19-P-885 Appeals Court

ADOPTION OF VALENTINA.[1]

No. 19-P-885.

Suffolk. December 12, 2019. - March 6, 2020.

Present: Desmond, Sacks, & Ditkoff, JJ.

Adoption. Parent and Child, Adoption. Minor, Adoption. Due Process of Law, Adoption, Assistance of counsel. Constitutional Law, Assistance of counsel. Practice, Civil, Adoption, Assistance of counsel.

Petition filed in the Suffolk County Division of the Juvenile Court Department on October 30, 2015.

The case was heard by Terry M. Craven, J.

Margaret M. Geary for the mother.
Yvette L. Kruger for the child.
Julie L. Datres, Assistant Attorney General, for Department of Children and Families.

DITKOFF, J. The mother appeals from a decree issued by a Juvenile Court judge terminating her parental rights to her daughter and placing the child into the care of the Department

[1] A pseudonym.

of Children and Families (department) pursuant to G. L. c. 119, § 26.[2] We consider the options available to a judge when a parent provides no instructions to her appointed attorney concerning the proceedings. We conclude that a judge has the discretion to strike the attorney's appearance, but may instead have the attorney participate in the trial as an officer of the court. In such a circumstance, the attorney generally will be unable to advocate for a particular outcome, and the attorney's consequent limited activity is not a constructive denial of counsel. Further concluding that the mother was not prejudiced by the judge's citations to two exhibits introduced after the termination trial, we affirm the decree.

1. Background. a. The child. The child was born in 2007. For the first five years of her life, she was exposed to violence and inconsistent care while in the mother's custody. In November 2012, a report pursuant to G. L. c. 119, § 51A (51A report), was filed and supported based on the mother's neglect of the child. Specifically, the child was not reaching developmental benchmarks or receiving routine medical care. The child disclosed that her mother "beat her" on the legs with a belt and that she felt unsafe.

[2] The judge also terminated the parental rights of the unknown father. The mother reported that the child's father died in 2007.

The maternal grandmother assumed custody of the child in 2013 pursuant to a "Care Giver Affidavit" signed by the mother. From 2013 through 2015, the child nonetheless lived with the mother for brief periods of time in shelters and in the homes of the mother's friends.[3] While the child was living with the maternal grandmother, three 51A reports were filed based on the child's disclosure that she was sexually assaulted by a resident of the grandmother's housing complex.

On October 29, 2015, the department petitioned for and received emergency custody of the child. Since then, the child "has lived in the care of at least four foster parents and six trauma specific hospitals and group homes."

On December 9, 2015, the department placed the child with a maternal aunt. There the child suffered from a psychiatric episode when the aunt intentionally withheld medication. The department then placed the child with a paternal aunt. In early January 2016, the child reported suffering from another sexual assault. The judge found that the child is a trauma-reactive child, and that the mother has been unable to address this issue and indeed has contributed to it. The child has significant psychological, behavioral, emotional, and educational needs.

[3] In November 2014, a 51A report was filed and supported because the mother was not providing stable housing for the child.

She has a well-documented mental health history that includes several mental health hospitalizations and a diagnosis of posttraumatic stress disorder and adjustment disorder with mixed disturbances of emotions and conduct.

The department designed a service plan for the mother to address the steps needed for reunification. The mother was required to engage in mental health treatment, counselling, substance abuse evaluations, domestic violence evaluations, and parenting classes. Additionally, the mother's service plan required that she follow department protocol for her scheduled visits with the child, meet with the department monthly, and sign release forms. As of October 2016, the mother "was not in compliance with nor making any progress on her service plan tasks."

In August 2016, the child's permanency plan changed from reunification to adoption. At the time of the trial, the mother had failed to complete any service plan task. The mother has a lengthy criminal record and had several open cases at the time of trial. The mother provided no evidence of stable housing or employment, and there was no evidence that the mother's parenting skills had improved.

The mother's attendance at visits was inconsistent. When the mother did visit, she berated the child, threatened department staff, and brought unapproved visitors. The mother's

telephone conversations with the child were suspended in March 2016 because of the mother's inconsistency and the negative impact they had on the child. The mother's visits were suspended in December 2016 for the same reasons. The mother's unfulfilled promises to visit the child caused an increase in tantrums and defiant behavior and poor peer interactions. The child prevented herself from using the bathroom to get the mother's attention. In January 2017, the child had a sigmoidoscopy because of her constipation issues.

b. Procedural history. Leading up to the trial, the mother's participation in court proceedings was inconsistent. Some of this may have been because of her unresolved criminal cases; she was taken into custody to answer multiple warrants at her last appearance in Juvenile Court on April 24, 2017.

