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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-461

No. COA21-36

Filed 7 September 2021

Orange County, No. 19 JA 25

IN THE MATTER OF: A.P.

Appeal by respondent-mother from order entered 16 October 2020 by Judge Samantha H. Cabe in Orange County District Court. Heard in the Court of Appeals 10 August 2021.

*Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.*

*Richard Croutharmel for appellant-respondent-mother.*

*North Carolina Administrative Office of the Courts, by Matthew D. Wunsche, for the Guardian ad Litem.*

ARROWOOD, Judge.

¶ 1 Respondent-mother appeals from a permanency planning order ceasing reunification efforts. Respondent-mother contends the trial court abused its discretion by failing to address whether to appoint a Rule 17 guardian *ad litem* (“GAL”), specifically arguing that the evidence showed respondent-mother “never exhibited any insight into why her son was removed from her care and custody.” For the following reasons, we affirm the trial court.

I. Background

¶ 2

On 4 March 2019, the Orange County Department of Social Services (“DSS”) received a report of neglect of the juvenile A.P. (“Alan”)<sup>1</sup> related to improper medical and remedial care, substance abuse, and dependency. Alan has Down’s Syndrome, attention deficit hyperactive disorder (“ADHD”), and has limited verbal skills. The report arose from an incident where respondent-mother appeared “impaired and unwell[,]” with slurred speech, difficulty standing upright, difficulty with written communication, and with a swollen arm, when bringing Alan home from school. Due to respondent-mother’s condition, she was taken to the emergency room through a Law Enforcement Crisis Unit. DSS social worker Ashley Bryson (“Ms. Bryson”) initiated an assessment at the emergency room. During the assessment, respondent-mother admitted to having an addiction to crack cocaine and had used crack cocaine within the prior two days. Respondent-mother also admitted that Alan had never had a sober caretaker and that respondent-mother provided care for him while impaired and occasionally while actively using drugs. On 2 March 2019, respondent-mother left food on the stove unattended and was alerted by a neighbor that there was smoke coming from respondent-mother’s apartment. Additionally, concerns were raised during the assessment regarding adequate food for Alan, as he appeared

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<sup>1</sup> Pseudonyms are used throughout the opinion to protect the identity of the juvenile and for ease of reading.

extremely hungry and consumed a large amount of food provided to him by the Crisis Unit officer and Ms. Bryson.

¶ 3

DSS filed a petition on 5 March 2019 alleging that Alan was neglected and dependent. The following day, respondent-mother was evicted from her residence for nonpayment of rent and did not have any alternative living arrangements for herself or Alan. A home visit revealed that respondent-mother's residence had substandard living conditions: the residence was dirty and disorganized, prescription pills and drug paraphernalia were observable and accessible to Alan, and numerous holes were observed in the walls. Furthermore, Alan's bedroom was not habitable, and it appeared that respondent-mother and Alan slept together on a small couch in the living room.

¶ 4

Upon placement in foster care, Alan began to exhibit sexualized behaviors. These behaviors were demonstrated in front of and directed at social workers, including frequent masturbation in public and in private, the use of sexualized language towards others, humping dolls, and frequently trying to touch others on their breasts or buttocks. Social workers interviewed collateral contacts and learned that respondent-mother may have sexually trafficked Alan for money to buy drugs. Alan also "dressed up a pillow as a woman with which he masturbate[d]" and called out respondent-mother's first name during sexual acts with the pillow. Additionally, during an interview with a social worker on 22 March 2019, Alan said that "he does

that white stuff with [respondent-mother]” and demonstrated drug use by sniffing; a subsequent hair follicle test screen tested positive for cocaine.

¶ 5

Also on 22 March 2019, Dr. Dana Hagele (“Dr. Hagele”) conducted a Child Medical Evaluation of Alan. Dr. Hagele began with a brief child medical interview prior to physical examination. During the interview, Alan disclosed that respondent-mother “has drugs[,]” and had slapped his face with an open hand, demonstrating the behavior by slapping his own cheek with some force. Alan spontaneously added “[h]er hurt me” and pointed to his genitalia making a jabbing motion and demonstrating sexual contact by moving his hand back and forth rapidly. Based on Alan’s history and information gathered during the interview, Dr. Hagele made a diagnosis of child sexual abuse, child physical abuse, and expressed significant concerns for neglect and dependency. On 23 April 2019, DSS filed an amended petition with an additional allegation of abuse based on information gathered from medical interviews.

¶ 6

On 2 May 2019, the trial court conducted an adjudicatory and dispositional hearing, the Honorable Sherri Murrell presiding. On 28 May 2019, the trial court entered an order adjudicating Alan abused, neglected, and dependent. In the order, the trial court noted that respondent-mother is hearing impaired and does not use American Sign Language, instead communicating through written communication. The parties stipulated that DSS Social Worker Supervisor Brittany Mann would transcribe the proceedings on her laptop while sitting next to respondent-mother so

that respondent-mother could view and read the screen, in addition to respondent-mother's attorney sitting on respondent-mother's other side to allow respondent-mother to communicate in writing.

