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NO. COA12-1400
NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2013

IN THE MATTER OF

R.D.

Mecklenburg County
No. 12 JA 150

Appeal by respondent from orders entered 4 September 2012 and 13 September 2012 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2013.

Twyla E. Hollingsworth-Richardson for petitioner-appellee.

Ryan McKaig for respondent-appellant.

The Law Office of Derrick J. Hensley, by Derrick J. Hensley; and Catherine Boutaud, for guardian ad litem-appellee.

GEER, Judge.

Respondent mother appeals from orders adjudicating R.P.D. ("Ricky") as a neglected and dependent juvenile and placing him in the custody of the child's father.¹ She contends the court erred by: (1) failing to conduct a hearing to determine the need

¹The pseudonym "Ricky" is used throughout this opinion to protect the minor's privacy and for ease of reading.

for appointment of a guardian ad litem for her and failing to appoint a guardian ad litem; (2) denying her motion to change venue; (3) awarding custody to the child's father; and (4) placing time limits upon the dispositional hearing. We conclude the court erred by failing to inquire into respondent's competency and, therefore, remand for further proceedings.

Facts

On 19 March 2012, the Mecklenburg County Department of Social Services ("DSS") filed a petition alleging that Ricky was a neglected and dependent juvenile. The petition stated that in response to a report that respondent mother was exhibiting mental health issues and asking for Ricky to be placed outside her care, respondent mother and Ricky were transported to Presbyterian Hospital where a mental health evaluation was conducted on respondent mother. The petition based its allegation of neglect and dependency on the fact that respondent mother's mental illness required hospitalization, and no relative placement could be found for the child.

The trial court entered an order on 4 September 2012 finding, based on the parties' stipulation and the evidence, the following facts. On 17 March 2012, respondent mother called 911 because she believed someone was following her. Although both Ricky and respondent mother were sitting in a hot car,

respondent mother was more concerned that Ricky's father might be following her. Respondent mother stated that she had taken out a restraining order against Ricky's father in December 2011. Ricky's father had consented to a no contact order that had been entered without findings of fact.

The court further found that because Ricky had severe diaper rash all over his side, Ricky and respondent mother were taken to Presbyterian Hospital by ambulance. While at the hospital, respondent mother was trying to burp Ricky, but she was not holding his head properly given his age, and she had to be reminded by hospital staff to support Ricky's head. Ricky was diagnosed with severe diaper rash, yeast infection, and thrush.

The order noted that when questioned, respondent mother said she and Ricky had been living at a shelter, but she would not provide any information about where they had lived before the shelter. A social worker, who interviewed respondent mother at the hospital, said respondent mother acted frightened and panicked and began to cry. Respondent mother was subsequently diagnosed with psychosis not otherwise specified with post-partum onset. The court found that none of respondent mother's family members who came to the hospital could provide placement for Ricky after respondent mother was involuntarily committed to

the hospital. Based on these findings, the trial court adjudicated Ricky as a neglected and dependent juvenile.

The trial court entered its disposition order on 13 September 2012. That order awarded legal custody of Ricky to his father. The trial court found more specifically than in the adjudication order that respondent mother had been hospitalized as a danger to herself and others after a doctor's examination found her to be confused, paranoid, bizarre, aggressive, combative, sexually inappropriate, suffering dissociative symptoms and memory loss, and psychotic with religious fixations and delusions. Respondent mother did not know what was going on and was disoriented. The doctor's diagnostic impressions included Axis 1, schizophrenia, paranoid type (provisional), and Axis IV, problems with primary support group.

The trial court also found that although respondent mother sent hundreds of text messages to Ricky's father, she had no recollection of sending them or that Ricky's father requested she stop. The trial court concluded, based on this lack of recollection, either "that she is unwilling to acknowledge a pattern of conduct that does not place her in the best light or she has no insight or recall of her significant conduct and suffers from memory loss." The trial court was "greatly concerned regarding her insight into her situation and her

ability to take action to address the issues that caused her child to be placed in care." The court found that respondent mother voluntarily terminated her course of treatment and had "describe[d] symptoms . . . to justify the termination of treatment but she never endorsed those symptoms to her medical doctor, counselor or social worker" before the hearing.

With respect to Ricky's father, the court found that he should have been aware of respondent mother's pregnancy, but took no steps to support Ricky until DSS' intervention. Nevertheless, since being contacted by DSS, he had cooperated fully, including obtaining an appropriate residence, cooperating with referrals, obtaining items for Ricky's childcare, and requesting placement.

Based on these findings, the trial court determined that respondent mother did not take seriously her mental deterioration of March 2012 "or at worse has not [sic] insight regarding the need for oversight to ensure she doesn't experience such decompensation again." The court continued: "The Court can only conclude she was suffering from a psychotic disorder. She has provided no explanation as to how she ended up in her situation and she has not appropriately addressed the issue with medical providers such that the Court can say that it is not likely to re-occur." Further, the court found that

respondent mother's "testimony was detrimental to her own interests" and "[t]he Court does have concern as to whether she has the insight and judgment to make rational decisions regarding her own well-being."

