IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1011

Filed 21 November 2023

Watauga County, Nos. 16 JT 32, 18 JT 69, 18 JT 70

IN THE MATTER OF: G.M., A.M.M., J.U.M.

Appeal by respondent-mother from order entered 25 August 2022 by Judge Hal Harrison in Watauga County District Court. Heard in the Court of Appeals 9 November 2023.

di Santi Capua & Garrett, PLLC, by Chelsea Bell Garrett, for petitioner-appellee Watauga County Department of Social Services.

Jacob R. Franchek for appellee guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-appellant mother.

PER CURIAM.

Respondent-mother ("Mother") appeals from an order terminating her parental rights to three of her children, arguing the trial court erred by allowing her attorney to withdraw during the termination hearing, and forcing Mother to proceed *pro se*, without first inquiring of Mother whether her waiver of the right to counsel was

knowing and voluntary. We agree, reverse the termination order, and remand for a new termination hearing.

I. Background

This appeal involves the termination of Mother's parental rights as to three of her children.[1] G.M. ("George") was born in July 2012, J.U.M. ("Jason") was born in March 2017, and A.M.M. ("Amy") was born in November 2018, to Mother and the children's father.[2]

On 19 June 2020, the trial court entered an order adjudicating all three children dependent based on Mother's substance abuse and mental health.[3] The trial court also set a permanent plan of reunification, continued custody with DSS, and ordered that Mother should enter into a case plan with DSS, including signing any medical releases and consents necessary for DSS to evaluate Mother's case plan compliance.

The trial court also entered a review order on 19 June 2020.[4] The trial court accepted into evidence and incorporated a 6 March 2020 DSS Court Report setting a case plan for Mother that among other things required Mother to complete a psychological evaluation and substance abuse assessment. On or about

[1] The children's father is not a party to this appeal; he was deported during the pendency of the juvenile matter below and his involvement with the juvenile proceedings ceased as of 7 June 2019.
[2] All three juveniles are referred to by pseudonyms stipulated to by the parties.
[3] The adjudicatory order was based on an 18 and 19 February 2020 hearing.
[4] The review order was based on a 12 and 13 March 2020 hearing.

10 December 2020, the trial court entered a permanency planning order that again accepted into evidence and incorporated DSS and GAL court reports.

On 12 February 2021, the trial court entered a permanency planning order and found Mother had "begun completing her court ordered psychological testing, [but] results ha[d] not come back yet on this." Mother completed her psychological evaluation in January 2021, and on 28 September 2021 the trial court entered another permanency planning order which made numerous findings regarding Mother's mental health. The trial court changed the permanent plan to adoption and set a concurrent plan of guardianship for all three children.

The trial court entered another permanency planning order on 24 September 2021.[5] The court again incorporated a DSS report detailing Mother's progress on her case plan since the last hearing. Mother was still not engaged in services, visitation was terminated since the permanent plans were changed, and DSS was prepared to seek termination of Mother's parental rights. The trial court entered a final permanency planning order on 23 February 2022 which ordered "DSS shall proceed with filing of [termination of parental rights] against Respondent Mother as soon as possible."

On 8 April 2022, DSS filed a motion to terminate Mother's parental rights

[5] The 28 September 2021 order was based on a 25 March 2021 hearing, and the 24 September 2021 order was based on a 22 July 2021 hearing. These orders are discussed chronologically based on hearing dates for clarity.

("TPR Motion") as to all three children, alleging grounds under N.C.G.S. § 7B-1111(a)(1) for neglect, N.C.G.S. § 7B-1111(a)(6) for dependency, and N.C.G.S. § 7B-1111(a)(2) for Mother's willfully leaving the juveniles in foster care for twelve months without showing reasonable progress on her case plan. The motion specifically alleged Mother's lengthy DSS history, the termination of her parental rights as to two of her unidentified older children,[6] Mother's mental health disorders, and the fact that the children had been in DSS's custody for over two years to support the asserted grounds for termination.