¶ 7 Based on the trial court's findings of fact and conclusions of law, the trial court ordered respondent-mother to demonstrate the ability to apply knowledge learned through a parenting service, participate in a Child and Family Evaluation ("CFE") and follow all recommendations, participate in a substance abuse assessment at the Freedom House<sup>2</sup> and follow all recommendations, participate in a psychological evaluation if recommended by the CFE and follow all recommendations, receive a peer support specialist and follow all recommendations, submit random drug screens, obtain and maintain stable and safe housing, and have bi-weekly, supervised visits with Alan.

¶ 8 Respondent-mother and her attorney were present for the first review hearing on 1 August 2019, the Honorable Joseph Buckner presiding. The trial court found that respondent-mother had attended all six scheduled visits with Alan to that point, had cancelled and rescheduled a substance abuse assessment, and attended Narcotics Anonymous meetings. The trial court ordered respondent-mother to follow all recommendations from the CFE and to take the same actions towards reunification

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<sup>2</sup> The Freedom House is a recovery center located in Chapel Hill, North Carolina.

as previously ordered.

¶ 9 Clinical and Forensic Social Worker Janet Hadler (“Ms. Hadler”) conducted a CFE on 12 July 2019 and completed a CFE report on 30 August 2019. In the CFE, respondent-mother told Ms. Hadler that she believed Alan’s behavior was the natural curiosity of a teenaged boy. Ms. Hadler reported that respondent-mother and Alan had a strong attachment to each other and exhibited appropriate physical affection, but that respondent-mother was “so unstable and vulnerable to slipping back into drug use” that it was “highly unlikely” respondent-mother could maintain a safe and appropriate home for Alan.

¶ 10 Another review hearing was held on 7 November 2019, the Honorable Joseph Buckner presiding. The trial court found that respondent-mother was attending Narcotics Anonymous meetings three times per week, was volunteering in the kitchen at Freedom House, had four drug screenings that were all negative, and was on time and in attendance for all scheduled visits. Based on the findings of fact, the trial court continued custody with DSS and set the next permanency planning hearing for 20 February 2020.

¶ 11 On 27 January 2020, Dr. Kristy Matala (“Dr. Matala”) conducted a Psychological and Parental Competency Evaluation (“PCE”). Dr. Matala diagnosed respondent-mother with cocaine use disorder in full remission, a mild case of major depressive disorder, and an overall IQ of 78, which is in the range of “Borderline

Intellectual Functioning.” An observed visit during the evaluation “revealed a loving, nurturing bond between them[,]” but also presented concerns about respondent-mother’s boundaries with Alan. During the visit, respondent-mother directed Alan to pull down his pants and underwear while respondent-mother rubbed lotion on his buttocks, legs, and back, in addition to cutting his toenails and picking wax from his ears. At one point during the observed visit, respondent-mother became emotional, resulting in Alan comforting respondent-mother “as if he were in the parenting role.”

¶ 12 At the time of the PCE, respondent-mother was consistently participating in substance abuse treatment and therapy, and although Dr. Matala commended respondent-mother’s progress with remaining sober, “based on the serious mistreatment that [Alan] experienced in her care, her denial or refusal to acknowledge [Alan’s] maltreatment history, and the presence of cognitive limitations, [respondent-mother] is not viewed as being capable of parenting [Alan] and ensuring that his needs are met in her care.” Dr. Matala recommended that any interactions between respondent-mother and Alan be supervised by a competent support person and that respondent-mother would benefit from parenting education regarding age-appropriate expectations and maintaining proper boundaries with Alan.

¶ 13 Respondent-mother and her attorney were present at the next permanency planning hearing on 20 February 2020, again before Judge Buckner. The trial court received a report summarizing Dr. Matala’s PCE as well as a subsequent interpretive

session conducted on 11 February 2020. At the interpretive session, respondent-mother disagreed that she needed a competent support person but noted her understanding of the recommendation. The trial court set a primary plan of reunification with a secondary plan of guardianship by order filed 10 March 2020. The trial court also ordered respondent-mother to participate in a parenting education class, follow all recommendations from the PCE, continue substance abuse treatment, and participate with a peer support specialist.

¶ 14 The next permanency planning hearing was held on 2 July 2020 before Judge Buckner. Respondent-mother and her attorney attended the hearing remotely via WebEx. The trial court found that respondent-mother had an extensive history of substance abuse but had remained sober since engaging in treatment. The trial court also noted the diagnoses made during the PCE, and found that respondent-mother did not understand her role in Alan's abuse and that she had not attained appropriate housing. The trial court concluded that a primary plan of guardianship with a secondary plan of reunification was appropriate and in Alan's best interest. Additionally, the trial court reiterated several requirements from previous orders regarding substance abuse treatment, following recommendations, and attending visitation with Alan.

