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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1284

Filed: 18 July 2017

Franklin County, No. 15 JT 1

IN THE MATTER OF: A.U.

Appeal by respondent-mother from order entered 19 August 2016 by Judge Carolyn J. Thompson in Franklin County District Court. Heard in the Court of Appeals 22 June 2017.

Gena Walling McCray for petitioner-appellee Franklin County Department of Social Services.

Robert W. Ewing for respondent-appellant mother.

ELMORE, Judge.

Respondent-mother appeals from an order terminating parental rights to her minor child, A.U. (Aaron).¹ Her sole argument on appeal is that the trial court erred by failing to appoint Aaron a guardian ad litem (GAL) in the termination of parental rights (TPR) proceedings. After careful review, we affirm.

I. Background

¹ A pseudonym is used to protect the minor's identity.

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In January 2015, the Franklin County Department of Social Services (“DSS”) obtained nonsecure custody of Aaron and filed a juvenile petition alleging that he was a dependent juvenile. Aaron was one day old at the time, and the petition alleged that two of respondent-mother’s older children were in DSS custody. The petition further alleged that respondent-mother had been diagnosed with mild mental retardation and was not able to parent Aaron independently in the future. Although respondent-mother had been provided services in the past, DSS alleged that she was nonetheless unable to demonstrate an understanding of child development and was unable to provide basic needs for her children, such as routine medical care, adequate food and nutrition, stable housing, appropriate clothing, and appropriate supervision and discipline. DSS further alleged that respondent-mother’s lack of understanding and inability to provide basic necessities caused her older children physical and emotional trauma. Therefore, DSS claimed, it would be detrimental to Aaron’s health and safety if he were to remain in respondent-mother’s custody.

Following a hearing, the trial court entered an order on 16 September 2015 adjudicating Aaron dependent. The court found that respondent-mother was unable to parent Aaron independently due to mild mental retardation, that she lacked stable housing until recently, that she was unable to provide basic needs for an infant, and that her older children had been severely traumatized by domestic violence, substance abuse, instability, and an inappropriate environment. The trial court also

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found that Aaron's father was unable to care for him. The case was continued for disposition until 1 October 2015. However, the record does not contain a disposition order.

On 6 October 2015, DSS filed a motion to terminate respondent-mother's parental rights to Aaron alleging the following grounds: (1) dependency, and (2) respondent-mother's parental rights to two other children were terminated involuntarily and she lacks the ability or willingness to establish a safe home. *See* N.C. Gen. Stat. § 7B-1111(a)(6), (9) (2015). Following a hearing, the trial court entered an order on 19 August 2016 terminating respondent-mother's parental rights based upon both grounds alleged by DSS. The trial court heard testimony from two social workers assigned to respondent-mother's case, two psychologists who conducted evaluations on respondent-mother, and a psychologist who observed Aaron. The trial court made detailed findings regarding respondent-mother's cognitive limitations and her resulting inability to parent independently. The trial court also made detailed findings regarding past services provided to respondent-mother, her inability to practically apply the skills taught through these services, her exposure to multiple partners who engage in domestic violence, and her inability to understand the consequences of remaining with such partners. The trial court concluded that termination was in Aaron's best interest. Respondent-mother appeals.

II. Analysis

On appeal, respondent-mother contends the trial court erred by failing to appoint Aaron a GAL before proceeding with the TPR case.

A. Governing Law

Respondent-mother argues that despite the trial court not being required by our juvenile code to appoint Aaron a GAL, it was required to do so under Rule 17 of the North Carolina Rules of Civil Procedure.

“[W]here the juvenile code does not identify a specific procedure to be used in termination cases, the Rules of Civil Procedure will fill the procedural gaps” *In re S.D.W.*, 187 N.C. App. 416, 419, 653 S.E.2d 429, 431 (2007). However, “where the juvenile code sets forth specific procedures governing termination actions, those procedures apply to the exclusion of the Rules of Civil Procedure.” *Id.*

Relevant here, under Chapter 7B of the North Carolina General Statutes (the Juvenile Code), Article 11 governs procedure in TPR cases. Section 7B-1108 of Article 11 sets forth the procedures a court must follow in appointing a GAL for a minor in TPR proceedings. *See* N.C. Gen. Stat. § 7B-1108 (2015). Subsection (b) of this statute requires that a minor be appointed a GAL only in cases where the respondent-parent files “an answer or response [which] denies any material allegation of the petition or motion.” *Id.* § 7B-1108(b). And subsection (c) explicitly provides that “[i]n proceedings under [Article 11], the appointment of a guardian ad litem *shall not be*

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required except . . . in cases in which an answer or response is filed denying material allegations”; yet “the court may, *in its discretion*, appoint a guardian ad litem for a juvenile . . . in order to assist the court in determining the best interests of the juvenile.” *Id.* § 7B-1108(c) (emphasis added). Since the Juvenile Code specifically sets out the requirements for appointing a minor a GAL in TPR proceedings, Rule 17 is not needed to fill any procedural gaps and is thus inapplicable here. Accordingly, because respondent-mother in this case failed to file a responsive pleading denying any material allegations in the petition, the court was under no statutory obligation to appoint Aaron a GAL for the TPR case.