On 27 May 2022, the trial court held a bifurcated termination hearing. During DSS's presentation of evidence at the adjudicatory portion of the hearing, the court recessed for lunch. After proceedings resumed in the afternoon, the following exchange occurred:

> [Mother's Attorney]: If I may address the Court, Your Honor. I believe that we were about to get started with another witness, however, I've had a chance to speak with [Mother] during the break. It seems that she has wished to hire her own attorney pending this trial. So I would state to the Court that it is her desire for [Mother] here to do the questions but she did want me to address that for her.
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> THE COURT: All right.
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> [DSS's Attorney]: Your Honor, you know, the department's position is that this has been long-time coming. It was not formally filed until I think April of something like that,

[6] Mother's parental rights to her two oldest children were previously terminated. These children are not identified by name or pseudonym in the record.

March or April. But she's had ample opportunity. This was continued from the last session I think, or maybe addressed at the last session.

[Mother's Attorney]: And if I may go ahead and make a motion to withdraw and just, you know, to back up my motion to withdraw. From what I understand earlier this month [Mother] had met actually with people from [DSS's Attorney's] law firm in an effort to maybe hire them or something like that. I was notified of that by a paralegal over there. From what I understand also, [Mother] does work full-time and I don't believe that she's indigent. I would ask the Court to look into that matter as well and that would be my motion to withdraw.

[DSS's Attorney]: Your Honor, can I just mention just I did receive a text or an email from a staff person in my office after the last session. I was in court. I was not in the office. I believe I was in court and they indicated that [Mother] had come to my office seeking legal counsel and of course, was informed that we would have a conflict. She did not meet with an attorney in my office. I'm a hundred percent sure of that. So, I just wanted to put that on the record.

THE COURT: Well, when were you appointed?

[Mother's Attorney]: Your Honor, I've been appointed to this case for probably three or four years. But I would state that it is my client's wishes and again I think I'm required by IDS rules to inform the court of her ability to retain counsel.

[DSS's Attorney]: I would like to know why this didn't come up before the hearing. To come up in the middle of the hearing feels like it's more strategic for purpose of delay than it does that she actually has had this—has this desire also.

[Mother's Attorney]: I will leave that to [Mother]. I'm not making this motion on my own. I'm making this motion because my client's requested me to do so. Don't wish to be heard any further, Your Honor.

THE COURT: [Mother's Attorney], is it your wish to withdraw regardless?

[Mother's Attorney]: It is, Your Honor. It is.

THE COURT: All right. Thank you.

[DSS's Attorney]: I will also point out, Your Honor, that [Mother] had a GAL appointed early in the case. That GAL was released so one of two things. Either this is not a well-informed decision or it's for the purposes of delay but I—for it to come up in the middle of—of the TPR, I'd really like for there to be more evidence in the record as to why this needs to happen and why it would be appropriate before we just—

THE COURT: Well, I'm—in the matters of [G.M., A.M.M., and J.U.M.], coming on before this Court for a termination of parental rights hearing the Court would make the following findings: This hearing was scheduled by the attorney for the Watauga County Department of Social Services and was specifically scheduled as a case on the court calendar for this term of juvenile court and beyond that was also listed as item number 2 on the priority list of cases for this term of court. The respondent in this case was previously appointed attorney . . . as her counsel some three or four years ago. And [Mother's Attorney] has served in that position until today.

This case was called for hearing at 9:30 a.m. on May 27th, 2022, in the juvenile court for Watauga County. At that time the respondent mother took—sat at the counsel table with [her attorney] and then was called as a—as a witness for the petitioner. Her testimony was completed at or near the time for lunch. The Court adjourned for lunch and then resumed at promptly 1:30 p.m. on this same day. Upon resumption, [Mother's Attorney] informed the Court that he had been requested to withdraw as respondent mother's counsel and that he chose to withdraw and requested—made his own request to withdraw.

The Court finds that the respondent mother has had ample

> time to obtain the services of another attorney if she chose to. The Court finds that it is not in the best interest of these juveniles to further delay this hearing and that the mother's actions at this time are solely for the purpose of obstructing and delaying this hearing.
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> Based thereon, this Court will allow [Mother's Attorney] to withdraw immediately. The respondent will keep her seat at the counsel table and this hearing will proceed.

Mother represented herself *pro se* during the remainder of the hearing. On or about 8 June 2022, the trial court entered an order under each juvenile's file allowing Mother's attorney to withdraw.