¶ 15 The most recent permanency planning hearing was held on 17 September 2020, the Honorable Samantha H. Cabe presiding. The trial court



heard testimony from social worker Terri Edwards (“Ms. Edwards”), guardian *ad litem* Nicole Roman (“Ms. Roman”), and respondent-mother. Ms. Edwards was assigned as the foster care social worker for Alan and provided testimony regarding the background of the case. Ms. Roman served as Alan’s guardian *ad litem* and testified that her observations of visitation between Alan and both of his parents were very positive, in addition to other observations of Alan’s progress and behavior. Respondent-mother testified that she had been looking for suitable housing and gave information to DSS about a potential relative placement, but had not secured appropriate housing for herself and Alan. She also testified that she was working on parenting behavior and appropriate boundaries but still found it “strange” that her use of lotion was deemed problematic as Alan had “very, very bad skin[,]” and she had applied the lotion in a similar manner at previous visits observed by Ms. Edwards, who had not raised concerns about the behavior previously. When asked if she understood why Alan was removed from her care and custody, she responded “I don’t understand, Your Honor, to be honest with you. I don’t want to understand. I did the best that I could be for my child, . . . grandchildren. I just don’t understand.” Respondent-mother identified her granddaughter as her intended support person to assist with supervision, and concluded her testimony by stating that she did not agree with the recommendation of guardianship with Alan’s foster family.

constitutionally protected status, that Alan’s foster mother was a fit and appropriate person to be Alan’s guardian, and that it was in Alan’s best interest for Alan’s foster mother to serve as Alan’s guardian. Accordingly, the trial court appointed Alan’s foster mother as Alan’s guardian. The trial court ordered a visitation plan including a minimum of one two-hour supervised visit every three months, additional supervised visitation on holidays and milestone events, and electronic communication twice a month, to allow respondent-mother and Alan to maintain their relationship. The order was filed 16 October 2020.

¶ 17 Respondent-mother filed written notice of appeal on 10 November 2020.

## II. Discussion

¶ 18 Respondent-mother contends the trial court erred in failing to appoint a Rule 17 GAL. We disagree.

¶ 19 “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 [that] 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). A trial court’s decision concerning whether to appoint a parental guardian *ad litem* based on the parent’s incompetence is reviewed for abuse of discretion. *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015). A trial court’s decision whether to conduct an inquiry into a parent’s competency is also discretionary in nature. *Id.* (citing *In re*

*J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49). An “[a]buse 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) (citation omitted).

¶ 20 Pursuant to Rule 17(b)(2), when incompetent persons are defendants in an action or special proceeding, they must be defended by general or testamentary guardian; if they have no guardian, a court may appoint a guardian upon motion of any of the parties. N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2019). A trial court may only appoint a GAL for a parent in a juvenile proceeding if the parent is incompetent and in need of a Rule 17 GAL. N.C. Gen. Stat. § 7B-602(c) (2019). 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 similar cause or condition.” N.C. Gen. Stat. § 35A-1101(7) (2019). This Court has held the appropriate test for this definition as “one of mental competence to manage one’s own affairs.” *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 557, 589 S.E.2d 391, 401 (2003) (internal citation omitted), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 194, *disc. review dismissed*, 358 N.C. 241, 594 S.E.2d 193 (2004).

¶ 21 The trial court is afforded substantial deference with respect to this discretionary decision, as the trial court “actually interacts with the litigant whose

competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record." *In re T.L.H.*, 368 N.C. at 108, 772 S.E.2d at 456. "[W]hen the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence." *Id.* at 108-109, 772 S.E.2d at 456.

¶ 22 Respondent-mother argues that this case presents one of the extreme instances contemplated by *In re T.L.H.*, particularly focusing on Dr. Matala's reports and opinions with respect to respondent-mother's mental capacity and her ability to parent without supervision. Respondent-mother's brief also emphasizes that respondent-mother "never came to understand her role in Alan's removal from her custody[.]" in addition to her beliefs that Alan exhibited no behavioral problems before DSS intervened, and that the Oxford House was a suitable residence for her and Alan. DSS and Alan's GAL, on the other hand, place greater emphasis on respondent-mother's participation in court proceedings, including her testimony.

¶ 23 Based on the record, there is an appreciable amount of evidence tending to show that respondent-mother is not incompetent, and the facts of this case do not present a "most extreme" instance. Respondent-mother consistently attended and

participated in the permanency planning hearings, testified on her own behalf, and communicated effectively with the trial court. Additionally, between the original dispositional and adjudicatory hearing and the final permanency planning hearing, respondent-mother appeared before three different Orange County District Court judges. We find it significant that respondent-mother had numerous, lengthy, direct interactions with multiple trial court judges, none of whom made any indication that a review of respondent-mother's competence was warranted. Although the evidence presented indicates that respondent-mother has significant intellectual limitations and an imperfect understanding of why she lost custody of Alan, evidence of an individual's limited mental capacity or lack of understanding of why certain court decisions are made does not always require an assessment of that individual's competence. The trial court had discretion to choose whether or not to inquire into respondent-mother's competency and chose not to. Based on the record, we hold that the trial court did not abuse its discretion.

### III. Conclusion

¶ 24 For the foregoing reasons, we hold that the trial court did not abuse its discretion in failing to inquire into respondent-mother's competency, and did not err by not appointing a Rule 17 GAL. Accordingly, we affirm the trial court's order granting guardianship to Alan's foster mother.

AFFIRMED.

IN RE: A.P.

2021-NCCOA-461

*Opinion of the Court*

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).