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NO. COA11-952
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

IN THE MATTER OF:

A.S.Y.

Orange County
No. 08 JT 101

Appeal by respondent-mother from order entered 4 May 2011 by Judge Page Vernon in Orange County District Court. Heard in the Court of Appeals 23 January 2012.

Wagner Law Firm, LLC, by Lisa Anne Wagner; and Northen Blue, LLP, by Carol J. Holcomb, for petitioner-appellee Orange County Department of Social Services.

Pamela Newell for guardian ad litem on behalf of A.S.Y.

Charlotte Gail Blake for respondent-appellant mother.

BRYANT, Judge.

Where the trial court had proper jurisdiction to reappoint respondent-mother's guardian *ad litem* and where the trial court properly allowed respondent-mother's guardian *ad litem* to testify about their communications, we affirm the order of the trial court.

Facts and Procedural History

This case is back before this Court after remand to the trial court. Although a summary of the facts preceding remand may be viewed in this Court's prior opinion, *In re A.S.Y.*, ___ N.C. App. ___, 703 S.E.2d 797 (2010), a brief synopsis of the history of this case is as follows: The Orange County Department of Social Services ("DSS") obtained non-secure custody of the minor child, A.S.Y.¹, on 28 October 2008, and filed a juvenile petition the next day alleging neglect and dependency. Two days later, the trial court appointed counsel and a guardian *ad litem* (hereinafter "GAL") for respondent-mother. The trial court adjudicated the minor child neglected and dependent on 30 December 2008. Respondent-mother appealed, and this Court affirmed the trial court's order. *In re A.Y.*, 199 N.C. App. 755, 687 S.E.2d 541 (2009) (unpublished).

On 17 June 2009, DSS filed a motion in the cause to terminate respondent-mother's parental rights, alleging as grounds neglect and incapability of care. Prior to the start of the termination hearing on 21 January 2010, the trial court allowed respondent's GAL to withdraw. After conducting the hearing, the trial court concluded that both grounds alleged by

¹ Initials have been used throughout to protect the identity of the juvenile.

DSS were supported by clear, cogent, and convincing evidence, and ordered that respondent-mother's rights be terminated. Respondent-mother appealed the trial court's termination order, and this Court determined that "the trial court erred by conducting the termination hearing without the presence and participation of a GAL for respondent-mother. . . ." *In re A.S.Y.* at ___, 703 S.E.2d at 803. This Court vacated the trial court's order and remanded for a new termination hearing. *Id.* The mandate from this Court issued on 10 January 2011.

On 6 January 2011, the trial court held a permanency planning review hearing and reappointed respondent's previous GAL, who attended the hearing. The new termination hearing was held on 20 January 2011. After hearing testimony and evidence, the trial court concluded that grounds existed to terminate respondent's parental rights based on neglect and incapability of care, and that termination serves the best interests of the child. The court entered its order on 4 May 2011. Respondent-mother appeals.

Respondent-mother presents the following issues on appeal: whether the trial court (I) lacked jurisdiction to reappoint the respondent-mother's GAL on 6 January 2011 prior to the issuance

of the 10 January 2011 mandate from this Court; and, (II) erred by allowing the respondent-mother's GAL to testify about her contact with respondent-mother and other matters.

I

First, respondent-mother argues the trial court lacked subject matter jurisdiction to reappoint a GAL for her since the court acted before the mandate regarding the prior appeal was issued from this Court.

Jurisdiction of the trial court over Chapter 7B matters pending resolution of an appeal to this Court is controlled by N.C. Gen. Stat. § 7B-1003 (2011). Where DSS filed a motion in the cause to terminate respondent's parental rights rather than a new petition, subsection (b) of that statute applies. *See In re K.L.*, 196 N.C. App. 272, 278, 674 S.E.2d 789, 793 (2009). The relevant portion of the Juvenile Code thus provides:

Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:

- (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
- (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C.G.S. § 7B-1003(b).

Respondent acknowledges that the trial court had authority to exercise jurisdiction and to conduct a permanency planning review hearing, which affects custody and placement of the minor child, while the prior termination order was on appeal to this Court. She argues, however, that section 7B-1003 has been construed narrowly, and that since an order appointing a GAL does not affect the custody or placement of the minor child, the trial court lacked authority to enter such an order. We disagree.

The trial court previously determined that respondent-mother required assistance from a GAL in the underlying juvenile action. This Court determined that the GAL's assistance should have continued throughout the termination proceedings based on the following analysis:

"[The GAL's] powers are coterminous with the beginning and end of the litigation in which he is appointed." *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 101, 165 S.E.2d 490, 497 (1969). Thus, once the trial court determined, in its discretion, that respondent-mother was "incompetent or ha[d] diminished capacity and c[ould] not adequately act in his or her own interest" and appointed her a GAL pursuant to N.C. Gen. Stat. § 7B-602, it was necessary for respondent-mother to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the

conditions that necessitated the appointment of a GAL still existed.

