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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-350

Filed 18 April 2023

Cumberland County, Nos. 17 JA 161-62, 21 JA 39

IN THE MATTER OF: N.P., T.P., and J.F.

Appeal by Respondent-Mother and Respondent-Father from order entered 10 January 2022 by Judge Frances M. McDuffie in Cumberland County District Court. Heard in the Court of Appeals 22 March 2023.

Patricia A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

Emily Sutton Deizo for respondent-appellant mother.

Sean P. Vitrano, for respondent-appellant father.

GAL Appellate Counsel Matthew D. Wunsche for guardian ad litem.

GRIFFIN, Judge.

Tyrone Perez¹ (“Respondent-father”) and Felicia Fennell² (“Respondent-

¹ Respondent-father is the biological father of Neil and Thomas.

² Respondent-mother is the biological mother of Neil, Thomas, and James.

mother”) both appeal from the trial court’s order adjudicating their minor children Neil, Thomas, and James³ dependent. Respondent-father appeals from the trial court’s order adjudicating Neil and Thomas as dependent and ordering the children remain in DSS custody while allowing him visitation for one hour each week. Respondent-mother appeals from the trial court proceeding to the adjudication and disposition of her minor children, Neil, Thomas, and James, in the absence of Respondent-mother’s guardian ad litem. We hold the trial court erred, and vacate and remand the trial court’s order.

I. Factual and Procedural Background

On 9 December 2020, Cumberland County Department of Social Services began investigating allegations that Respondent-father and Respondent-mother had been in a physical altercation in the presence of the children, which resulted in Respondent-mother’s arrest. During her arrest, Respondent-mother damaged Respondent-father’s car. The assigned social worker reported that neither parent was cooperative with the investigation nor would they provide information on the whereabouts of the minor children.

On 3 February 2021, DSS returned to the home to attempt contact with the children. Two social workers were present and stated Respondent-mother “became

³ We use a pseudonym for ease of reading and to protect the identity of the juveniles. *See* N.C. R. App. P. 42(b).

aggressive . . . and threatened to harm them,” damaged a DSS vehicle, and got into her own vehicle to chase the social workers when they tried to leave the residence. The following day, the social workers filed a complaint, an arrest warrant was issued, and Respondent-mother was arrested. On 12 July 2021, a district attorney dismissed all charges against Respondent-mother in connection with the 3 February 2021 incident.

On 4 February 2021, DSS filed a juvenile petition naming Neil, Thomas, and James as being neglected and dependent juveniles. Further, the petition stated, “[b]ased on Respondent Mother’s erratic and violent behavior, it is alleged and believed [sic] that [she] is not mentally stable.” The court issued a nonsecure custody order and the three children were removed from the home by DSS the same day. When interviewed by DSS, the minor children stated Respondent-mother and Respondent-father engaged in frequent bouts of domestic violence in their presence and that Respondent-mother had recently maced Thomas.

On 14 April 2021, Respondent-mother’s court-appointed attorney motioned the court to appoint a Rule 17 GAL for her as she was “receiving SSI benefits for her mental health issues.” The trial court appointed a Rule 17 GAL upon finding Respondent-mother incompetent because, in addition to receiving SSI benefits, she exhibited “erratic behavior in and out of the courtroom[,] [s]he used profanity toward the social worker . . .[,] and the court fe[lt] she [was] unable to control and fully understand” the proceedings.

On 11 August 2021, upon motions to withdraw, the court released Respondent-mother's court appointed attorney and her GAL, because she "had no contact with . . . her assigned attorney recently" and was "not present in court [] or at the last hearing on 7-14-21." No competency hearing was held prior to the release of the Rule 17 GAL nor did the court make findings as to Respondent-mother's continued need, or lack thereof, for a GAL.

After the release of Respondent-mother's GAL, on 5 October 2021, the court held an adjudication and disposition hearing wherein the court found "by clear, cogent, and convincing evidence" that the juveniles were neglected and dependent" as defined by N.C. Gen. Stat. §§ 7B-101(9) and (15). The findings were based solely on the juvenile petition filed 4 February 2021 and the testimony of one witness, the investigating social worker whose name appeared on the petition. Respondent-father and Respondent-mother were not present at the hearing nor were attorney appearances made on their behalf.

On 10 January 2022, the trial court filed the 5 October 2021 adjudication and disposition order. On 19 January 2022, a second identical adjudication and disposition order was filed. On 19 January 2022, Respondent-father filed a Rule 60(b) motion citing "at least 13 errors, mistakes, mis-information, [and] false-statements[.]" On 26 and 27 January 2022, a supporting memorandum, motions for court appointed counsel, and motions for discovery were filed by both Respondents.

