NO. COA14-657

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

J.R.W. Guilford County
No. 12 JB 382

Appeal by Respondent-mother from order entered 27 March 2014 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 27 October 2014.

*Mercedes O. Chut for Petitioner Guilford County Department of Health and Human Services.*

*Peter Wood for Respondent-mother.*

*Ellis & Winters LLP, by Lenor Marquis Segal, for guardian ad litem.*

STEPHENS, Judge.

Respondent-mother ("Respondent") appeals from an order terminating her parental rights[1] to her minor child, "Joey."[2]

[1] In her notice of appeal, Respondent also indicated her intent to appeal "the permanency planning order changing the plan to adoption filed 20 July 2013." However, this order does not appear in the record and Respondent does not address it in her brief.

Respondent does not challenge the order itself; instead, she argues that the trial court abused its discretion by conducting the termination proceedings without first holding a hearing to determine whether a guardian *ad litem* ("GAL") should have been appointed for her. After careful review of the record and in light of the recent revisions to N.C. Gen. Stat. § 7B-1101.1, which governs when a guardian *ad litem* must be appointed for a parent in a termination of parental rights ("TPR") hearing, we hold that the trial court did not abuse its discretion by not inquiring into Respondent's competency prior to holding the TPR hearing.

*Facts and Procedural History*

The record indicates that since 2008, Respondent has lost custody of six children, including Joey, due to a combination of Respondent's substance abuse issues, unstable housing, unemployment, and mental health problems. Prior to this matter, Respondent's parental rights were involuntarily terminated as to her three oldest children, and she relinquished her parental rights to her fourth child. On 13 July 2012, the Guilford County

[2] For the purpose of protecting his privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile by a pseudonym in this opinion.

Department of Social Services ("DSS")[3] obtained nonsecure custody of Joey and his twin brother two days after their birth and filed petitions alleging they were neglected and dependent juveniles. After a hearing on 22 August 2012, the trial court entered an adjudication and dispositional order in which it concluded Joey and his brother were dependent juveniles, but dismissed the allegation of neglect. The court continued custody of Joey and his brother with DSS, directed DSS to continue to make reasonable efforts toward reunification of Joey and his brother with Respondent and their father, established case plans for Respondent and the father, and directed Respondent and the father to comply with their case plans and cooperate with DSS. The day after the hearing, Joey's brother died from an acute respiratory infection while in foster care.

Respondent initially worked with DSS on her case plan, and on 16 May 2013, the trial court appointed a GAL to assist her in the juvenile proceedings pursuant to the then-extant version of N.C. Gen. Stat. § 7B-1101.1(c), which provided for a GAL to be appointed for a parent "if the court determines that there is a reasonable basis to believe that the parent is incompetent or

[3] Although the Department of Social Services is now known as the Department of Health and Human Services, for ease of reading we refer to the agency throughout this opinion as "DSS."

has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2011). While the record does not specifically indicate why a GAL was appointed here, there is no indication that substantial questions arose regarding Respondent's competency to participate in these proceedings.[4] Moreover, when Respondent's GAL filed a motion to withdraw on 19 September 2013, he indicated that he had been appointed only in an assistive capacity, and was withdrawing in light of our General Assembly's enactment of Session Law 2013-129, which eliminated the assistive GAL role for respondents with diminished capacity in TPR cases effective 1 October 2013. The trial court subsequently granted the motion to withdraw, although, perhaps due to a clerical error, it left several pre-printed boxes unchecked in its findings of facts and conclusions of law. Consequently, the court's order did not explicitly indicate: (1) whether there were substantial questions regarding

[4] According to the trial court's Permanency Planning Review Hearing Order of 30 August 2013, Respondent, who was diagnosed with schizo-affective bipolar disorder in 2012, reported to a social worker in April 2013 that she occasionally heard voices and saw images that were not there; that resulted in the appointment of an assistive GAL in a separate TPR proceeding regarding her fourth-oldest child. There is no evidence in the record that the trial court ever appointed a substitute GAL in this or any prior proceeding involving Respondent or any of her children.

Respondent's competency; (2) whether there was good cause to allow Respondent's GAL to withdraw; and (3) whether the GAL was merely assistive and should thus be permitted to withdraw pursuant to recent statutory changes without holding another hearing to determine if a new substitutive GAL should be appointed.