The court, therefore, concluded that respondent mother was not a fit and proper person to have care and custody of Ricky. Because the court concluded that Ricky's father was fit and proper, had been observed taking appropriate care of Ricky, had scored high in most areas in a parenting assessment, had stable employment and housing, and had an appropriate plan for child care, the court determined that it was in Ricky's best interest for the father to be awarded legal and physical custody with respondent mother having supervised visitation. Respondent mother timely appealed to this Court.

Discussion

We first address respondent mother's contention that the trial court erred in failing to conduct a hearing on whether respondent mother needed to have a guardian ad litem appointed for her. Appointment of a guardian ad litem for a parent in an abuse/neglect/dependency proceeding is governed by N.C. Gen. Stat. § 7B-602 (2011). Subsection (c) of the statute provides that the trial court may appoint a guardian ad litem for a parent pursuant to Rule 17 of the North Carolina Rules of Civil

Procedure upon motion of any party or on the court's own motion "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-602(c).

An incompetent adult is one

who lacks 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) (2011). As for the phrase "diminished capacity," this Court has explained:

The phrase "diminished capacity," which appears in N.C.G.S. § 7B-602(c), is used primarily in the criminal law context and is defined as "[a]n impaired mental condition - - short of insanity -- that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime." Black's Law Dictionary 220 (8th ed. 2004). However, our Court has also defined "diminished capacity" in the juvenile context as a "lack of 'ability to perform mentally.'" *In re Reinhardt*, 121 N.C. App. 201, 204, 464 S.E.2d 698, 701 (1995) (quoting *Taber's Cyclopedic Medical Dictionary* 278 (16th ed. 1989)), *overruled on other grounds by In re Brake*, 347 N.C. 339, 493 S.E.2d 418 (1997).

In re M.H.B., 192 N.C. App. 258, 262, 664 S.E.2d 583, 585-86 (2008). Stated another way, a person "with diminished capacity is not incompetent, but may have some limitations that impair [his or her] ability to function." *In re P.D.R., L.S.R., J.K.R.*, ___ N.C. App. ___, ___, 737 S.E.2d 152, 158 (2012).

It is well established 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. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). The decision whether the circumstances call for this inquiry is within the discretion of the trial judge. *Id.*

This Court found an abuse of discretion in *In re M.H.B.*, 192 N.C. App. at 265, 664 S.E.2d at 587, an abuse, neglect, and dependency proceeding, when the trial court failed to conduct a hearing to assess the parent's competency, capacity, or ability to adequately act in his own interest. In that case, the court made findings in its adjudication order that the parent suffered from post-traumatic stress disorder and manic depression for which he was prescribed lithium. *Id.* at 262, 664 S.E.2d at 586. The court further found that the parent had been receiving mental health treatment and taking medications as a part of this

treatment and that the parent had threatened to commit suicide. *Id.* at 263, 664 S.E.2d at 586. In its disposition, the trial court ordered a psychological evaluation of the parent. *Id.* at 266, 664 S.E.2d at 587. We concluded that these findings of fact by the trial court raised "serious questions as to [the parent's] competency, capacity, and ability to adequately act in his own interest," *id.* at 264, 664 S.E.2d at 587, and that the court's "complete failure to exercise its discretion to hold such a hearing and make such determinations under these circumstances amounted to an abuse of discretion." *Id.* at 266, 664 S.E.2d at 588. See also *In re N.A.L. & A.E.L., Jr.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008) (holding trial court erred in failing to inquire into mother's competency and need for guardian ad litem when petition sought to terminate parental rights based on dependency and trial court's order found that mother had full scale IQ of 74 and suffered from personality disorder).

Here, the petition alleged dependency arising out of respondent mother's mental illness. The trial court's adjudication and disposition orders included numerous findings raising questions regarding whether respondent mother was incompetent or had diminished capacity. As the orders noted, respondent mother had been hospitalized only six months earlier

for a psychotic episode, and the evaluating doctor's diagnostic impressions included schizophrenia, paranoid type. The court expressed some reservations about whether respondent mother was receiving appropriate treatment for her mental illness and adequately addressing the mental health issues which resulted in the removal of the child from her custody. The trial court's dispositional order stated that the court could "only conclude [respondent mother] was suffering from a psychotic disorder." Further, the court found that respondent mother's "testimony was detrimental to her own interests" and "[t]he Court does have concern as to whether she has the insight and judgment to make rational decisions regarding her own well-being." These findings -- although denominated conclusions of law -- raise a question, at a minimum, whether respondent mother suffered diminished capacity.

While petitioner and the child's guardian ad litem point to evidence suggesting that respondent mother was not incompetent or suffering diminished capacity, they do not address the trial court's findings showing that the court had questions about respondent mother's mental state. The court was required to resolve those questions by conducting a hearing to determine whether a guardian ad litem should be appointed for respondent mother. Under *In re M.H.B.* and *In re N.A.L.*, the court abused

its discretion in failing to do so. Consequently, we reverse the adjudication and disposition orders and remand the matter to the trial court for further proceedings to determine whether a guardian ad litem should have been appointed for respondent mother.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).