NO. COA14-549

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

T.L.H. Guilford County
No. 13 JT 59

Appeal by respondent mother from order entered 4 February 2014 by Judge Tabatha Holliday in Guilford County District Court. Heard in the Court of Appeals 6 October 2014.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

J. Thomas Diepenbrock for respondent-appellant mother.

Parker Poe Adams & Bernstein, LLP, by Sye T. Hickey, for guardian ad litem.

ELMORE, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to the juvenile T.L.H. Respondent contends the trial court abused its discretion by failing to inquire into whether it was necessary to appoint her a guardian *ad litem* (GAL), when the allegations supporting termination of her rights were focused on her serious mental health disorders. We reverse the order terminating respondent's

parental rights and remand for a hearing to determine whether respondent requires a GAL.

I. Background

In addition to the juvenile T.L.H., who was born in 2013, respondent has two older children who were removed from her care. The Guilford County Department of Health and Human Services (DHHS) became involved with this juvenile at the time of the juvenile's birth, after respondent informed the hospital that she had no place to take the juvenile and a hospital psychiatrist evaluated respondent and determined the juvenile would not be safe with her. Respondent has a substance abuse history and is schizophrenic. According to DHHS, respondent "has a history of substance abuse and has diagnoses of schizophrenia, chronic paranoid type, chronically noncompliant, marijuana dependence, personality disorder," and DHHS stated it needed to "rule out borderline intellectual functioning." Respondent requested that DHHS "take custody of [the juvenile] until [respondent] could obtain her own housing and other things needed for her and her baby."

On 12 April 2013, DHHS filed a petition alleging the juvenile was neglected and dependent, and the juvenile was placed in non-secure custody. The petition alleged that

respondent had "a substance abuse history and is schizophrenic and has poor mental health compliance;" respondent had two children removed from her care due to substance abuse, domestic violence and her unresolved mental health issues; and respondent was hospitalized on several occasions in the past year due to mental health complications.

Deputy County Attorney Robert W. Brown, III requested that the trial court appoint respondent a GAL at an 18 April 2013 hearing to determine the need for the continued nonsecure custody of the juvenile. Judge Betty Brown (Judge Brown) appointed attorney Amy Bullock as respondent's GAL on that date. Judge Brown did not indicate whether the GAL was appointed in a substitutive capacity or an assistive capacity. The trial court dismissed the neglect allegation but adjudicated the juvenile dependent in an order entered 5 June 2013. The order also relieved DHHS of the duty to make reasonable efforts toward reunification, although it permitted DHHS to continue to make such efforts.

The matter came on for a permanency planning hearing on 11 July 2013, and respondent testified at the hearing. The trial court changed the permanent plan for the juvenile to adoption. On 9 September 2013, DHHS filed a petition to terminate the

parental rights of respondent and the juvenile's unidentified father. As grounds for termination of respondent's rights, the petition alleged: (1) neglect; (2) dependency; and (3) respondent's rights to another child had previously been terminated and she lacked the ability to establish a safe home. N.C. Gen. Stat. § 7B-1111(a)(1, 6, 9) (2013). A pretrial hearing was conducted before Judge Thomas Jarrell (Judge Jarrell), following which Judge Jarrell entered an order on 19 November 2013 stating: "Attorney Amy Bullock was released by operation of law effective October 1, 2013 as [respondent's] guardian ad litem attorney of assistance." Respondent proceeded in this matter without the assistance of a GAL. The case came on for a termination hearing on 6 January 2014. Respondent was not present for the hearing, and her attorney made a motion to continue on her behalf. According to the attorney, he had been unable to send respondent notice of the hearing because she had moved and DHHS had not provided him with her new address. The attorney had sent correspondence to respondent's former address in November and December of 2013. DHHS contended that a social worker had informed respondent of the termination hearing date and that respondent had not been present for any court dates since the July permanency planning hearing. The trial court

denied the motion to continue, and terminated respondent's parental rights based on all three grounds alleged in the petition. The trial court's order also terminated the parental rights of the juvenile's unidentified father. Respondent appeals.