On 31 January 2022, Respondent-mother filed a motion to join Respondent-

father's Rule 60(b) motion, as well as a Rule 15(D) motion for supplemental pleadings, adding a claim for violations of her Sixth Amendment right to counsel and N.C. Gen. Stat. § 7B-602 right to a Rule 17 GAL. On 9 February 2022, Respondents filed a timely joint notice of appeal from the 10 January 2022 order. On 28 February 2022, the trial court signed an adjudication and disposition order, making alterations to five paragraphs and completely eliminating two paragraphs from the original order; the order was filed 2 March 2022.

II. Analysis

Both Respondent-mother and Respondent-father argue this Court should vacate the trial court's order and remand for further proceedings. Respondent-father argues the trial court erred in adjudicating the juveniles dependent and abused its discretion in ordering the juveniles to remain in DSS custody while allowing him visitation for one hour per week. Respondent-mother argues several issues, the most significant being whether the trial court committed reversible error under N.C. Gen. Stat. § 7B-602(c) by releasing Respondent-mother's Rule 17 GAL without conducting a competency hearing to inquire into her continued need for such protection or appointing another GAL. We agree with Respondent-mother and therefore decline to address Respondent-father's contentions as we vacate and remand the order from which he appeals.

A Rule 17 GAL appointed for an incompetent parent in proceedings regarding abuse, neglect, or dependency "act[s] as a guardian of procedural due process for that

parent, to assist in explaining and executing her rights.” *In re A.S.Y.*, 208 N.C. App. 530, 540, 703 S.E.2d 797, 803 (2010) (internal marks and citation omitted); *see also* N.C. R. Civ. P 17. When an appeal from a trial court’s order is based on a constitutional violation, as is the case here, this Court reviews the trial court’s order *de novo*. *In re C.A.B.*, 381 N.C. 105, 112, 871 S.E.2d 468, 474 (2022).

The juvenile code provides for the appointment of a Rule 17 GAL for incompetent parents “[o]n motion of any party or on the court’s own motion[.]” N.C. Gen. Stat. § 7B-602(c) (2022). A trial judge has a duty to properly inquire into the competency of a parent when circumstances are brought to the judge’s attention, which raise a substantial question as to the parent’s competency. *In re D.L.P.*, 242 N.C. App. 597, 600, 776 S.E.2d 241, 243 (2015) (citation omitted). Once a trial court determines that a parent is incompetent, they must appoint a GAL to “represent the party . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party” so “long as the conditions that necessitated the appointment of a GAL still exist[.]” *In re A.S.Y.*, 208 N.C. App. at 539–40, 703 S.E.2d at 802–03 (internal marks and citations omitted). The GAL appointed for an incompetent parent in abuse, neglect, and dependency or termination cases must be present and participate “in order for the trial court to proceed to final judgment, order or decree” against the parent. *In re P.D.R.*, 224 N.C. App. 460, 470, 737 S.E.2d 152, 159 (2012) (citation and internal marks omitted).

In *In re A.S.Y.*, the trial court “allowed [the GAL’s] motion to withdraw as [the]

respondent-mother's GAL and then failed to appoint a substitute GAL." *In re A.S.Y.*, 208 N.C. App. at 540, 703 S.E.2d at 802–03. After releasing the GAL, the trial court conducted a hearing without the respondent-mother or a GAL present and subsequently entered an order terminating the respondent-mother's parental rights. *Id.* This Court held that "the trial court's order terminating [the] respondent-mother's parental rights . . . was invalid" and vacated the order stating that "even in the absence of [the] respondent-mother, the GAL [is] still required to remain and represent [the] respondent-mother to the fullest extent feasible during [a] hearing." *Id.* at 539, 703 S.E.2d at 802.

In re A.S.Y. is instructive in the instant case. Here, the trial court determined that Respondent-mother's incompetency required the appointment of a GAL to protect her rights as she was receiving SSI benefits, exhibited erratic behavior in and out of the courtroom, and it was the opinion of the court that she was unable to control and fully understand the proceedings. Respondent-mother's GAL was later released without the trial court making findings that "the conditions that necessitated the appointment of a GAL" no longer exist. *Id.*

Because the trial court proceeded with the hearing and adjudicated the minor children neglected and dependent, notwithstanding the requirements of Rule 17, the adjudication and disposition order is invalid and the remaining issues on appeal do not need to be addressed.

III. Conclusion

IN RE: N.P., T.P., AND J.F.

Opinion of the Court

Accordingly, we vacate the trial court's order and remand the case for a new termination hearing in accordance with the requirements of Rule 17 and N.C. Gen. Stat. § 7B-602(c).

VACATED AND REMANDED.

Judges TYSON and FLOOD concur.

Report per Rule 30(e).