Over the course of twenty months, five different attorneys were appointed to represent the mother. The mother's first attorney was appointed on October 30, 2015. The mother asked the first attorney to withdraw on October 24, 2016, based on the breakdown of the relationship. The mother attended the October 24, 2016, hearing in which the judge allowed the motion to withdraw after determining that it would not delay a trial date. The department announced the changed goal to adoption, and the mother was appointed a second attorney. After a brief recess, the second attorney stated that the mother "is not completely

against the idea of a guardianship or adoption, though would prefer her mother be considered rather than the sister."

The second attorney withdrew on December 1, 2016, because the mother expressed a desire for the judge to appoint different counsel. The third attorney was appointed that same day, and the third attorney withdrew on May 31, 2017, because of a complete breakdown in communication and the mother's lack of confidence in the attorney's advice. The judge appointed a fourth attorney that same day, and the fourth attorney withdrew on July 20, 2017. The judge immediately appointed the fifth attorney to represent the mother that same day.

The mother had the ability to contact the fifth attorney, but provided the attorney with no instructions about how to proceed. When the trial date was set, the fifth attorney stated she would send the mother a registered letter with the date. In response, the mother informed the fifth attorney that she had hired another attorney and instructed the fifth attorney to withdraw. The fifth attorney filed a motion to withdraw.

On the day of trial, May 16, 2018, the mother did not appear, and there was no sign of any retained counsel. The fifth attorney brought her previously-filed motion to withdraw to the attention of the judge and explained, "I have heard absolutely nothing, Your Honor, from my client, or any new

lawyer that she said she hired. So that's where we are." The trial judge denied the motion to withdraw.

During the trial, the fifth attorney objected several times on grounds of hearsay and relevance but did not introduce evidence, present any witnesses, or cross-examine the witnesses. At the time for closing argument, the fifth attorney stated, "I'm sorry, Your Honor. I have nothing to present, since my client asked me to withdraw and I don't -- that's as much contact as I've had."

2. Constructive denial of counsel. The mother argues that she was constructively denied the assistance of counsel. We disagree. Essentially, the mother asserts that, where an attorney who has received no instructions is denied leave to withdraw, that attorney must presume the parent opposes termination, and must advocate for that position or automatically be found ineffective. As we explain, such a presumption is not generally sound.

a. Motion to withdraw. "Parents have a fundamental liberty interest in maintaining custody of their children, which is protected by the Fourteenth Amendment to the United States Constitution." Adoption of Rory, 80 Mass. App. Ct. 454, 457-458 (2011), quoting Care & Protection of Erin, 443 Mass. 567, 570 (2005). To that end, "[a]n indigent parent in a G. L. c. 210, § 3, proceeding has a constitutional right to counsel."

Adoption of Raissa, 93 Mass. App. Ct. 447, 451-452 (2018), quoting Adoption of William, 38 Mass. App. Ct. 661, 663 (1995). "That right, however, is not absolute." Adoption of Olivia, 53 Mass. App. Ct. 670, 674 (2002). "[R]ecognition of important parental rights does not change the 'crucial fact' that the focus of proceedings that terminate or curtail parental rights should be the best interest of the child." Adoption of Raissa, supra at 454, quoting Adoption of Olivia, supra at 677.

The mother was not constructively denied counsel. She had been appointed five attorneys, and each of them moved to withdraw. See Commonwealth v. Means, 454 Mass. 81, 93 n.19 (2009) ("Where trouble in an attorney-client relationship extends through multiple counsel, it is less likely that the disquiet is due to the particular attorney-client relationship, and more likely that the difficulty is due to the client's intransigence or misconduct"). The judge did not abuse her discretion in denying the fifth attorney's motion to withdraw, when it was the day of trial, and the motion was based only on the apparently inaccurate premise that the mother had hired private counsel. See Adoption of Raissa, 93 Mass. App. Ct. at 454 ("Repeated changes in counsel delay proceedings because of the need for each new attorney to become familiar with the client and the case; consequently, they interfere with orderly proceedings"). A judge must balance the interests of the parent

with the child's interest in finality. See Adoption of Olivia, 53 Mass. App. Ct. at 675 ("the record indicates that [the judge] balanced the competing interests, in particular the reason the father sought to change counsel and the children's need for resolution after more than three years in custodial uncertainty"). The judge acted within her discretion in denying the motion to withdraw. See id. ("The decision on a motion to change counsel is committed to the trial judge's sound discretion, which should be exercised only after the defendant has been given an adequate opportunity to state his grounds for seeking discharge of counsel").

