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NO. COA11-232
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

IN THE MATTER OF:

N.T.S.

Columbus County
Nos. 07 CVD 1232, 08 JA 41

Appeal by respondent-mother from orders entered 21 December 2010 by Judge William F. Fairley in Columbus County District Court. Heard in the Court of Appeals 15 August 2011.

Terri L. Martin for petitioner-appellee Columbus County Department of Social Services.

Pamela Newell for respondent-Guardian ad Litem.

H. Griffith Garner for respondent-appellee father.

Richard Croutharmel for respondent-appellant mother.

ERVIN, Judge.

Respondent-Mother Tasha M. appeals from orders continuing custody of N.T.S.¹ with Respondent-Father Leon S., requiring Respondent-Mother to engage in visitation with Nancy subject to the supervision of an out-of-county agency, suspending

¹ N.T.S. will be referred to throughout the remainder of this opinion as Nancy, which is a pseudonym used to protect the juvenile's privacy and for ease of reading.

Respondent-Mother's visitation with Nancy, and waiving further review hearings. On appeal, Respondent-Mother contends that the trial court erred by requiring her to proceed *pro se* at a dispositional hearing in the absence of a proper waiver of her right to counsel, by requiring her to have supervised visitation with Nancy at the Child Advocacy and Parenting Program, and by suspending her visitation with Nancy. After careful consideration of Respondent-Mother's challenges to the lawfulness of the trial court's orders in light of the record and the applicable law, we conclude that the trial court's orders should be reversed and that this case should be remanded to the Columbus County District Court for a new dispositional hearing.

I. Factual Background

Respondent-Mother and Respondent-Father married in July 2004 and separated in May 2007. Nancy, who was born in 2005, lived with Respondent-Mother after her parents separated.

On 1 August 2007, Respondent-Father filed a complaint in Columbus County District Court seeking custody of, visitation with, and support for Nancy. In April 2008, the Columbus County Department of Social Services took non-secure custody of Nancy and filed a juvenile petition alleging that Nancy was a neglected and dependent juvenile. The custody, visitation, and

support action and the juvenile proceedings were subsequently consolidated. On 7 October 2008, the trial court entered orders finding Nancy to be a neglected and dependent juvenile; the trial court subsequently vacated these orders on the grounds that they had not been entered in a timely fashion. On 22 October 2008, DSS filed a second juvenile petition alleging that Nancy was an abused, neglected, and dependent juvenile. On 25 March 2009, the trial court entered a consent order determining that Nancy was a neglected and dependent juvenile.

The trial court held numerous dispositional hearings beginning on 27 July 2009. At the 6 May 2010 dispositional hearing, the trial court allowed Respondent-Mother's retained counsel to withdraw. At the next dispositional hearing, which was held on 3 June 2010, Respondent-Mother proceeded *pro se*. On 7 July 2010, the trial court entered a Temporary Order in which it awarded legal custody of Nancy to Respondent-Father and required Respondent-Mother to engage in visitation with Nancy subject to supervision by the Child Advocacy and Parenting Program, which is located in New Hanover County. Although Respondent-Mother noted an appeal to this Court from the Temporary Order, we subsequently dismissed Respondent-Mother's appeal as having been taken from an unappealable interlocutory

order. *In re N.T.S.*, ___ N.C. App. ___, 707 S.E.2d. 651, *disc. review denied*, ___ N.C. 710, S.E.2d 21 (2011).

On 19 October 2010, prior to conducting another dispositional hearing, the trial court found Respondent-Mother to be financially unable to afford the cost of counsel and appointed an attorney to represent Respondent-Mother. After holding a final disposition hearing on 30 November 2010, the trial court entered a Disposition Order and Order of Custody on 21 December 2010. In its dispositional order, the trial court ordered that Nancy remain in Respondent-Father's custody and suspended Respondent-Mother's visitation with Nancy. In addition, by means of a separate order, the trial court dispensed with the necessity for further review hearings. Respondent-Mother noted an appeal to this Court from the trial court's orders.

II. Legal Analysis

On appeal, Respondent-Mother argues that the trial court erred by requiring her to proceed *pro se* at the 3 June 2010 dispositional hearing despite the fact that she had not properly waived her right to counsel. Respondent-Mother's contention has merit.