II. Appointment of GAL

In her sole argument on appeal, respondent contends the trial court abused its discretion by failing to conduct an inquiry into whether it was necessary to appoint her a guardian ad litem. We agree.

In 2013, our General Assembly enacted amendments to Article 11 of the Juvenile code that apply to all proceedings occurring on or after 1 October 2013. 2013 N.C. Sess. Laws 129, §§ 32, 42. N.C. Gen. Stat. § 7B-1101.1(c) no longer allows the trial court to appoint a GAL for a parent with diminished capacity. Instead, subsection (c) specifies: "On 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." As such, N.C. Gen. Stat. § 7B-1101.1 now contemplates the appointment of a GAL only for the substitution for a parent who is incompetent in accordance with N.C. Gen. Stat. 1A-1, Rule 17. N.C. Gen. Stat. § 7B-1101.1 (2013).

In line with this amendment is the well-settled rule that "[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). "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.* (citation and quotation omitted). Thus, although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into whether a GAL need be appointed. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008). This Court has recently explained the process which must be followed in connection with the appointment of a parental guardian ad litem pursuant to N.C. Gen. Stat. § 7B-1101.1(c) as follows:

> [T]he trial court . . . must conduct a hearing in accordance with the procedures required under [N.C. Gen. Stat. § 1A-1,] Rule 17 in order to determine whether there is a reasonable basis for believing that a parent is incompetent or has diminished

> capacity and cannot adequately act in his or her own interest. If the court chooses to exercise its discretion to appoint [a guardian ad litem] under N.C. Gen. Stat § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the [guardian ad litem] should play, whether one of substitution or assistance.

In re P.D.R., ___ N.C. App. ___, ___, 737 S.E.2d 152, 159 (2012). There is no record evidence that Judge Brown conducted a hearing to determine in what capacity respondent's GAL would serve. In the present case, "the record clearly reflects that the trial court failed to delineate the precise role to be played by Respondent-Mother's guardian ad litem during the termination proceeding as required by N.C. Gen. Stat. § 7B-1101.1(c)." *In re B.P.*, ___, N.C. App. ___, 748 S.E.2d 773, 2013 WL 3379659 at *7 (2013). Though Judge Jarrell indicated that he believed respondent's GAL was serving in an assistive capacity, there is no record evidence that he conducted any hearing before making the determination. We believe *B.D.* and *P.D.R.* required that he do so before removing respondent's GAL.

To illustrate the effect of the amendment, we look to an unpublished opinion recently authored in this Court, *In re* H.B., 762 S.E.2d 1 (N.C. Ct. App. 2014). *In re* H.B., the respondent-

mother argued that the trial court erred in failing to inquire as to whether she needed a GAL based on the fact that the trial court had before it evidence of her diminished capacity and because, at the time of the termination hearing, N.C. Gen. Stat. § 7B-1101.1(c) (2011) authorized the appointment of a GAL based on evidence of incompetency and/or diminished capacity. This Court noted that, as amended, N.C. Gen. Stat. § 7B-1101.1, applied to any future proceedings occurring on or after 1 October 2013. *Id.* Given that the termination order was entered after the amendment date, we held that the record must have shown evidence of incompetency to require the trial court to consider whether to appoint a GAL in the cause. Because there was no such evidence in the record and because DHHS did not allege dependency as a ground for terminating the respondent's parental rights, we concluded the trial court did not err. *Id.*

In *In re N.A.L.*, the juvenile petition alleged that the juveniles were dependent and that the respondent-mother was "incapable of providing for the proper care and supervision of the minor child" because of her "problems in controlling her anger outbursts; her significant tendency to be aggressive towards others, including her child; and her lack of understanding of her prior neglect of the minor child." *N.A.L.*,

