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NO. COA12-124  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

IN THE MATTER OF:

K.T. & K.T.

Ashe County  
Nos. 11 JA 27-28

Appeal by Respondent from order entered 29 September 2011 by Judge Jeannie Houston in District Court, Ashe County. Heard in the Court of Appeals 14 August 2012.

*Grier J. Hurley for petitioner-appellee Ashe County Department of Social Services.*

*Sydney Batch for Respondent-Appellant Mother.*

*Pamela Newell for Guardian ad Litem.*

McGEE, Judge.

Respondent appeals from the trial court's order adjudicating her minor children abused and neglected. The sole issue Respondent raises on appeal is whether the trial court erred in failing to appoint a guardian ad litem for Respondent. We affirm.

The Ashe County Department of Social Services (DSS) filed juvenile petitions on 17 June 2011, alleging the minor children, one age sixteen and one age ten, to be abused and neglected juveniles. The petition alleged that Respondent hit, punched, and bit her sixteen-year-old daughter on 16 June 2011 and that, when Respondent's ten-year-old son jumped on Respondent's back to stop her, Respondent threw him against a wall. Respondent also allegedly poured lighter fluid on her boyfriend's clothing and lit the clothing, setting it on fire. Both children tried to put the fire out, and then left the house. The children called the boyfriend of Respondent's daughter, who took the children to the workplace of the daughter's natural father. The petition further alleged that Respondent sent threatening texts to the children and told her daughter she was going to file assault charges against her for pulling Respondent's hair. Further, both children expressed being afraid of Respondent. DSS was granted non-secure custody and the children were placed with the daughter's natural father.

An adjudication hearing was held on 31 August 2011. The trial court adjudicated the children abused and neglected, ordered that custody be continued with DSS, and authorized

continued placement with the daughter's natural father. Respondent appeals.

Respondent argues the trial court committed reversible error by failing to appoint a guardian ad litem attorney for her on its own motion. Respondent argues that the trial court had ample evidence that Respondent had diminished capacity, and points out that she was involuntarily committed after the 16 June 2011 incident that led to the filing of the juvenile petitions. Respondent notes DSS alleged in its juvenile petitions that Respondent "threatened to blow her brains out," which Respondent states indicates DSS's knowledge of Respondent's "fragile" mental state. Respondent asserts that the factual allegations, and her hospitalization, were sufficient to require that the trial court appoint a guardian ad litem on its own motion. We are not persuaded by these arguments.

Pursuant to the Juvenile Code,

[o]n 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.

N.C. Gen. Stat. § 7B-602(c) (2011). The trial court's decision

to appoint a guardian ad litem under this provision is discretionary, and will be reviewed only for an abuse of discretion. *In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008). An abuse of discretion occurs when a decision is "'manifestly unsupported by reason.'" *Id.* (citation omitted). "However, '[a] court's complete failure to exercise discretion amounts to reversible error.'" *Id.* (citation omitted).

Pursuant to N.C. Gen. Stat. § 35A-1101, an incompetent adult is defined as one "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" or other enumerated health conditions. N.C. Gen. Stat. § 35A-1101(7) (2011). The phrase "diminished capacity" has been defined "as a lack of ability to perform mentally." *In re M.H.B.*, 192 N.C. App. at 262, 664 S.E.2d at 586 (citation and quotation marks omitted).

In this case, the allegations in the juvenile petitions did not focus on Respondent's mental health or any alleged incapacity to care for the children. Rather, the allegations were almost entirely focused on a specific incident in which a

fight between Respondent and her boyfriend escalated to the point where the children got involved which led to Respondent physically fighting with the children. DSS alleged that the incident amounted to abuse and neglect. No allegations of dependency or Respondent's inability to care for the children were made.

Further, evidence was presented which tends to contradict Respondent's contention that she was incompetent or had diminished capacity. The night of the altercation, Alice Langseth (Ms. Langseth), a DSS social worker spoke with Respondent in the emergency room of the hospital. Ms. Langseth testified that Respondent was upset about what had happened, but she was coherent and able to answer questions and tell Ms. Langseth what happened from her point of view. Respondent informed Ms. Langseth that she had ADHD and suffered from depression and anxiety issues, and she listed the medications she was taking. Respondent was also making phone calls and texting while Ms. Langseth was present. Respondent's daughter and the daughter's father submitted a petition to a magistrate to have Respondent committed due to her outbursts and behavior. After being evaluated, Respondent was involuntarily committed until 22 June 2010.

After Respondent was released, she entered into a case plan with DSS. By the time of the adjudication hearing, Respondent had completed parenting classes and a psychological evaluation; she was following recommendations from the evaluation, was attending counseling, and was working on substance abuse issues through an organized program. Further, Respondent was visiting with the children, which a social worker testified was going well and which led DSS to recommend unsupervised visits, albeit in public places. The social worker also testified that Respondent kept her home clean and in good condition and drove her own car.

Regarding the status of Respondent's mental health, evidence was presented that her psychological evaluation showed diagnoses of post-traumatic stress disorder and "borderline personality features." Respondent's medications were reported to be Lexapro, Clonapin, Wellbutrin, Vivance, and Allegra.

Respondent argues that, since the trial court was on notice that Respondent had mental health issues and had been involuntarily committed, the trial court should have at least considered whether or not Respondent needed a guardian ad litem. We note that neither Respondent nor her counsel were concerned enough to request that a guardian ad litem be appointed.

Further, based on the foregoing facts, it appears that Respondent was not lacking an "ability to perform mentally" which would indicate diminished capacity, since Respondent was able to communicate effectively with the social worker and meaningfully participate in the case by agreeing to a case plan and complying with its provisions. *In re M.H.B.*, 192 N.C. App. at 262, 664 S.E.2d at 586 (citation and quotation marks omitted). Nor does it appear Respondent was "unable to manage [her] own affairs or to make or communicate important decisions" so as to meet the statutory definition of an incompetent adult. N.C.G.S. § 35A-1101(7). Respondent successfully worked toward several of the goals set forth in her case plan, a significant indication of her competency. Further, she had successful visits with the children, kept her house clean, and had her own vehicle. There is no evidence in the record to suggest that Respondent was so incompetent, or so diminished in her mental capacity, that the trial court necessarily had to appoint a guardian ad litem, despite the fact that Respondent had some mental health issues which required treatment. Therefore, the trial court did not abuse its discretion in failing to *sua sponte* appoint a guardian ad litem for Respondent.

Affirmed.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).