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NO. COA09-1039

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

IN THE MATTER OF:

A.S., Minor Child

Durham County
No. 08 J 135

Appeal by respondent-mother from an order entered 19 May 2009, *nunc pro tunc* 22 April 2009, by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 7 December 2009.

Cathy L. Moore, for Durham County Department of Social Services, petitioner-appellee.

Richard Croutharmel, for respondent-appellant mother.

Pamela Newell Williams, for Guardian ad Litem.

JACKSON, Judge.

Respondent-mother ("respondent") appeals the 19 May 2009 order terminating her parental rights as to the minor child A.S. For the reasons stated herein, we affirm.

On 11 April 2008, the Durham County Department of Social Services ("DSS") filed a petition alleging that A.S. was a neglected juvenile in that the child was not receiving proper care from respondent, or lived in an environment injurious to her welfare. DSS alleged that previously, on 26 April 2006, another

child of respondent had been adjudicated neglected based upon findings of fact that:

7. The mother and child tested positive for cocaine at the child's birth. This is the second child born to the mother within three years that tested positive for cocaine at birth. The other child is in the custody of the mother's adult daughter. The mother has not engaged in substance abuse treatment during this time.

8. The child was born premature and weighed 3 pounds two ounces at birth. At the time of the filing of the petition, the child was in the hospital and due to be discharged on Friday, March 10, 2006. The mother had not visited the child in the hospital since February 28, 2006. The mother had no supplies for the baby. The mother had no prenatal care for the baby. The mother was living in the home of a friend.

9. A Team Decision Making Meeting was held on March 8, 2006. The mother was unable to suggest a feasible plan for assistance in caring for the baby.

10. DSS has no information regarding the appropriateness of the putative father to provide care for the child. The mother has informed DSS that the putative father is in Mexico. DSS is unable to verify that information.

At disposition in this earlier case, respondent was ordered to abstain from drug and alcohol use, obtain a substance abuse evaluation and follow treatment recommendations, and apply to and participate in Family Drug Treatment Court. Additionally, the court ordered respondent to obtain a mental health evaluation with full psychological and educational testing and follow any recommendations for treatment. The court further ordered that respondent obtain and maintain stable housing and employment,

attend and complete a parenting program, visit regularly with the child, and demonstrate an ability to care for the child. DSS alleged that respondent wholly failed to comply with the court's orders, that DSS was authorized to cease reunification efforts, and that the permanent plan for that child was adoption.

DSS made allegations with respect to A.S. that were similar to the facts surrounding the 26 April 2006 adjudication of neglect for A.S.'s sibling. DSS alleged that at A.S.'s birth, both respondent and child tested positive for cocaine and that respondent had not engaged in substance abuse treatment. Additionally, DSS alleged that A.S. was born prematurely and weighed four pounds and nine ounces at birth. According to the petition, A.S. had been in the hospital since birth because of feeding problems and was due to be discharged on the day the petition was filed. DSS claimed that respondent had no supplies for A.S., had received no prenatal care, and was living in the home of a friend. DSS alleged that at a Team Decision Making Meeting held on 10 April 2008, respondent was unable to suggest a feasible plan for assistance in caring for A.S., and additionally, that respondent objected to placement of A.S. with family members who were caring for A.S.'s sibling. A non-secure custody order was entered and A.S. was placed into the custody of DSS.

On 8 August 2008, the trial court adjudicated A.S. a neglected juvenile pursuant to stipulations made by respondent. The court granted DSS custody of the child and ordered respondent to

be drug and alcohol free, receive a substance
abuse evaluation and follow any

recommendations for treatment, . . . apply to, and, if accepted, participate in the Family Drug Treatment Court, . . . receive a mental health evaluation and follow any recommendations for treatment, . . . obtain and maintain stable housing, . . . obtain and maintain stable employment and . . . attend and complete a parenting program.

Following a review hearing, the trial court entered an order on 17 November 2008, which included findings that:

The mother . . . has not been in contact with the DSS social worker regarding [A.S.] She has been in jail a number of times since the child was born. Her most recent time[] was from August 18, 2008 to approximate[ly] September 26, 2008 for misdemeanor probation violation, non-support of a child, and failure to comply with Family Drug Treatment Court. She did attend FDTC on September 25, 2008, from jail.

The trial court found that because respondent was not engaging in services, further reunification efforts would be futile. Accordingly, DSS was authorized to cease reunification efforts, and the permanent plan for the child was changed to a concurrent plan of adoption and guardianship with relatives.