193 N.C. App. at 118-19, 666 S.E.2d at 771. Further, the respondent was also diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning. *Id.* In the order terminating the respondent's parental rights, the trial court found that she "has significant mental health issues which impact her ability to parent this child and meet his needs." *Id.* at 119, 666 S.E.2d at 771. Despite DHHS's allegations and its own findings of mental health issues, the trial court did not inquire whether the appointment of a GAL was appropriate. On appeal, the respondent-mother argued, and we agreed, that the trial court should have "properly inquired into" the respondent's competency pursuant to N.C. Gen. Stat. § 1A-1, Rule 17 to determine whether she was a candidate for the appointment of a GAL. *Id.* at 119, 666 S.E.2d at 771-72.

Here, respondent challenges the trial court's failure to inquire into her need for a GAL based on the evidence of her incompetency and the DHHS petition alleged dependency as a ground for termination. As in *In re N.A.L.*, the allegations against respondent in this case partly revolve around respondent's multiple, serious mental health conditions. DHHS alleged that respondent had schizophrenia, had poor mental health compliance, and was not taking her medication. A

hospital psychiatrist evaluated respondent and determined that "there was no way this newborn child can be safe with this mother." DHHS also noted that respondent's parental rights to her two other biological children were terminated, in part, due to her unresolved mental health issues. In the petition to terminate respondent's parental rights filed 9 September 2013, DHHS requested that the trial court make an inquiry to determine whether a guardian was necessary to proceed with the termination. There is no indication in the record, however, that the trial court ever made such an inquiry at the termination stage. The petition also noted that respondent's mental illness was one of the facts that led to the juvenile's removal to DHHS custody, and that respondent received Social Security benefits based on her mental health diagnoses.

In the termination order, the trial court made the following findings of fact:

> 16. The mother has been diagnosed with Bipolar Disorder, Schizophrenia, Schizo-Affective Disorder, and Narcolepsy. The mother also has a long history of failing and refusing to take her mental health medications as prescribed and recommended. As a result of the Narcolepsy, the mother falls asleep unexpectedly and may remain asleep for hours. The mother has also been diagnosed with Cannabis Dependence, has a long history of the same, tested positive for Marijuana, and failed to submit to a

> substance abuse assessment as requested.
>
> . . . .
>
> 26. The mother's mental illness, consistent refusal to comply with mental health medications, narcolepsy, and [Cannabis] Dependence render the mother incapable of providing proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. § 7B-101. These conditions contributed to the juvenile being removed from the home and the dependency adjudication on May 16, 2013. The mother's long history of the same conditions despite [DHHS] intervention in 2000 and 2004 evidences a reasonable probability that such incapability will continue for the foreseeable future. The mother has failed to come forward with an appropriate alternative child care arrangement.

Given the serious nature of respondent's multiple ongoing mental health conditions, the trial court's reliance on those conditions to support grounds to terminate her parental rights, and the probable impact of respondent's mental health status on her ability to participate in the proceedings, we believe the record demonstrates that the trial court abused its discretion by failing to conduct an inquiry into respondent's competency and the need for a guardian *ad litem*. *See In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d at 772 (trial court erred by failing to make inquiry in light of evidence raising issues of

respondent's competence). There was evidence before Judge Brown which could reasonably have allowed her to appoint the GAL in a substitutive capacity, but Judge Brown failed to make the determinations required by *P.D.R.*, *supra*. There is no record evidence that Judge Jarrell conduced a hearing pursuant to *P.D.R.* In light of this evidence, we remand for the purpose of determining respondent's "need for a GAL and the proper role of that GAL." *P.D.R.*, ___, N.C. App. at ___, 737 S.E.2d at 159, and "conducting any additional proceedings that might be needed dependent upon the determination made at that time." *B.P.*, ___ N.C. App. at ___, 748 S.E.2d 773, ___, 2013 WL 3379659 at *7. Accordingly, we reverse the termination order as to respondent, and remand for a hearing for the trial court to determine whether respondent is in need of a GAL.

