded.

Judges JACKSON and THIGPEN concur.

Report per Rule 30(e).