The record indicates that Respondent failed to make sufficient progress toward reunification, and by order entered 30 August 2013, the trial court modified the permanent plan to include adoption as well as reunification with a parent. DSS subsequently filed a motion to terminate the parental rights of Respondent and Joey's father on 30 September 2013. DSS alleged grounds to terminate Respondent's parental rights on the basis of neglect, failure to make reasonable progress to correct the conditions that led to Joey's removal from Respondent's home, failure to pay a reasonable portion of the cost of care for Joey, dependency, and the prior termination of her parental rights to other children. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6), (9) (2013). By order entered 19 December 2013, the trial court relieved DSS of further reunification efforts, changed the permanent plan for Joey to adoption only, and directed DSS to continue making efforts toward finalizing the

permanent plan of adoption. In its motion to terminate Respondent's parental rights, DSS acknowledged the previous appointment of a GAL for assistance but alleged that "[t]here is no evidence to suggest that the mother is incompetent." In her reply to the motion to terminate her parental rights, Respondent fully admitted to the allegation that there was no evidence to suggest she is incompetent. After a hearing on 11 February 2014, the trial court entered an order on 27 March 2014 terminating Respondent's parental rights to Joey.[5] The court concluded all five grounds alleged by DSS existed, and that termination of Respondent's parental rights was in Joey's best interest. Respondent appeals.

*GAL Withdrawal Order*

Respondent first argues that the trial court's order entered on her assistive GAL's motion to withdraw is fatally deficient because it does not make adequate findings of fact or conclusions of law. Respondent, however, has no right to appeal this order under N.C. Gen. Stat. § 7B-1001(a) (2013) (limiting the orders which may be appealed in cases brought under Chapter 7B); *see also In the Matter of A.R.G.*, 361 N.C. 392, 646 S.E.2d

[5] Joey's father agreed to sign a general relinquishment of his parental rights at the start of the termination hearing.

349 (2007) (demonstrating our Supreme Court's refusal to expand the bases for appellate review under section 7B-1001 and its predecessors). Further, even if Respondent did have a right to appeal under section 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it as required by section 7B-1001(b). Respondent has not filed a petition for a writ of *certiorari* seeking review of the order under Rule 21 of our Rules of Appellate Procedure, and her argument is thus not properly before this Court. Finally, even if this Court were to suspend its rules pursuant to N.C.R. App. P. 2, Respondent's argument would be moot, and it is well-established that where an argument is moot, no appellate review should lie. *See, e.g., Davis v. Zoning Bd. of Adjustment of Union Cnty.*, 41 N.C. App. 579, 582, 255 S.E.2d 444, 446 (1979) (dismissing appeal after finding that all questions raised had been rendered moot by amendments to the ordinance in question). Here, given the statutory changes to section 7B-1101.1 that went into effect on 1 October 2013, Respondent's assistive GAL would have been removed by operation of law with or without a court order. Moreover, nothing in the record indicates that substantial questions had arisen regarding Respondent's competency sufficient to qualify her for a

substitutive GAL when she had previously not qualified. Indeed, Respondent herself admitted in her reply to DSS's motion to terminate her parental rights that there is no evidence to suggest she is incompetent. Accordingly, Respondent's first argument is without merit.

*GAL Inquiry*

Respondent next contends that the trial court abused its discretion when it did not conduct, on its own motion, an inquiry to determine whether she required a GAL before holding the hearing to terminate her parental rights. We disagree.

We review a trial court's determination of whether or not to appoint a GAL for a parent for abuse of discretion. *See In re M.H.B.*, 192 N.C. App. 258, 664 S.E.2d 583 (2008). "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.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511 (citation omitted), *affirmed per curiam*, 364

N.C. 596, 704 S.E.2d 510 (2010). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Under the statutory changes that went into effect on 1 October 2013, section 7B-1101.1(c) of our General Statutes provides that, "[o]n motion of any party or on the court's own motion, the court may appoint a guardian *ad litem* for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013). North Carolina law defines an incompetent adult 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, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2013). As noted above, although prior versions of section 7B-1101.1 also provided for the appointment of an assistive GAL for a parent who suffers from diminished capacity, our General Assembly eliminated that provision when it revised the statute.