Prior to the 6 May 2010 dispositional hearing, Respondent-Mother sent a letter to her retained counsel in which she

requested him to stop working on her case. As a result, Respondent-Mother's retained counsel filed a motion seeking authorization to withdraw in April 2010. At the time this case was called for dispositional hearing on 6 May 2010, the following exchange took place between the trial court and Respondent-Mother concerning her counsel's withdrawal motion:

THE COURT: . . . [Respondent-Mother], what would you like to tell me about Mr. Grady's motion to withdraw, ma'am?

[RESP.-MTH.]: I don't have any objections.

THE COURT: Let -- let me talk to you about that [a] little bit. . . . Now, what I can tell you . . . at this point, is that I cannot require you to go forward with a lawyer, but I can require you to go forward, ma'am. My knee-jerk reaction here . . . is to tell you that I'm -- I'm -- we're not going back to the beginning and retry this case if I let Mr. Grady withdraw as your counsel; do you understand that, ma'am?

[RESP.-MTH.]: Yes, sir.

THE COURT: You understand that ----

[RESP.-MTH.]: I understand what you're saying.

THE COURT: ---- that if Mr. Grady does not represent you, and if you cannot find another lawyer who is prepared to step in on your behalf at this point and continue the case from this point forward, that you will have to do that yourself?

[RESP.-MTH.]: Yes, sir.

THE COURT: You understand that, ma'am?

[RESP.-MTH.]: Yes, sir, I do.

THE COURT: Okay. You think you're prepared to do that?

[RESP.-MTH.]: Yes, sir. I'm - I don't have nothing to lose. I lost my daughter, so I don't really have nothing to lose in this case, but fight. And that's what I intend on doing. . . .

THE COURT: Okay. . . . I - that's fine. I - I want - but I want to be very clear, absolutely clear about this, that - Ms. Madam Clerk, when's this matter set for trial; do you know?

. . . .

CLERK: Jun[e] 3rd.

THE COURT: Okay . . ., this matter is set to recommence the trial on June 3rd.

[RESP.-MTH.]: Yes, sir. And I'm prepared to take it from ----

THE COURT: You are prepared to take it on June 3rd and to go with it yourself?

[RESP.-MTH.]: Well, I'm gonna - I've already talked to an attorney; I'm gonna just let him go from there.

THE COURT: Well, ma'am, I - I can't make any representation to you about what some other lawyer may be willing to do for you.

[RESP.-MTH.]: Uh-huh.

THE COURT: But I want you to understand that if you cannot find another lawyer, you will be charged with moving forward on June 3rd from the point where we stopped it at the last hearing.

[RESP.-MTH.:] Sure.

THE COURT: Are you prepared to do that?

[RESP.-MTH.:] I'll be ready - ready, sir, yes.

At the start of the 3 June 2010 disposition hearing, the following colloquy took place between the trial court and Respondent-Mother:

THE COURT: . . . [C]ome on up and have a seat, please, ma'am. . . . [A]t the last session of court with your consent I released Mr. Grady from representation of you further in the matter. Do you have a lawyer ----

[RESP.-MTH.:] No.

THE COURT: ---- to represent you?

[RESP.-MTH.:] No, sir.

THE COURT: You do not. All right. Ma'am, you're prepared to move forward by yourself then; is that correct?

[RESP.-MTH.:] Yes, sir.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-

602(a). In considering issues that have arisen in connection with the parental right to counsel in abuse, neglect or dependency proceedings, this Court has looked to decisions in criminal cases for guidance. See *In re S.L.L.*, 167 N.C. App. 362, 364, 605 S.E.2d 498, 499 (2004). After a parent's second court-appointed attorney was discharged in the proceedings that led to our decision in *S.L.L.*, the parent requested that the trial court appoint new counsel. The trial court refused to appoint substitute counsel to represent the parent on the grounds that:

Okay. Well, this is the second attorney that you've let go, so we've appointed two attorneys to represent you. They've both been very competent. You've elected not to proceed with them. I can't continue the case ad infinitum until you find an attorney you're pleased with, so you're just going to have to represent yourself. . . .