Reversed and remanded.

Chief Judge McGEE concurs.

Judge HUNTER, Robert C., dissents by separate opinion.

NO. COA14-549

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

T.L.H. Guilford County
No. 13 JT 59

HUNTER, Robert C., dissenting.

Because I believe that the record shows that the trial court did not abuse its discretion in failing to inquire as to respondent's competency at the termination hearing, I must respectfully dissent.

"On 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). Although the statute formerly allowed the trial court to appoint a GAL for a parent who was incompetent or had diminished capacity, it was amended in October 2013 to delete language permitting appointment of GALs for parents who have diminished capacity. The statute now only allows appointment of a GAL for incompetent parents. An incompetent adult:

> [L]acks 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).

"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). "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.* "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010).

Previously, a trial court was required to appoint a GAL when the petition alleged dependency as a ground to terminate the parent's rights. *In re J.D.*, 164 N.C. App. 176, 180, 605

S.E.2d 643, 645, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). However, a dependency allegation no longer automatically triggers appointment of a GAL, although allegations of mental health problems may still require the trial court to inquire into appointment of a GAL. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008).

On appeal, respondent contends that the "trial court . . . had a duty to properly inquire whether [respondent] was incompetent, and required the appointment of a guardian ad litem. The trial court's failure to conduct such an inquiry is an abuse of discretion and requires reversal." Citing respondent's mental illness and failure to comply with treatment, respondent alleges that there was a substantial question as to respondent's competency. For the following reasons, I disagree.

To resolve whether the trial court abused its discretion, I believe it is necessary to detail the procedural history of the case prior to the termination stage. Based on the allegations in the juvenile petition filed 12 April 2013, the trial court appointed Amy Bullock as respondent's provisional GAL at the first hearing on the petition. At the time, the trial court exercised its then-existing authority under section 7B-1101.1(c)

to appoint a GAL for a parent with diminished capacity. Respondent's GAL assisted respondent in a number of hearings including the adjudication and disposition hearing on 16 May 2013, the permanency planning hearing on 11 July 2013, and the pretrial hearing on 18 November 2013. It was only after the statute change in October 2013 that the trial court released the GAL, noting that a parent with diminished capacity was no longer entitled to a GAL.

Furthermore, I disagree with the majority's conclusion that the record demonstrates respondent's incompetency to such a level that its failure to conduct another inquiry as to her competency once the statute changed constituted an abuse of discretion. In contrast, while I do believe that the evidence would support a finding of diminished capacity, I cannot say that the evidence rose to such a level that the trial court abused its discretion. As discussed, the trial court initially appointed the GAL based on its finding of diminished capacity but released the GAL once the statute changed in October 2013. Implicit in this decision is that the trial court concluded that respondent was not incompetent as of October 2013; otherwise, the trial court would not have dismissed the GAL despite the statute change. Thus, the issue is whether the trial court was

presented with sufficient evidence that respondent was incompetent to render the failure to conduct an inquiry at the termination hearing an abuse of discretion.

"[A] person with diminished capacity is not incompetent, but may have some limitations that impair their ability to function." *In re P.D.R.*, __ N.C. App. __, __, 737 S.E.2d 152, 158 (2012). Therefore, the fact that respondent was initially appointed a GAL based on diminished capacity has little bearing on the determination of whether she was/is incompetent. As noted above, for purposes of a section 7B-1101.1(c) determination of whether a parent should be appointed a GAL, incompetency means that the parent is unable to manage her affairs or communicate important decisions due to, among other conditions, mental illness.