In the present case, Respondent contends that due to her history of mental health problems, the trial court should have conducted an inquiry into her competence and need for a GAL in the termination proceedings. In support of her argument, Respondent relies on case law decided under prior versions of section 7B-1101.1(c), such as *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), which she contends supports the proposition that allegations of mental health issues should trigger a GAL inquiry. Essentially, the crux of Respondent's argument boils down to the notion that if her mental health history rendered her incompetent as a parent, it must also have rendered her incompetent as a litigant.

However, this argument ignores the fact that mental health was just one of several bases for the court's TPR order. It also appears to erroneously conflate the circumstances generating incapacity to provide appropriate care and supervision of a juvenile with the circumstances that establish a parent's lack of capacity to manage her own affairs or act in her own interest during termination proceedings. We note that these are two separate concepts with their own specific standards, and conflating them ignores this Court's prior holdings that evidence of mental health problems is not *per se* evidence of

incompetence to participate in legal proceedings. *See, e.g.*, *In re S.R.*, 207 N.C. App. 102, 698 S.E.2d 535, *disc. review denied*, 364 N.C. 620, 705 S.E.2d 371 (2010) (concluding the trial court did not abuse its discretion in not appointing a guardian *ad litem sua sponte* where, even though the mother suffered from substance abuse and mental health issues, there was no indication that she was incompetent or had a diminished capacity); *Soderlund v. Kuch*, 143 N.C. App. 361, 546 S.E.2d 632, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 438 (2001) (holding that a mentally ill adult was not necessarily legally incompetent).

Much of Respondent's argument relies on cases, such as *N.A.L.*, that were decided under earlier iterations of section 7B-1101.1(c), which required appointment of GALs for parents who suffered from diminished capacity in addition to GALs for those who are incompetent. Indeed, prior versions of the controlling statute once contained language that required a trial court to appoint a guardian *ad litem* any time a TPR petition alleged incapability to care for the juvenile due to substance abuse, mental retardation, mental illness, or organic brain syndrome. However, that language was deleted when section 7B-1101.1 was enacted in 2005, *see* 2005 N.C. Sess. Laws 398 § 14, and the

current version of section 7B-1101.1(c) is far narrower in its requirements. In fact, nothing in the statute's plain language requires the trial court to conduct an inquiry to determine whether a GAL should be appointed for a parent merely because of her mental health history. Although our General Assembly could have revised the statute to reinstate this requirement in 2013, it chose not to do so. Instead, as it stands, the statute vests discretion in the trial court, which *may* hold a hearing on appointing a GAL only for a parent who is incompetent.

Here, despite Respondent's claims to the contrary, the record establishes both that the severity of her mental health problems was well known to the trial court, and that those issues did not rise to the level of incompetency. On the one hand, the fact that Respondent attended all but one of the hearings related to this matter gave the trial court ample opportunity to observe and evaluate her capacity to act in her own interests. Moreover, although the record contains no evidence that Respondent could not "manage [her] own affairs" or "make or communicate important decisions," *see* N.C. Gen. Stat. § 35A-1101(7), it does include facts in keeping with a finding of competency.

For example, Respondent successfully transitioned from living at a shelter when Joey was born to living by herself in an apartment through a supportive housing program in July 2012, where she resided through the date of the termination hearing. Respondent also enrolled in a GED program and attended a vocational rehabilitation program. Although the fact that Respondent's application for Social Security disability benefits was denied is by no means conclusive proof of her competency, it does provide some evidence to support such a finding. Respondent regularly visited Joey, where she functioned as a parent and exhibited no instances of poor judgment. Additionally, in August 2012, Respondent asked to participate in the Juvenile Court Infant Toddler Initiative and completed the Positive Parenting Program in February 2013. Respondent does not suggest that her mental health problems worsened between the release of her GAL in September 2013 and the hearing to terminate her parental rights on 11 February 2014. In sum, the record does not suggest that Respondent's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she is *non compos mentis* and would be unable to aid in her defense at the termination of parental rights proceeding.

Accordingly, we hold that the trial court did not abuse its discretion when it did not, on its own motion, inquire into Respondent's competency before holding the hearing to terminate her parental rights. Respondent does not challenge the grounds found to terminate her parental rights or the trial court's conclusion that termination of her parental rights is in Joey's best interest. Thus, the trial court's order terminating her parental rights to Joey is

AFFIRMED.

Judges GEER and MCCULLOUGH concur.