On 25 August 2022, the trial court entered an order terminating Mother's parental rights to all three children based on grounds under N.C.G.S. § 7B-1111(a)(1), (a)(2), and (a)(6) ("TPR Order"). The trial court made one finding regarding Mother's attorney's withdrawal:

> Shortly after the Court began the hearing, the Court recessed for lunch. Upon the resumption of the hearing after lunch, [Mother's attorney] informed the Court that Respondent Mother requested that he withdraw from representing her and he made a motion to do so in open Court, which Motion was granted. Inasmuch as DSS's Motion for Termination was filed April 8, 2022 and has been continued several times, there has been sufficient and ample time for Respondent Mother to have obtained another attorney or even asked for another court appointed attorney before today's hearing- which she has not done. Therefore, it is in the best interest of the Juveniles not to delay the hearing further or allow a continuance for Respondent Mother for the purpose of hiring new legal counsel.

The trial court determined it was in George, Jason, and Amy's best interest that

Mother's parental rights be terminated and terminated her parental rights. Mother appealed.

II. Discussion

Mother argues on appeal that the trial court erred by allowing her attorney to withdraw, thereby requiring her to proceed *pro se*, without an adequate inquiry into whether she knowingly and voluntarily waived her right to counsel.

Ordinarily, "[a] trial court's decision concerning whether to allow the withdrawal of a parent's counsel in a termination of parental rights proceeding is discretionary in nature," and may only be reversed if the court's ruling was an abuse of discretion. *In re K.M.W.*, 376 N.C. 195, 209 (2020). But "the trial court's discretion to allow a respondent-parent's counsel to withdraw from representation only comes into play when the parent has been provided adequate notice of counsel's intent to seek leave of court to withdraw and the trial court has adequately inquired into the basis for counsel's withdrawal motion."[7] *In re L.Z.S.*, 383 N.C. 309, 321 (2022) (citation, quotation marks, and brackets omitted). If these two requirements are not met, the court has no discretion to allow an attorney's motion to withdraw. *See id.* Questions regarding waiver of the right to counsel are reviewed *de novo*. *See In re K.M.W.*, 376 N.C. at 209–10.

[7] Here, we need not address whether Mother had notice of her attorney's withdrawal; it is undisputed that Mother was present at the termination proceeding when she requested her attorney withdraw. We instead focus our analysis on whether the trial court adequately inquired into the basis for Mother's attorney's withdrawal.

"According to well-established federal and North Carolina law, when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures[.]" *Id.* at 208 (citation, quotation marks, and brackets omitted). Although "[w]e are always loath to delay th[e] goal" of establishing permanency for juveniles subject to termination proceedings, "this Court has consistently vacated or remanded TPR orders when questions of fundamental fairness have arisen due to failures to follow basic procedural safeguards." *In re M.G.*, 239 N.C. App. 77, 83 (2015) (citation and quotation marks omitted).

As to "basic procedural safeguards" at termination hearings, *id.*, N.C.G.S. § 7B-1101.1 unequivocally grants Mother "the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C.G.S. § 7B-1101.1(a) (2021). The statute also provides "[a] parent qualifying for appointed counsel may be permitted to proceed without the assistance of counsel *only after the court examines the parent* and makes findings of fact sufficient to show that the waiver is knowing and voluntary."[8] N.C.G.S. § 7B-1101.1(a1) (2021) (emphasis added).

[8] We note the GAL and DSS separately argued N.C.G.S. § 7B-1101.1(a1) did not apply to Mother because she was not indigent. However, the North Carolina Supreme Court has expressly held "[t]he fact that respondent-mother had been represented by counsel at the underlying juvenile proceeding and had been provisionally appointed counsel to represent respondent-mother in the termination proceeding provides ample basis for believing that respondent-mother was indigent at the beginning of the termination proceeding." *In re K.M.W.*, 376 N.C. at 212. Here, Mother's court-appointed counsel had represented her since 2016, through multiple juvenile proceedings, including through the first portion of the termination hearing. Without evidence to the contrary, this is an "ample basis" for assuming Mother was indigent at the termination hearing. *Id.* at 212.