b. Striking an attorney's appearance. A parent must make an appearance to be entitled to be appointed counsel. See Adoption of Holly, 432 Mass. 680, 689 (2000). Once counsel is appointed, counsel's appearance may be stricken if the parent repeatedly fails to communicate with the department and counsel. See Care & Protection of Marina, 424 Mass. 1003, 1003-1004 (1997). By contrast, if the parent fails to participate in the court proceedings but "effectively and directly communicated an instruction from the [parent] to [her] attorney about how to proceed," it is improper for the judge to strike an attorney's appearance. Adoption of Rory, 80 Mass. App. Ct. at 459. Similarly, even where counsel's appearance was properly struck, the judge must allow counsel to appear on the parent's behalf if

the parent initiates or resumes contact. See Adoption of Imelda, 72 Mass. App. Ct. 354, 365-366 (2008).

Here, because the mother provided the attorney with no instruction other than to withdraw, the judge could have struck the appearance and proceeded without an attorney representing the mother. Care & Protection of Marina, 424 Mass. at 1003-1004. Instead, the judge chose to continue the attorney's representation, understanding that the attorney would "be going forward with no position." This action was within the judge's discretion and constitutes sound practice.

Keeping the attorney in the case has numerous advantages, akin to those gained from appointing advisory counsel for parents proceeding pro se. See Adoption of Olivia, 53 Mass. App. Ct. at 676 n.5 ("it would be preferable, if possible, for counsel to be retained in an advisory role during the trial"). If the parent appears at some point in the trial or contacts her attorney to provide instructions, the attorney will be able to act in furtherance of those instructions, without requiring any delay in the proceedings. If the parent does not do either of these things, then the attorney will be able to describe to the parent what has occurred and can file any appropriate posttrial motions if so instructed. Finally, the attorney may assist the court, as the attorney did here, by acting as an officer of the court and objecting to, among other things, errors in the

presentation of the evidence. See Committee for Public Counsel Services, Assigned Counsel Manual c. 4 at N. 1.9 commentary (Jan. 2019) (Assigned Counsel Manual) (except with respect to temporary custody hearings, "if counsel has never had contact with a client or counsel is unable to contact the client after diligent efforts, counsel may either [a] withdraw from the representation, or [b] take no position in the proceedings but take such actions as counsel deems necessary and appropriate to protect other rights and interests of the client, such as rights to confidentiality and the exercise of privileges").

We would expect a judge exercising her discretion to proceed in this matter to establish on the record that the attorney has made diligent efforts to contact the client such that the lack of instruction is not the result of any lack of reasonable effort by the attorney. Cf. Adoption of Holly, 432 Mass. at 686 (department seeking notice by publication "should . . . set forth in its motion . . . what 'diligent efforts' had been made to locate" parent). Here, the attorney represented in open court that she would send a registered letter to the mother informing her of the trial date and then received back the instruction to move to withdraw.

Finally, we reject the mother's argument that an attorney without instructions invariably must oppose termination of parental rights. "A lawyer cannot assume that an absent parent

would want to contest the proceedings." Adoption of Holly, 432 Mass. at 689. Consistent with this case law, the Assigned Counsel Manual directs appointed counsel for a parent who cannot be located to "take a position . . . consistent with the client's last clearly articulated position or directive." Assigned Counsel Manual c.4 at N. 1.9. "In the absence of such information, or in the event circumstances have changed materially since the client last articulated a position, whether or not to take action on behalf of such client is a matter left to the discretion of counsel consistent with the Massachusetts Rules of Professional Conduct." Id.

This case shows the wisdom of that principle. Here, although the fifth attorney had no way to know this, the mother had told her second attorney that she was "not completely against the idea of a guardianship or adoption, though would prefer her mother be considered rather than the sister." The department was still considering a kinship placement and had secured the agreement of one of the child's special education teachers to serve as a transitional placement. In the absence of instruction, there was no way for the fifth attorney to know whether the mother wanted to oppose termination of parental rights, urge a kinship placement, or attempt to secure posttermination visitation.

