

NO. COA14-756

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

IN THE MATTER OF:

J.K.P.

Wake County
No. 12 JT 150

Appeal by respondent mother from order entered 4 April 2014 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 9 December 2014.

Roger A. Askew for petitioner-appellee Wake County Human Services.

Administrative Office of the Courts Appellate Counsel, Tawanda N. Foster, for guardian ad litem.

Edward Eldred for respondent-appellant mother.

DIETZ, Judge.

Respondent, the mother of J.K.P., appeals from an order terminating her parental rights. She argues that the trial court erred in allowing her to waive her right to counsel and represent herself at the termination hearing. She also contends that the trial court improperly corrected a clerical mistake on the waiver-of-counsel form after entering judgment. We reject Respondent's arguments and affirm.

Facts and Procedural Background

The Wake County Department of Human Services (WCHS) filed a petition on 29 May 2012 alleging that J.K.P. was a neglected juvenile. By order filed 17 August 2012, the trial court adjudicated J.K.P. neglected. Respondent appealed and this Court affirmed the adjudication on 7 May 2013. *In re J.P.*, ___ N.C. App. ___, 741 S.E.2d 928 (2013) (unpublished). WCHS filed a motion to terminate Respondent's parental rights on 18 September 2013.

The trial court held a review and permanency planning hearing on 2 October 2013, at which Respondent indicated she did not wish to have her court-appointed attorney, Mr. Milholland, represent her. The trial court allowed both Respondent's court-appointed attorney and her guardian ad litem to withdraw. Respondent later filed an affidavit of indigency requesting court-appointed counsel, and the trial court appointed Ms. Ferrell to represent Respondent in the termination hearing.

Then, at a January 2014 pre-trial hearing, Respondent informed the trial court that she changed her mind, did not want Ms. Ferrell to represent her, and intended to retain an attorney.

The trial court held the termination hearing on 28 February 2014. Ms. Ferrell advised the court that "[Respondent] has informed me that she wishes to represent herself in this matter." The trial court engaged in a lengthy colloquy with Respondent about her desire to proceed *pro se* and her understanding of the consequences, and then asked Respondent to read and sign a waiver-of-counsel form. Respondent checked the box indicating that she intended to represent herself and signed her name. On the signed form, the court made written findings of fact to show that Respondent's waiver was "knowing and voluntary"; however, the court checked the box corresponding with the conclusion of law that "[p]arent's waiver is *not* knowing and voluntary." Respondent proceeded *pro se* at the termination hearing.

By order filed 4 April 2014, the trial court terminated Respondent's parental rights. Respondent timely filed her notice of appeal on 6 May 2014. Three days later, before the record on appeal was docketed with this Court, the trial court signed appellate entries and amended Respondent's waiver form to correct the court's mistaken check mark in the wrong box on the waiver-of-counsel form.

Analysis

I. Request to Relieve Counsel and Proceed *Pro Se*

On appeal, Respondent contends the trial court erred in allowing her to waive her right to counsel and proceed *pro se* at the termination hearing. A parent's right to counsel in a termination of parental rights proceeding is governed by N.C. Gen. Stat. § 7B-1101.1, which provides:

- (a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right.

. . . .

- (a1) 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.

N.C. Gen. Stat. § 7B-1101.1 (2013).

Here, after the trial court explained the nature of the proceeding and the consequences of waiving the right to counsel, Respondent read and signed a waiver form containing the following language:

I am the parent of the juvenile named above. I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one.

With full knowledge of these rights, I knowingly, willingly, and understandingly choose as follows:

. . . .

I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do.

Below Respondent's signature on the form, the trial court made specific factual findings supporting its conclusion that Respondent's waiver of counsel was knowing and voluntary. The court found that Respondent understood she was represented by a court-appointed attorney and agreed that her court-appointed attorney "has not been ineffective." The court also found that Respondent knew she "was expected to know the law of [termination of parental rights], rules of evidence, [and] rules of court."