In re A.S.Y. at ___, 703 S.E.2d at 802. Thus, the prior termination order was vacated because the trial court dismissed the GAL prior to conducting the termination hearing, even though "the conditions which led to the appointment of respondent-mother's GAL still existed at the time of the termination hearing." *Id.*

We conclude that the same question of whether respondent-mother required a GAL's assistance applies to the permanency planning review hearing which the trial court held on 6 January 2011, before the issuance of this Court's mandate. Both DSS and A.S.Y.'s GAL submitted court reports regarding the status of the case and progress by both respondent-mother and A.S.Y. DSS stated in its report that respondent-mother "refused to engage in any sort of case planning or community based services to address any of the safety concerns raised by the Department and the Courts," and that the agency had not had contact with respondent-mother since May 2009. The GAL's report referenced respondent-mother's failure to comply with any court orders or recommendations of DSS, and that her current location was unknown. The trial court's written order from the permanency planning review hearing indicates that the court reappointed

respondent-mother's GAL at the hearing, and that the GAL was present at that hearing.

The court reports submitted at the permanency planning hearing indicate that respondent-mother continued to refuse to interact with DSS and to follow court orders. Thus, it appears that "the conditions that necessitated the appointment of a GAL still existed," and the trial court was correct in deciding to reappoint a GAL for respondent-mother to assist with that hearing and any following hearings until final resolution of the case was reached. Where the trial court had jurisdiction and authority to hold a permanency planning hearing during the pendency of the appeal to this Court pursuant to section 7B-1003(b), and respondent-mother still required the assistance of a GAL, the court had authority to reappoint respondent-mother's GAL, despite the fact that the hearing was held before the mandate issued from this Court.² Therefore, respondent-mother's arguments on this issue are without merit.

II

² We would like to note that our prior opinion, *In re A.S.Y.*, __ N.C. App. __, 703 S.E.2d 797 (2010), vacating the trial court's termination order and remanding for a new termination hearing, was filed and available for access online on 21 December 2010. Pursuant to N.C. R. App. P. 28(b) (2011), however, the mandate did not issue until 20 days following the filing of the opinion.

In her second argument, respondent-mother contends the trial court erred in allowing her GAL to testify, over counsel's objection, as a witness against her. She argues that the trial court erred by allowing her GAL to testify against her and by relying on that testimony to terminate respondent-mother's parental rights, because in both respects, the GAL's duty to represent her "to the fullest extent feasible and to do all things necessary to secure a judgment favorable to" her was undermined. *In re A.S.Y.* at ___, 703 S.E.2d at 803 (quotation marks and citation omitted). She also challenges the trial court's finding of fact that respondent-mother's failure to contact her GAL was "unreasonable and illogical" and argues the finding is not supported by evidence where the GAL made no effort to contact respondent-mother after withdrawing in January 2010 until January 2011 when she was reappointed. **[R.p. 221-22]** We disagree.

At the 20 January 2011 termination hearing, DSS called respondent-mother's GAL to testify about the extent of their communications. Respondent-mother's counsel objected, and the trial court overruled the objection. Respondent-mother's GAL testified that the last meeting she had with respondent-mother was on 19 February 2009, and she stated she attempted to contact

respondent-mother by telephone and by letter multiple times since that date. She did not have any contact with respondent-mother after she was allowed to withdraw at the previous termination hearing, or after being reappointed, despite attempts at making contact. She related that she knew nothing about respondent-mother's current circumstances.

The Juvenile Code states:

Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

N.C. Gen. Stat. § 7B-602(d) (2011). However, "[i]t is the substance of the communication that is protected and not the fact that there have been communications" *Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 822 (1992) (citation omitted).

Here, respondent-mother's GAL did not testify regarding the nature or substance of any communications she had with respondent-mother; rather, she related her attempts to contact respondent-mother and the fact that she had not heard from respondent-mother. Therefore, the trial court did not err in

allowing the GAL to testify. Nor did the court err in making findings of fact based on the GAL's testimony.

Next, respondent-mother argues the trial court erred by finding that respondent-mother's failure to communicate with her GAL was "unreasonable and illogical." The trial court's factual findings must be adequately supported by competent evidence. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). We conclude such finding is supported where the record indicates respondent-mother never responded to the GAL's attempts at communication after 19 February 2009 and up to the 20 January 2011 termination hearing, but she was able and willing to communicate with her attorney during that time. The court also noted respondent-mother's past refusal to accept the court's jurisdiction and DSS's authority over her, her failure to attend review hearings and both termination hearings, and her continued refusal to engage with DSS or her GAL despite the fact that DSS had custody of A.S.Y. Thus, the court did not err in finding that respondent-mother's lack of communication was unreasonable.

In conclusion, the trial court had the authority to reappoint respondent-mother's GAL for the permanency planning review hearing on 6 January 2011, and did not err in allowing

the testimony of respondent-mother's GAL regarding efforts to communicate with respondent or in making findings of fact based on that testimony. Accordingly, the order of the trial court terminating respondent-mother's parental rights is affirmed.

Affirmed.

Chief Judge MARTIN and Judge McCullough concur.

Report per Rule 30(e).