Id. at 363, 605 S.E.2d at 499. On appeal, we reversed the trial court's adjudication and disposition orders and remanded that case to the trial court for a new hearing on the grounds "that the trial court erred by equating respondent's request for new counsel with a waiver of court-appointed counsel, and requiring respondent to proceed to trial *pro se.*" *Id.* at 365, 605 S.E.2d at 500.

Similarly, this Court looked to the statutory requirements delineated in N.C. Gen. Stat. § 15A-1242, which sets out the

inquiries which a trial judge must make prior to allowing a criminal defendant to waive counsel and represent herself, in addressing the validity of a parent's waiver of counsel at a termination hearing. In *In re P.D.R.*, ___ N.C. App. ___, ___ S.E.2d ___ (2011), a parent contended that the trial court erred by allowing her to waive counsel and represent herself during a termination of parental rights hearing. *Id.* On appeal, we remanded the case to the trial court for a new hearing on the grounds that the trial court had failed to conduct an adequate inquiry concerning the extent to which the parent understood the consequences of her decision to waive counsel and the possible outcome of the termination of parental rights hearing before allowing her to represent herself. *Id.* As a result, contrary to the arguments advanced in support of affirming the trial court's orders, the legal principles governing the circumstances under which a criminal defendant is entitled to waive counsel and appear *pro se* are applicable in juvenile cases as well.

Thus, based upon well-established North Carolina law, we conclude that the trial court erred by failing to adequately advise Respondent-Mother of her right to counsel, including her right to court-appointed counsel, and failing to properly ensure that Respondent-Mother knowingly, intelligently, and voluntarily waived her right to counsel before allowing her to represent

herself. Although Respondent-Mother did consent to the withdrawal of her retained attorney, she did not expressly waive her right to counsel or choose to represent herself at the ensuing disposition hearing. Instead, at the time that it allowed her retained attorney to withdraw, the trial court informed Respondent-Mother that she would be required to proceed at the next hearing even if she did not have an attorney. The trial court simply did not inform Respondent-Mother of her right to counsel, including court-appointed counsel, or conduct any inquiry intended to determine whether Respondent-Mother knowingly, intelligently, and voluntarily waived her right to counsel at the time that it allowed her counsel to withdraw and permitted her to represent herself. As a result, we are unable to avoid the conclusion that the trial court erred by allowing Respondent-Mother to represent herself at the 3 June 2010 dispositional hearing.

Although DSS, the Guardian ad Litem, and Respondent-Father all urge us to refrain from overturning the trial court's dispositional orders despite the fact that Respondent-Mother was not represented by counsel at the 3 June 2010 dispositional hearing, we do not find their arguments persuasive. In light of *S.L.L.*, we are unable to conclude that the fact that Respondent-Mother had previously employed counsel and subsequently asked

him to withdraw constituted a valid waiver of counsel, much less court-appointed counsel. Similarly, the fact that Respondent-Mother, unlike the parent in *S.L.L.*, did not specifically ask for the appointment of new counsel did not operate as a waiver of her right to counsel under N.C. Gen. Stat. § 7B-602 given the mandatory nature of the procedures that must be followed prior to a judicial decision to allow a parent to appear *pro se*. Moreover, the trial court's decision to appoint counsel for Respondent-Mother prior to the final dispositional hearing and the fact that Respondent-Mother never asked to reopen the record for the purpose of allowing her to present or elicit additional evidence did not cure the trial court's error given that Respondent-Mother was clearly required to represent herself at one dispositional hearing and given that the events that occurred at this hearing were before the trial court at the time that it entered its dispositional orders. Finally, given the fundamental nature of the right to counsel in juvenile abuse, neglect, and dependency cases, our cases have not required parents to demonstrate prejudice in order to obtain appellate relief based upon a violation of their right to counsel. Thus, we are required to reverse the trial court's dispositional orders and remand this case to the Columbus County District Court for a new dispositional hearing. In light of our decision

to reverse the trial court's dispositional orders, we need not address the other issues that Respondent-Mother has raised on appeal.

VACATED AND REMANDED.

CHIEF JUDGE MARTIN and JUDGE THIGPEN concur.

Report per Rule 30(e).