Respondent does not challenge these findings by the trial court, nor does she argue that these findings are insufficient to support the trial court's conclusion that her waiver was knowing and voluntary. Instead, Respondent argues that she never requested to represent herself and that the court never told her she had a right to counsel. We disagree.

First, the transcript unquestionably shows that Respondent asked to represent herself. Before the proceedings began, the trial court engaged in the following lengthy colloquy about Respondent's right to counsel:

MS. FERRELL: Okay. But I would make my motion to withdraw at this time based on my client's wishes for me to do so, Your Honor.

THE COURT: *And, [Respondent], why is it that you wish to represent yourself?*

[RESPONDENT]: *Because every attorney that you put on my case has given me ineffective assistance of counsel and y'all violating my constitutional rights.*

. . . .

THE COURT: All right. On October the 2nd you said in the underlying case that you did not want a court-appointed attorney. When we -- in the underlying case. On the TPR I asked you what you wanted to do about a lawyer and on November the 25th you filed an affidavit of indigency and I appointed Ms. Ferrell to represent you. Is that correct?

[RESPONDENT]: Yes, you did.

THE COURT: Okay. And what is your basis for saying that you have been given ineffective assistance of counsel by Ms. Ferrell?

[RESPONDENT]: I was never given ineffective assistance of counsel by Ms. Ferrell.

THE COURT: You were not.

[RESPONDENT]: I was given --

THE COURT: You were not --

[RESPONDENT]: Right.

THE COURT: -- is that correct?

[RESPONDENT]: I was given ineffective assistance of counsel by Mr. Locke Milholland from the beginning.

THE COURT: And since you have not been given ineffective assistance of counsel by Ms. Ferrell why is it that you wish to waive your right to a lawyer instead of allowing Ms. Ferrell to represent you?

[RESPONDENT]: Because I'm going to wait until I find me the appropriate attorney even if I have to find a way to get me an attorney to come and regard [sic] and research this case and do this case over from the beginning because this whole case like I said in the beginning was fallacious. That whole petition was fallacious.

THE COURT: Well, ma'am, we've moved on from there. We're at the termination of parental rights case today.

[RESPONDENT]: You can do whatever you want. But I'm going to let you know that I'm going to get an attorney to show that you violated my constitutional rights.

THE COURT: And you're more than welcome to do that, [Respondent]. I'm asking you why for purpose of the termination of parental rights case that was filed in September why you are asking that Ms. Ferrell not represent you in this hearing today.

[RESPONDENT]: Because y'all work together.

THE COURT: Because we work together?

[RESPONDENT]: Yes.

THE COURT: Ms. Ferrell is in private practice, she has no association with me, ma'am.

[RESPONDENT]: That's hard to believe.

. . . .

THE COURT: Well, ma'am, let me just tell you what the law says. The law says that these cases are to be heard within 90 days of the filing. We're two months past that. You have a very effective lawyer that's been appointed to represent you. I'm asking why you want to waive your right to counsel.

[RESPONDENT]: Because like I said, I've been violated by this courtroom since the beginning.

THE COURT: Okay.

. . . .

THE COURT: *And why is it that you believe that you should not -- you should represent yourself?*

[RESPONDENT]: *Because I'll make sure what I say is everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom and what was mentioned in that courtroom.*

THE COURT: Okay. And you know that the Court of Appeals had a complete record of everything that was said during your adjudication hearing.

[RESPONDENT]: Uh-huh.

THE COURT: You know that?

[RESPONDENT]: And neither did I get a chance to speak on record because you had Mr. Locke Milholland speaking for me.

THE COURT: Well, I had Mr. Milholland at your request because --

[RESPONDENT]: That was not my request.

THE COURT: Because you filed an affidavit of indigency, ma'am, Mr. Milholland was appointed to represent you. I don't choose the attorney that represents people.

[RESPONDENT]: But you could have chose to get him off my case if I requested for him to be off my case as an attorney.

