NO. COA01-1112

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

IN THE MATTER OF:

Alexander County
No. 97-J-8

DIANE DENISE HALL

Appeal by respondent from order entered 7 March 2001 by Judge James M. Honeycutt in Alexander County District Court. Heard in the Court of Appeals 6 June 2002.

No brief filed for petitioner-appellee Alexander County Department of Social Services.

Womble Carlyle Sandridge & Rice, by Julie Barker Pape, for Guardian ad Litem, appellee.

Robert E. Campbell, for Darlene Lackey Hall, respondent-appellant.

MARTIN, Judge.

On 1 December 1999, Diane Denise Hall, a minor child then two years old, was adjudicated a neglected juvenile based on the actions of respondent-mother, Darlene Lackey Hall, in engaging in two physical altercations in the child's presence, and in operating a motor vehicle, with the child present, after consuming alcohol and using crack cocaine. The court also ruled that the child was dependent because respondent-mother was incarcerated and there was no other adult to care for the child. At a dispositional hearing on 15 December 1999, the trial court ordered that legal and

physical custody of the minor child be placed with the Alexander County Department of Social Services, that respondent-mother have supervised visitation, that respondent-mother have substance abuse assessment and be subject to random alcohol and drug screening, that respondent-mother complete parenting classes at the direction of the Department of Social Services, and that respondent-mother undergo a psychological assessment. On 8 November 2000, the court continued legal and physical custody in the Department of Social Services after concluding that it was contrary to the welfare of the minor child for her to be returned to the care of respondent-mother at that time based partly on respondent-mother's substance abuse assessment.

On 15 November 2000, the court again ordered that the Department of Social Services continue to have legal and physical custody of the child with placement authority. The court ordered that the plan of care would be reunification with respondent-mother and concurrently termination of parental rights and adoption. The court ordered respondent-mother to participate in and complete strengthening classes and that she be re-evaluated at Foothills Mental Health Center to determine whether she had a need for medication management and, if so, to submit to random blood tests to determine compliance. Respondent-mother's appeal from the 15 November 2000 order was dismissed by this Court. *In re Hall*, 148 N.C. App. 214, 560 S.E.2d 242 (unpublished, COA01-591, 28 December 2001).

On 7 March 2001, a permanency planning hearing was held in

accord with G.S. § 7B-907. The court concluded that termination of respondent-mother's parental rights would not be in the best interests of the child but that the best interests of the minor would be served by her remaining in the custody of her maternal aunt, Renee Morron, with whom she had resided since 3 March 2000, and that her permanent plan of care should be a guardianship with Renee Morron. The court also ordered that no further efforts needed to be made to reunify the child and respondent-mother and ordered that respondent-mother be allowed visitation, but that respondent-mother not be under the influence of any intoxicating substance during such visits. Respondent-mother appeals.

By her first assignment of error, respondent-mother asserts the trial court "abused its discretion in placing legal guardianship of the minor child with an aunt on the grounds that there was insufficient evidence to support or justify the court's ruling." In the brief, however, respondent-mother's counsel neither offers argument nor cites authority in support of the assignment of error; instead he asks that we review the record pursuant to *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985) in order to determine whether prejudicial error exists. We have held, as have a majority of states, that the right to file an *Anders* brief does not extend to civil proceedings, including a proceeding involving custody of minors and termination of parental rights with respect to such

minors. *In re Harrison*, 136 N.C. App. 831, 526 S.E.2d 502 (2000). Therefore, respondent-mother's first assignment of error is deemed abandoned and is dismissed. N.C.R. App. P. 28(b)(6).

By her remaining assignment of error, respondent-mother contends the trial court committed reversible error by appointing, as her trial counsel in this proceeding, Edward L. Hedrick, IV, who was also serving as the county attorney for Alexander County at the time. Although there is no documentation in the record on appeal that Mr. Hedrick was serving as county attorney when he was appointed to represent respondent-mother in this proceeding, we will accept as true such assertion by counsel in the brief.

Counsel was appointed on 17 November 1999. At that time, G.S. § 7B-602 stated:

> 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. *In no case may the court appoint a county attorney, prosecutor, or public defender*.

N.C. Gen. Stat. § 7B-602 [effective prior to 1 July 2001] (emphasis added). The statute was amended to delete the last sentence effective on and after 1 July 2001. The trial court violated the statute when it appointed the Alexander County attorney to represent respondent-mother.

No objection was asserted in the trial court to Mr. Hedrick's appointment at any stage of this proceeding, and respondent-mother makes no claim that any conflict of interest existed by reason of her representation by the county attorney or that she was harmed

thereby. She acknowledges the general rule "that failure to assert a statutory or constitutional right in the trial court is a waiver of that right." *In re Richard v. Michna*, 110 N.C. App. 817, 821, 431 S.E.2d 485, 488 (1993). However, citing *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988) and *In re Richard, supra,* she contends that where the trial court acts contrary to a statutory mandate, the error is not waived by her failure to object and that she is not required to show prejudice because the error should be deemed prejudicial *per se*. We disagree. Unlike other statutes to which the waiver exception applies, the last sentence of G.S. § 7B-602 requires no affirmative act by the court; rather it is a prohibition. Therefore, we conclude that by her failure to object to the appointment of the county attorney to represent her in this proceeding, respondent-mother has waived her right to assert the appointment as error on appeal.

Moreover, even if the error had not been waived, it is not prejudicial *per se*, and respondent-mother has shown no prejudice arising from her representation by the county attorney. The cases upon which respondent-mother relies are distinguishable. In *Hucks,* the defendant was charged with capital murder; the trial court did not appoint additional assistant counsel as mandated by G.S. § 7A-450(b1). The Supreme Court held the violation of the express statutory mandate was prejudicial error *per se.* Likewise, in *In re Richard*, where the trial court did not appoint a *guardian ad litem* for a mentally retarded mother who was a respondent in a proceeding to terminate her parental rights, this Court held that the failure

of the trial court to comply with the statutory mandate of G.S. § 7A-289.23 providing that a guardian *ad litem* "shall be appointed" required remand without a showing of prejudice. In this case, however, the error asserted is not a violation of the requirement of G.S. § 7B-602 which mandates the appointment of counsel for an indigent parent in a juvenile proceeding, rather, it is a violation of the provision that states that such counsel "may" not be a county attorney. Under such circumstances, we are persuaded that prejudice is not presumed and must be shown in order to warrant a reversal on appeal. Here, respondent-mother has shown no prejudice; indeed she has not contended that she was prejudiced. She was not denied the assistance of counsel nor any other protection mandated by the statute; she was represented by counsel throughout the proceeding, her attorney had no conflict of interest, and he cross-examined witnesses and argued to the court on her behalf. Her assignment of error is overruled.

Finally, respondent attempts to argue that the trial court abused its discretion with respect to its order specifying that respondent should have visitation with the minor at least twice each month for two hours and authorizing the minor's guardian to approve the time, and location of such visitation. However, respondent did not assign error to the trial court's order with respect to visitation. The scope of appellate review is limited to the assignments of error set out in the record on appeal. N.C.R. App. P. 10(a). Consequently, the question is not properly before us and we decline to address it.

Dismissed in part and affirmed in part.

Judges TIMMONS-GOODSON and CAMPBELL concur.

Report per Rule 30(e).