On 29 January 2009, DSS filed a "Motion and Petition For Termination of Parental Rights." DSS alleged five grounds for termination of respondent's parental rights: (1) that respondent had neglected A.S. within the meaning of North Carolina General Statutes, section 7B-101(15); (2) that respondent, for a continuous period of six months immediately preceding the filing of the petition, willfully had failed to pay a reasonable portion of the cost of care for A.S. although physically and financially able to do so; (3) that respondent was incapable as a result of substance

abuse of providing for the proper care and supervision of A.S., such that A.S. was a dependent juvenile within the meaning of North Carolina General Statutes, section 7B-101(9), and there was a reasonable probability that such incapability would continue for the foreseeable future; (4) that respondent willfully had abandoned A.S. for at least six consecutive months immediately preceding the filing of the petition; and (5) that the parental rights of respondent with respect to another child of the mother had been terminated involuntarily by a court of competent jurisdiction and respondent lacks the ability or willingness to establish a safe home. These allegations correspond with North Carolina General Statutes, sections 7B-1111(a)(1), (3), (6), (7), and (9), respectively. Respondent denied the allegations of the petition in her answer.

A hearing on the petition to terminate respondent's parental rights was held on 21 and 22 April 2009. The trial court concluded that grounds existed pursuant to North Carolina General Statutes, sections 7B-1111(a)(1), (7) and (9) to terminate respondent's parental rights, although the order did not refer to those statutes specifically. The court further concluded that it was in the juvenile's best interests that respondent's parental rights be terminated. Accordingly, on 19 May 2009, *nunc pro tunc* 22 April 2009, the trial court terminated respondent's parental rights. Respondent appeals.

Respondent first argues that the trial court erred by failing to appoint her a guardian *ad litem* ("GAL") pursuant to North Carolina General Statutes, section 7B-1101.1(c). We disagree.

North Carolina General Statutes, section 7B-1101.1(c) provides:

On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent 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-1101.1(c) (2007). Pursuant to this statute, the trial court has a duty to inquire into the competency of a party "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 C.G.A.M., J.C.M.W.*, __ N.C. App. __, __, 671 S.E.2d 1, 4 (2008) (quoting *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (first emphasis added)). "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.'" *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (quoting *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)¹).

¹ *Rutledge* was superseded by statute as stated in *Culton v. Culton*, 96 N.C. App. 620, 621, 386 S.E.2d 592, 592 (1989). However, *Culton* subsequently was superseded by statute – and *Rutledge* was reaffirmed – as stated in *In re J.A.A. & S.A.A.*, 175 N.C. App. at 72-73, 623 S.E.2d at 49.

Here, respondent did not request a GAL. See *In re D.H., C.H., B.M., C.H. III*, 177 N.C. App. 700, 708-09, 629 S.E.2d 920, 925 (2006) (holding that the trial court did not err by failing to appoint a GAL pursuant to the predecessor statute, North Carolina General Statutes, section 7B-1101, when the parent did not request appointment of a GAL). In addition, although DSS alleged that respondent was incapable of providing proper care for the juvenile, pursuant to North Carolina General Statutes, section 7B-1111(a)(6), this was due to respondent's drug abuse. We note that pursuant to prior law, a trial court was required to appoint a GAL for a parent in a termination proceeding when the petition alleged that, pursuant to North Carolina General Statutes, section 7B-1111(a)(6), the parent was incapable of providing proper care for the child because of the parent's "substance abuse, mental retardation, mental illness, organic brain syndrome, or another similar cause or condition." N.C. Gen. Stat. § 7B-1101(1) (2003). However, in 2005 the General Assembly deleted the portions of North Carolina General Statutes, section 7B-1101 that required a trial court to appoint a GAL for a parent when incapacity is alleged in the petition. The General Assembly simultaneously enacted North Carolina General Statutes, section 7B-1101.1, which is applicable here. 2005 N.C. Sess. Laws 398 §§ 14, 15; N.C. Gen. Stat. § 7B-1101.1(c) (2007).

North Carolina General Statutes, section 7B-1101.1 now provides that "a trial court *may* appoint a guardian *ad litem* for a parent, 'if the court determines that there is a reasonable basis to believe that the parent is [(1)] incompetent or [(2)] has

diminished capacity and cannot adequately act in his or her own interest.'" *In re C.G.A.M., J.C.M.W.*, __ N.C. App. at __, 671 S.E.2d at 4 (first emphasis added) (quoting N.C. Gen. Stat. § 7B-1101.1(c) (2007)). Here, there was no allegation that respondent experienced any mental defect, mental illness, lack of understanding or a diminished capacity. Thus, the allegations in the petition did not automatically mandate that the trial court appoint a GAL.