Nonetheless, respondent-mother relies heavily on our Supreme Court’s decision in *In re Clark*, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981), to support her position that despite these relevant provisions of the Juvenile Code requiring a minor be appointed a GAL only where a respondent-parent denies material allegations in the petition, Rule 17 mandates a minor be appointed a GAL in termination actions.

In *In re Clark*, our Supreme Court stated in dicta:

We recognize that G.S. 7A-289.29(b) requires that a guardian ad litem . . . be appointed for the child only if an answer is filed denying the material allegations of the petition. *This language does not prevent the application of other pertinent statutory provisions.* Whether or not the Act requires it, appointment of a guardian ad litem for both the minor respondent-mother and her minor child is mandated by G.S. 1A-1, Rule 17(c), Rules of Civil Procedure.³

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Id. at 598, 281 S.E.2d at 52 (emphasis added). The *In re Clark* Court noted:

The conclusion that G.S. 1A-1, Rule 17(c)(2), Rules of Civil Procedure, applies is inescapable. All remedies in the courts of this State divide into (1) actions or (2) special proceedings. G.S. 1-1. A proceeding to terminate parental rights is clearly not a criminal action, thus it is either a civil action or a special proceeding, G.S. 1-2, G.S. 1-3, G.S. 1-4. If this is a civil action, the Rules apply, G.S. 1A-1, Rule 2; if this is a special proceeding, the Rules apply, G.S. 1-393, *except where a different procedure may be prescribed by statute.*

Id. at 598 n.3, 281 S.E.2d at 52 n.3 (emphasis added). Respondent-mother's reliance on *In re Clark* and *In re Barnes*, 97 N.C. App. 325, 327, 388 S.E.2d 237, 238 (1990) ("N.C.G.S. § 1A-1, Rule 17(c) mandates that a guardian ad litem must always be appointed for a minor child in a termination proceeding regardless of whether a respondent filed an answer denying material allegations of the petition." (citing *In re Clark*, 303 N.C. at 598, 281 S.E.2d at 52)), is misplaced.

The *In re Clark* Court interpreted N.C. Gen. Stat. § 7A-289.29(b) (1981), which provided that "[i]f an answer denies any material allegation of the petition, the court shall appoint a . . . guardian ad litem for the child to represent the best interests of the child." Effective 6 July 1990 and before *In re Barnes* was filed in February 1990, the General Assembly inserted subsection (c) into this statute, which provided: "In proceedings under this Article, the appointment of a guardian ad litem *shall not be required except . . .* in cases in which an answer is filed denying material allegations . . . ; but the court may, in its discretion, appoint a guardian ad litem for

a child . . . in order to assist the court in determining the best interests of the child.” Act of 6 July, 1990, ch. 851, sec. 1, 1989 N.C. Sess. Laws 141 (entitled “An Act to Clarify Provisions Regarding the Appointment of a Guardian ad Litem”). The quoted language in N.C. Gen. Stat. § 7A-289.29(c) (repealed 1999) mirrors that of N.C. Gen. Stat. § 7B-1108(c) applicable here.

By enacting subsection (c), which explicitly states that a trial court “shall not be required” to appoint a minor a GAL in TPR proceedings unless a respondent-parent files an answer denying material allegations in the petition, the General Assembly “prevented the application of [Rule 17’s] pertinent statutory provisions” in this context. Because “a different procedure . . . [has since been] proscribed by statute,” the statements in *In re Clark* and *In re Barnes* regarding Rule 17’s mandate in the context of TPR proceedings do not support respondent-mother’s argument.

As concluded above, we hold the more specific provisions of N.C. Gen. Stat. § 7B-1108 of the Juvenile Code concerning the appointment of a GAL for a minor in TPR proceedings, rather than those more general provisions in Rule 17, controls the analysis of this issue.

B. Issue Preservation

Having concluded the Juvenile Code alone governs the appointment of a GAL for a child in a TPR case, we must determine within this context whether respondent-mother preserved her challenge to the trial court’s failure to appoint Aaron a GAL.

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Here, because respondent-mother failed to object at trial to the court’s failure to appoint Aaron a GAL, she has failed to preserve this issue for appellate review. *See In re A.D.N.*, 231 N.C. App. 54, 65–66, 752 S.E.2d 201, 209 (2013) (reiterating that, “in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below” (citing *In re Fuller*, 144 N.C. App. 620, 623, 548 S.E.2d 569, 571 (2001); *In re Barnes*, 97 N.C. App. at 326, 388 S.E.2d at 238)), *disc. rev. denied*, 367 N.C. 321, 755 S.E.2d 626 (2014); *see also* N.C. R. App. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired . . .”).