Similarly, the mother's reliance on Mass. R. Prof. C. 3.1, as appearing in 471 Mass. 1414 (2015), is misplaced. That rule prohibits an attorney from defending a proceeding unless there is a nonfrivolous basis for doing so, but then adds, "A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established." Mass. R. Prof. C. 3.1. Contrary to the mother's suggestion, this rule does not require an attorney for an absent criminal defendant always to argue for acquittal. The rule does not override the attorney's duty to follow the objectives of representation as defined by the client or allow an uninstructed attorney to choose the objectives of representation herself. See Mass. R. Prof. C. 3.1 comment [4] ("The option granted to a criminal defense lawyer to defend the proceeding so as to require proof of every element of a crime does not impose an obligation to do so. Sound judgment and reasonable trial tactics may reasonably indicate a different course"). Rather, the rule allows an attorney to defend a criminal case by holding the Commonwealth to its burden of proof when instructed to do so by the defendant, even if there is no nonfrivolous defense. In any event, the rule does not, by its terms, apply to a case involving the termination of parental rights.

3. Ineffective assistance of counsel. Assuming the dubious proposition that we can analyze the effectiveness of an attorney who has received no instructions from her client, the mother has not demonstrated any prejudice. See Adoption of Ulrich, 94 Mass. App. Ct. 668, 673-674 (2019). As we discuss infra, "the evidence of the mother's unfitness was overwhelming." Adoption of Ulrich, supra at 674. The mother has not identified any steps that would have allowed her to avoid termination of her parental rights or alleged any way in which she was denied a substantial defense. Cf. Commonwealth v. Sepheus, 468 Mass. 160, 171 (2014) ("The preferred course for raising a claim of ineffective assistance of counsel is to file a motion for a new trial, supported by affidavit"). Accordingly, she has failed to show that counsel was ineffective.

4. Reliance on posttermination trial evidence. In the judge's findings supporting termination of the mother's parental rights, the judge cited to exhibits admitted in posttermination proceedings regarding the department's permanency plan. We discern no prejudice.

"We give substantial deference to the judge's decision to terminate parental rights 'and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion.'" Adoption of Talik, 92 Mass. App.

Ct. 367, 370 (2017), quoting Adoption of Ilona, 459 Mass. 53, 59 (2011). "Subsidiary findings must be supported by a preponderance of the evidence . . . , and none of the findings will be disturbed unless clearly erroneous." Adoption of Ulrich, 94 Mass. App. Ct. at 676, quoting Adoption of Nancy, 443 Mass. 512, 515 (2005).

Nearly two months before receiving the contested exhibits, at the conclusion of the trial on termination of parental rights, the judge gave extensive oral findings and concluded that there was clear and convincing evidence that the mother was unfit and that termination of parental rights was in the best interests of the child. Accordingly, even if the judge improperly considered the posttermination exhibits in her written findings, "'[w]e have no doubt that the judge would have reached the same result' without the impermissible evidence." Adoption of Keefe, 49 Mass. App. Ct. 818, 824 (2000), quoting Care & Protection of Leo, 38 Mass. App. Ct. 237, 244 (1995).

Although thirty-three of the 122 factual findings in the termination decision order cite to the contested exhibits, all but four of these findings are adequately supported elsewhere in the record.[4] Thus, any error was not prejudicial. See Adoption of Astrid, 45 Mass. App. Ct. 538, 547-548 (1998).

---

[4] The four findings of fact which are unsupported included one regarding the mother's failure to respond to letters from a

If we disregard the four contested findings, the department presented clear and convincing evidence that the mother was unfit and termination of parental rights was in the best interests of the child. The child was exposed to violence and inconsistent care while in the mother's custody. See Adoption of Zak, 87 Mass. App. Ct. 540, 543 (2015). The mother inconsistently maintained contact with the child, and when she did speak with the child her statements were often inappropriate and harmful to the child. See Adoption of Jacques, 82 Mass. App. Ct. 601, 607 (2017). While in the care of family members, the child disclosed two allegations of sexual abuse. See Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011). The mother did not complete any service plan tasks. See Adoption of Lisette, 93 Mass. App. Ct. 284, 296 (2018). The mother's unexplained failure to attend the trial permitted a negative inference. See Adoption of Talik, 92 Mass. App. Ct. at 372. The child also "showed a marked improvement in her behavior" since the suspension of telephone calls and visits with the mother.

---

court investigator, another regarding the opinion of the staff at the child's last program regarding the impact a visit from the mother would have on the child, and two regarding the special education teacher identified as a transitional placement.

"[W]e discern no prejudice to the mother . . ., as the remaining evidence overwhelmingly supports -- by clear and convincing evidence -- that the mother was unfit as to [the child] and that termination was in [the child's] best interests." Adoption of Ulrich, 94 Mass. App. Ct. at 680. Accord Adoption of Keefe, 49 Mass. App. Ct. at 824; Adoption of Astrid, 45 Mass. App. Ct. at 547-548; Care & Protection of Leo, 38 Mass. App. Ct. at 243.

Decree affirmed.