THE COURT: When you made that motion, ma'am, I did relieve him of that obligation.

[RESPONDENT]: You relieved him at the last moment.

THE COURT: I relieved him at the hearing in which you requested that he not represent you, ma'am, because you signed a waiver of your right to counsel in the underlying case.

[RESPONDENT]: Right.

THE COURT: Do you understand that if you represent yourself at this hearing today that you will be expected to know the law pertaining to termination of parental rights? Do you understand that?

[RESPONDENT]: Uh-huh.

THE COURT: Do you understand that law?

[RESPONDENT]: No.

THE COURT: Do you understand that you would be expected to know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you know the Rules of Evidence?

[RESPONDENT]: Yes.

THE COURT: Do you understand that you would be expected to understand --

[RESPONDENT]: Matter of fact, let me correct that. I understand the law of termination of parental rights.

THE COURT: Okay. And --

[RESPONDENT]: Let me correct that to you.

THE COURT: And do you understand that you would have to know the Rules of Court?

[RESPONDENT]: Yes.

THE COURT: And do you believe you understand those?

[RESPONDENT]: Some of it.

THE COURT: Okay. Do you believe that you are qualified to represent yourself?

[RESPONDENT]: As an attorney, no.

THE COURT: Okay. Do you think you can do a better job than an attorney can?

[RESPONDENT]: No.

THE COURT: *Then why are you choosing to represent yourself?*

[RESPONDENT]: *Because I don't want an attorney on my case that's not going to properly represent me.*

. . . .

THE COURT: *I'm asking you, ma'am, do you understand what you're doing if you waive your right to a lawyer?*

[RESPONDENT]: *Yes.*

THE COURT: *And are you sure that you want to represent yourself or do you want Ms. Ferrell to represent you today?*

[RESPONDENT]: *How can she represent me if she don't [sic] even know what's going on? She understand [sic] some of it, not everything.*

. . . .

THE COURT: *Ma'am, what are you going to do about a lawyer in this case? Are you going to allow Ms. Ferrell to continue to represent you or are you going to represent yourself?*

[RESPONDENT]: *I'm fine where I'm at, Your Honor, thank you.*

THE COURT: *I don't know what that means, ma'am.*

[RESPONDENT]: *I'm good, I don't need Ms. Ferrell. Thank you.*

THE COURT: *You do not want Ms. Ferrell to represent you?*

[RESPONDENT]: I'm good. Thank you.

THE COURT: Then I need you to step over and see the Clerk, sign a waiver of your right to counsel by marking box number two.

At the beginning of this lengthy colloquy, Respondent's counsel informed the court that Respondent did not want to be represented by counsel. The trial court then asked Respondent repeatedly "why is it that you wish to represent yourself?" Each time, Respondent provided a cogent answer confirming that she wanted to represent herself. As Respondent explained, she intended to hire a lawyer in the future to collaterally attack the constitutionality of the proceedings. Respondent believed that, unlike her appointed counsel, "I'll make sure . . . everything is on record so that when I do have an attorney, he can go back to the record and see everything that I was said [sic] in that courtroom."

Moreover, Respondent read and signed the waiver of counsel form which expressly states that "I do not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do." Accordingly, we reject Respondent's argument that she never asked to represent herself.

Respondent next argues that the trial court never told her she had a right to counsel. But during the lengthy colloquy quoted above, the trial court explained that Respondent was represented by court-appointed counsel because she "filed an affidavit of indigency" and requested a lawyer. Indeed, Respondent repeatedly invoked her right to have court-appointed representation during the juvenile proceedings in the trial court and was represented by counsel at various points throughout the proceedings. Moreover, the court told Respondent that if she chose to represent herself "you waive your right to a lawyer." Finally, Respondent read and signed the waiver form which stated that "I have been told that I have the right to have a lawyer represent me. I have been told of my right to have a lawyer appointed by the Court if I cannot afford to hire one." Thus, we reject Respondent's argument that she was never told she had a right to be represented by counsel.