Alternatively, respondent-mother requests that if this issue was unpreserved for appellate review, we invoke Appellate Rule 2 to suspend Rule 10(a)(1)’s requirement and address her argument.

Under Rule 2, “[t]o prevent manifest injustice to a party,” this Court may “suspend or vary the requirements or provisions of any of [the appellate] rules in a case pending before it.” N.C. R. App. P. 2. “Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances.*” *State v. Campbell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, slip. op. at 6 (Jun. 9, 2017) (No. 252PA14-2) (quoting *Steingress v. Steingress*,

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350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)). Our Supreme Court has recently clarified that the determination of whether to invoke Rule 2 “must necessarily be made in light of the *specific circumstances of individual cases and parties*” and that “precedent cannot create an automatic right to review via Rule 2.” *Campbell*, ___ N.C. at ___, ___ S.E.2d at ___, slip. op. at 6, 7 (citing *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Rather, “whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis.” *Id.* at ___, ___ S.E.2d at ___, slip op. at 7 (citing *Dogwood Dev. & Mgmt. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008); *Hart*, 361 N.C. at 315–17, 644 S.E.2d at 204–06; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299–300).

In *In re P.T.W.*, this Court declined to invoke Rule 2 where the respondent-mother failed to preserve her argument that the trial court erred by failing to appoint a minor a GAL prior to the termination hearing. ___ N.C. App. ___, ___, 794 S.E.2d 843, 856 (2016). The *In re P.T.W.* Court concluded that “[i]n light of Respondent-Mother’s willful failure to make progress on her [] case plan, both before and after reunification efforts were ceased, and because a GAL appointment was not statutorily required, we do not find it necessary to invoke Rule 2 ‘to prevent manifest injustice’ to either Respondent-Mother or [the juvenile].” *Id.*; cf. *In re A.D.N.*, 231 N.C. App. at 66, 752 S.E.2d at 209 (declining to invoke Rule 2 under similar circumstances and

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distinguishing prior cases in which this Court invoked Rule 2 on grounds that “there is no indication in those [previous] cases, as there is here, that the appealing respondent had repeatedly chosen substance abuse over the child’s welfare throughout the child’s life and had almost entirely abdicated responsibility for the child to the petitioner”). Although we are not bound by this Court’s prior decisions regarding whether to invoke Rule 2 under similar circumstances, we find the analysis and reasoning underlying those decisions instructive to this case.

Here, the trial court was not statutorily required to appoint Aaron a GAL and the court’s unchallenged findings establish that respondent-mother had been evaluated by several psychologists who all opined that she was unable to parent independently due to her cognitive limitations and her inability to retain and demonstrate parenting skills taught by DSS—services provided to respondent-mother since 2012. The findings also show that DSS had been involved with respondent-mother’s family since 2007, that her oldest son had been raised by respondent-mother’s mother, and that respondent-mother’s parental rights to two other children had been terminated. Additionally, the findings establish that Aaron had lived in the same foster care home since birth, that he had a loving bond with his foster mother, whom he identified as his mother, and that Aaron’s foster parents intended to adopt him.

Based upon the particular facts of this case and the parties involved, we conclude this is not “the rare case meriting suspension of our appellate rules” and thus decline to invoke Rule 2 to address respondent-mother’s argument. *Campbell*, ___ at ___, ___ S.E.2d at ___, slip op. at 7 (citations omitted).

C. Alleged Statutory Error

Respondent-mother also argues that the trial court erred in failing to comply with N.C. Gen. Stat. § 7B-1108.1 (2015) (requiring a trial court to hold a pretrial hearing and consider, *inter alia*, whether a GAL should be appointed for a minor).

DSS filed two notices of hearing indicating that a pretrial hearing was scheduled for the same day as the termination hearing. However, much of the testimony at the outset of the first day of the termination hearing was inaudible. “Where the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties.” *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982).

Although respondent-mother did not object to the trial court’s failure to consider whether a GAL should have been appointed for Aaron, she argues that this issue is nonetheless preserved because N.C. Gen. Stat. 7B-1108.1 is a statutory mandate and a court’s failure to comply with a statutory mandate is reversible error.

Generally, “[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court’s action is preserved, notwithstanding the failure of the appealing

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party to object at trial.” *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931 (2001) (citation and quotation marks omitted). Yet “[n]ot every statutory violation . . . is grounds for reversal.” *In re E.K.H.*, 226 N.C. App. 448, 451, 739 S.E.2d 613, 615 (2013). Reversal is warranted only where an appellant satisfies her burden of demonstrating the alleged error was prejudicial. *Id.*; *see State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (“[W]hen a trial court acts contrary to a statutory mandate and *a defendant is prejudiced thereby*, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” (emphasis added)). Here, respondent-mother is unable to demonstrate that she was prejudiced by the trial court’s failure to appoint Aaron a GAL. The same facts underlying our decision not to invoke Rule 2 support our conclusion that respondent-mother cannot demonstrate prejudice and need not be repeated here. Accordingly, we affirm the trial court’s order.

AFFIRMED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).