Here, the transcript of the termination hearing reveals the trial court never examined Mother. N.C.G.S. § 7B-1101.1(a1) clearly sets forth the court *must* have examined Mother before determining she waived the right to counsel and allowing her to proceed *pro se*. Because this procedure was not followed, and Mother did not waive her right to counsel, the trial court erred by requiring Mother to proceed *pro se* for the remainder of the termination hearing. *See In re K.M.W.*, 376 N.C. at 212 ("At an absolute minimum, given that respondent-mother had never waived the right to all counsel, the trial court violated N.C.G.S. § 7B-1101.1(a1) by allowing respondent-mother to represent herself at the termination hearing without having examined respondent-mother and making findings of fact sufficient to show that respondent-mother knowingly and voluntarily wished to appear *pro se*." (quotation marks and original brackets omitted)).

But DSS and the GAL both argued that Mother forfeited her right to counsel and the trial court did not err because an inquiry under N.C.G.S. § 1101.1(a1) is not required where the "litigant has forfeited h[er] right to counsel by engaging in actions which totally undermine the purposes of the right itself by [1] making representation impossible and [2] seeking to prevent a trial from happening at all." *In re K.M.W.*, 376 N.C. at 209. Appellees generally identify two aspects of Mother's conduct that purportedly justify forfeiture: (1) Mother's resistance to mental health evaluation and treatment and the resulting delay in receiving her mental health assessment and (2) Mother's decision to dismiss her attorney during the termination proceeding.

However, the trial court never found that Mother forfeited her right to counsel, and it is not clear what analysis the trial court engaged in upon a review of the record. The transcript of the termination hearing reveals the trial court was allowing Mother's attorney's motion to withdraw both because it was in the best interest of the children not to delay the hearing and because it believed Mother's motion was made to obstruct and delay the hearing. The trial court's only finding regarding Mother's attorney's motion does not state Mother forfeited her right to counsel. Nor do the trial court's three orders allowing Mother's attorney's motion to withdraw make any reference to forfeiture; these orders only state Mother requested that her attorney withdraw and "[t]here is other good cause to permit the withdrawal" of Mother's attorney from the case.

Further, even if we construe the court's finding as a finding that Mother forfeited her right to counsel, Mother's conduct was not "so egregious, dilatory, or abusive . . . so as to constitute a waiver or forfeiture of counsel[.]" *In re L.Z.S.*, 383 N.C. at. 317. Our Supreme Court has held that much more disruptive conduct is required for a parent to forfeit their right to counsel under N.C.G.S. § 7B-1101.1(a1). *Compare In re L.Z.S.*, 383 N.C. at 317–18 (holding respondent did not forfeit right to counsel when respondent intentionally avoided hearings, refused to communicate with his attorney, and refused to communicate or cooperate with DSS), *and In re K.M.W.*, 376 N.C. at 212–13 (holding respondent did not forfeit right to counsel when respondent missed hearings, showed up late to hearings, failed to ask for counsel, and

proceeded *pro se* at a termination hearing), *with In re T.A.M.*, 378 N.C. 64, 72–74 (2021) (holding respondent forfeited the right to counsel when he refused to provide his whereabouts, avoided phone calls, indicated he did not want to receive mail, "actively attempt[ed] to conceal his residence from DSS[,]" failed to appear at hearings, did not maintain contact with his attorney, and was repeatedly warned that if he did not attend proceedings his attorney would be allowed to withdraw). Neither category of Mother's conduct highlighted by the appellees has "the repeatedly disruptive effect necessary to constitute the egregious conduct that is required to support a determination that respondent-mother had forfeited her statutory right to counsel." *In re K.M.W.*, 376 N.C. at 212–13.

Thus, the trial court erred when it allowed Mother to proceed *pro se* without first engaging in a statutorily required inquiry into her waiver of the right to counsel. Because this issue is dispositive, we need not address Mother's remaining arguments.

III. Conclusion

The trial court erred by requiring Mother to proceed *pro se* at the termination hearing without engaging in the inquiry required by N.C.G.S. § 7B-1101.1(a1). The TPR Order is reversed and this case is remanded for another termination hearing where Mother's right to counsel is adequately protected.

REVERSED AND REMANDED.

Panel consisting of: Judges DILLON, ARROWOOD, and GRIFFIN.

Report per Rule 30(e).