In sum, the trial court properly concluded that Respondent knowingly and voluntarily chose to represent herself at trial. However unwise that decision may have been, it "must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California*, 422 U.S. 806, 834 (1975)

(internal quotation marks omitted) (discussing the right to self-representation in criminal proceedings).

II. Clerical Error on the Waiver of Counsel Form

Respondent next argues the trial court expressly found that her waiver of counsel was *not* knowing and voluntary because the court checked the "not knowing and voluntary" box on the waiver form. Respondent acknowledges that the trial court amended the form several days after entering judgment to show that Respondent's waiver was knowing and voluntary, making the following handwritten change on the form:

The court ex mero moto amends the clerical error made by the court on 2/28/14[.] The parent's waiver was knowing and voluntary[.] The court marked the incorrect box.

But Respondent argues that the trial court lacked jurisdiction to make this amendment because Respondent already had filed her notice of appeal. We disagree.

Generally, "a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court." *In re C.N.C.B.*, 197 N.C. App. 553, 555, 678 S.E.2d 240, 241 (2009) (citation and internal quotation marks omitted). But Rule 60(a) of the North Carolina Rules of Civil Procedure permits the trial court to correct "clerical mistakes" in orders and judgments on its own initiative, even after notice of appeal has been filed,

so long as the case has not yet been docketed with this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013).

"Clerical mistakes" are typographical errors, mistakes in writing or copying something into the record, or other, similar mistakes that are not changes in the court's reasoning or determination. See *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006). Importantly, this Court has held that the term "clerical mistakes" includes the "inadvertent checking of boxes on forms." *Id.*

The AOC form used here, entitled "Waiver of Parent's Right to Counsel," contains a "Findings of Fact" section that requires the trial court to make findings of fact demonstrating that the waiver is knowing and voluntary. The section contains six blank lines for the court to make such findings of fact. The form also includes a "Conclusions of Law" section which requires the trial judge to check one of two boxes concluding either: (1) "The parent's waiver is knowing and voluntary," or (2) "The parent's waiver is not knowing and voluntary."

Here, the trial court hand-wrote five sentences in the "Findings of Fact" section of the form and checked the box associated with the conclusion of law that Respondent's waiver "is not knowing and voluntary." But, as explained above, the

handwritten findings of fact support the conclusion that Respondent's waiver of counsel was knowing and voluntary. Moreover, the trial court made additional remarks at the conclusion of the hearing that confirm the court intended at the time to check the "is knowing and voluntary" box. The trial court stated:

I am just going to very briefly state for the record once again that [Respondent] has chosen to represent herself today, that she had an attorney throughout the underlying proceeding. I believe that the first time she may have mentioned she wanted another attorney may have been at a September hearing which we in fact did not have.

She waived her right to an attorney in an underlying proceeding in October. I believe the record would show at the October hearing she represented herself during that hearing. But by that time the Court had already ordered that [sic] the permanent plan for the child to be adoption and we were moving on with that. There have not been any additional review hearings since that time.

At her request in November I did appoint an attorney to represent her for these proceedings and today she has determined that she did not want that person. She didn't want any attorney to represent her.

We hold that the trial court's findings on the form, and its additional, contemporaneous statements at that hearing, show that the trial court made an inadvertent "clerical mistake" by checking the wrong box. Under Rule 60(a), the trial court had

jurisdiction to correct that mistake at any time before the record on appeal was docketed in this Court. N.C. Gen. Stat. § 1A-1, Rule 60(a). Because the court corrected this clerical mistake before the appeal was docketed, we reject Respondent's jurisdictional argument.

Conclusion

The trial court's findings support its conclusion that Respondent knowingly and voluntarily waived her right to counsel at the termination proceeding below. Accordingly, we reject Respondent's arguments and affirm the trial court's judgment.

AFFIRMED.

Judges STROUD and DILLON concur.