Respondent cites her mental health diagnoses as sufficient evidence requiring an inquiry into her competency, and it is undisputed that she has a long history of mental illness. However, respondent has identified no specific information in the record that indicates she is incapable of managing her own affairs due to her mental conditions, including in this termination matter. At the July 2013 permanency planning hearing, respondent testified that she began receiving social

security benefits. When she received the first check, she used it to pay back rent and bills. In November 2013, respondent applied for and obtained new housing away from her boyfriend with whom she had a long history of domestic violence. In December 2013, she came to DSS and applied for new benefits. Finally, by releasing the GAL appointed based on the lower threshold of diminished capacity, the trial court implicitly indicated that respondent is not incompetent. Accordingly, I am unable to conclude that the trial court's decision to release the GAL was so arbitrary that it could only have been the result of an unreasoned decision; since respondent exhibited some level of sufficiency at managing her affairs, I do not think the trial court abused its discretion in releasing the GAL.

Finally, the majority's reliance on *In re N.A.L.* is misplaced. There, despite allegations that the respondent had serious mental health issues, the trial court failed to conduct any inquiry as to whether she was entitled to a GAL under section 7B-1101.1(c). *In re N.A.L*, 193 N.C. App. at 119, 666 S.E.2d at 771. Therefore, the Court held that the trial court abused its discretion by failing to conduct any inquiry as to whether the respondent should be appointed a GAL. *Id.* at 119, 666 S.E.2d at 772.

However, unlike *In re N.A.L.*, here, the trial court actually appointed a GAL under section 7B-1101.1(c) based on the circumstances alleged in the juvenile petition that suggested that respondent had diminished capacity. It was only after the statute changed in October 2013 that the trial court released the GAL because parents with diminished capacity were no longer entitled to a GAL. Furthermore, *In re N.A.L.* was decided before N.C. Gen. Stat. § 7B-1101.1(c) changed. Thus, this Court had to determine whether the evidence was sufficient to raise a substantial question as to the respondent's incompetency and diminished capacity, a lesser standard than incompetency. *See generally In re P.D.R.*, __ N.C. App. at __, 737 S.E.2d at 158. Accordingly, *In re N.A.L.* is distinguishable from the present case and is not controlling.

Finally, I believe that the Court's recent decision in *In re H.B.*, No. COA13-1474, 2014 WL 2507835 (June 3, 2014) (unpublished), provides guidance, and I would adopt its reasoning. In *In re H.B.*, the trial court originally appointed the respondent a GAL prior to the adjudication hearings. *Id.* at *2. However, although the GAL participated in the hearings through the permanency planning review hearing, she did not attend any further hearings nor was there any indication in the

record why she no longer participated. *Id.* On appeal, the respondent argued that the trial court abused its discretion by failing to inquire into her competency or diminished capacity because "nothing in the record indicate[d] that her need for a GAL had lessened." *Id.* After noting that her appeal as to diminished capacity was moot based on the change in N.C. Gen. Stat. § 7B-1101.1, this Court found no abuse of discretion as to the trial court's failure to inquire into her competency. *Id.* at *3.

Here, like *In re H.B.*, respondent was initially appointed a GAL before the statute changed in October 2013. However, once the statute changed, the trial court released the GAL, noting that parents with diminished capacity were no longer entitled to a GAL. Furthermore, I do not believe that respondent's circumstances had worsened to the extent that the trial court's decision to not inquire as to her competency at the later termination hearing was so arbitrary that it could not have been the result of a reasoned decision. In contrast, I believe that the evidence shows that her circumstances had improved. After the appointment of the GAL based on diminished capacity, respondent began receiving social security benefits, paid back bills and rent, applied for new benefits, and obtained new

housing away from her boyfriend. Accordingly, I would find no abuse of discretion.

In sum, I believe that the trial court did not abuse its discretion by failing to re-inquire as to respondent's competency at the termination hearing. Although respondent clearly had a long history of mental illness, she was able to apply for and obtain new housing, apply for new benefits at DSS, and use her social security benefits to pay back rent and bills. Thus, given this evidence of competency, I am unable to say that the trial court's decision was so arbitrary that it could have only resulted from an unreasoned decision. Therefore, I would affirm the order terminating her parental rights.