Further, nothing in respondent's conduct at the hearing raised a question about her competency. She testified on her own behalf and asserted her own interest in retaining her parental rights. In fact, the trial court did not find that respondent suffered from any incapacity, as alleged in the petition, and did not conclude that grounds existed pursuant to North Carolina General Statutes, section 7B-1111(a)(6) to terminate her parental rights. Therefore, we conclude that the trial court acted within its discretion when it did not appoint a GAL for respondent.

Respondent next argues that the trial court erred by concluding that grounds existed to terminate her parental rights. We disagree.

North Carolina General Statutes, section 7B-1111 sets forth the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support a termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear,

cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)).

In the instant case, the trial court concluded that grounds existed pursuant to North Carolina General Statutes, section 7B-1111(a)(1) to terminate respondent's parental rights. "Neglected juvenile" is defined in North Carolina General Statutes, section 7B-101(15) as

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. . . .

N.C. Gen. Stat. § 7B-101(15) (2007). Generally, "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). However, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). When a prior adjudication of neglect is considered by the trial court, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and

the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Thus, when

there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

In the case *sub judice*, A.S. was adjudicated neglected on 8 August 2008 based upon facts to which respondent stipulated. Among the reasons for the juvenile's removal from respondent's care were respondent's continuing drug abuse and her failure to follow through with substance abuse treatment. Another child of respondent had been adjudicated neglected on 26 April 2006, in part due to respondent's drug abuse and failure to obtain treatment. Respondent was ordered to stay drug and alcohol free, receive a substance abuse evaluation, and follow recommendations for treatment. Respondent did not comply with the court's order, and at A.S.'s birth, respondent and A.S. both tested positive for cocaine. The trial court again ordered respondent to stay drug and alcohol free, obtain a substance abuse evaluation, and follow recommendations for treatment. Additionally, the court ordered respondent to receive a mental health evaluation, obtain stable housing and employment, and attend and complete a parenting program. As found by the trial court, prior to the filing of the

petition, respondent failed to comply with the court's order. The trial court found that

25. The motion for termination of parental rights was filed on January 29, 2009. Prior to that date, the mother had not been drug or alcohol free, had not had a mental health or substance abuse evaluation, had not engaged in substance abuse treatment, had not engaged in mental health treatment, had not obtained housing or employment, and had not completed a parenting program, during the times when the mother was not incarcerated. The mother had the ability to comply with the Court's order to engage in the services and take the ordered actions.

The court considered evidence of changed conditions at the termination hearing, as demonstrated by its findings that, since her incarceration in January 2009, respondent had been clean from drugs, had taken parenting classes, and had been involved with drug treatment. However, the trial court also found that respondent had "a long history of substance abuse . . . with cocaine being her substance of choice. She [had] participated in several substance abuse treatment programs, but has continued to relapse." The court thus found that "[i]t is unknown whether or not the mother will maintain her recovery once she is released from prison." Accordingly, the trial court concluded that there was "a reasonable probability of repetition of the neglect."

Respondent does not challenge the above findings made by the trial court. Therefore, these findings of fact are deemed to be supported by sufficient evidence and are binding on appeal. N.C. R. App. P. 28(b)(6) (2007); *see also In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding that respondent had

abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). Based upon the prior adjudication of neglect, the trial court's findings of fact regarding respondent's long history of substance abuse, her failure to comply with court orders, and her failure to stay drug-free when not incarcerated, we hold that the trial court properly concluded that there was likely to be a repetition of neglect should A.S. be returned to respondent's care. Accordingly, we hold that sufficient grounds existed for termination of respondent's parental rights pursuant to North Carolina General Statutes, section 7B-1111(a)(1).

Respondent further argues that the trial court erred by concluding that grounds existed pursuant to North Carolina General Statutes, section 7B-1111(a)(7) and (9) to terminate her parental rights. However, because grounds existed pursuant to North Carolina General Statutes, section 7B-1111(a)(1) to support the trial court's order, we will not address the remaining grounds found by the trial court to support termination. See *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground . . . found by the trial court.") (citation omitted).

Respondent's final assignment of error – that the trial court abused its discretion by terminating her parental rights – is not argued in her brief, and therefore, it is deemed abandoned. N.C. R. App. P. 28(b)(6). Accordingly, we affirm.

Affirmed.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).