

NO. COA14-934

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

IN THE MATTER OF:

M.G. and H.G.

Cumberland County  
Nos. 11 JT 501-02

Appeal by Respondent-mother from order entered 3 July 2014  
by Judge Edward A. Pone in Cumberland County District Court.  
Heard in the Court of Appeals 4 December 2014.

*Elizabeth Kennedy-Gurnee for Petitioner Cumberland County  
Department of Social Services.*

*Richard Croutharmel for Respondent-mother.*

*Beth A. Hall for guardian ad litem.*

STEPHENS, Judge.

Respondent-mother ("Respondent") appeals from an order  
terminating her parental rights to her minor children, "Melvin"  
and "Hannah."<sup>1</sup> Respondent argues that the district court abused  
its discretion by: (1) denying her trial counsel's motion to

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<sup>1</sup> For the purpose of protecting their privacy, in accordance with  
Rule 3.1 of our Rules of Appellate Procedure, we refer to the  
juveniles by pseudonyms in this opinion.

continue the termination of parental rights ("TPR") hearing because Respondent was not present and had not received notice of the hearing date, and (2) by allowing Respondent's trial counsel to withdraw from her representation at the start of the TPR hearing without first confirming that Respondent had been notified of counsel's intent to do so. After careful review of the record, we vacate the TPR order and remand the case to the Cumberland County District Court for further proceedings necessitated by its erroneous decision to allow Respondent's counsel to withdraw.

*Facts and Procedural History*

On 17 August 2011, Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging abuse, neglect, and dependency ("AND") of Respondent's five-year-old son Melvin and eight-year-old daughter Hannah, and also obtained an order for nonsecure custody of them. The petition alleged that on 3 August 2011, Melvin's father beat him severely enough that he sustained "black and blue" bruises from his waistline to his buttocks and thigh, as well as a handprint on his face from multiple slaps, while Hannah sustained bruising on her hip from

being beaten or spanked with a belt by her father's girlfriend.<sup>2</sup> Respondent reported her children's injuries to the Fayetteville Police Department, but at that time had no permanent address and a history of unstable housing, unstable employment, drug use, and anger management problems. DSS also presented evidence of domestic violence by the children's father against Respondent, and further alleged that Respondent "put pills in the juice of the children for them to drink." On 22 August 2011, attorney Mona Burke was appointed as Respondent's trial counsel for the AND proceedings and the court continued its order of nonsecure custody for the children with DSS but granted Respondent supervised visitation rights.

On 27 April 2012, the parties engaged in a permanency mediation and agreed for Melvin and Hannah to be adjudicated neglected and for dismissal of the abuse and dependency claims. On 25 July 2012, the district court entered a Dispositional Order wherein Respondent was ordered to complete a psychological evaluation, a parenting assessment, and age appropriate parenting classes, as well as obtain and maintain safe, stable,

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<sup>2</sup> Criminal charges were subsequently filed against the juveniles' father, whose parental rights were terminated in the same proceeding from which Respondent now appeals. However, as he did not appeal from the TPR order entered against him, this opinion focuses solely on the issues raised by Respondent.

and suitable housing and employment sufficient to sustain herself and her children.

A permanency planning hearing was held over the course of three days in late October 2012. The hearing was originally scheduled for 23 October 2012, on which date Respondent was initially present in the courthouse but disappeared without explanation prior to the matter being called. The hearing was continued to 25 October 2012, but when Respondent again failed to appear and Ms. Burke could not explain her absence, the court temporarily suspended Respondent's visitation rights with her children. Respondent finally appeared on 31 October 2012, attributing her prior absences to transportation issues; she also informed the court that she had obtained housing and was working cleaning houses, although she did not provide any written verification. The district court reinstated Respondent's visitation rights, contingent on negative drug screens, set the permanent plan for reunification, and ordered Respondent to successfully complete a psychological evaluation, a parenting assessment, age appropriate and cooperative parenting classes, and anger management classes; submit to random drug testing and not use, possess, or consume alcohol or controlled substances;

and actively engage in individual therapy and substance abuse counseling and treatment.

Respondent failed to appear at the next permanency planning hearing on 10 January 2013, and Ms. Burke was unaware as to the reasons for her absence. The court found Respondent had not made any progress toward complying with its orders but left the permanent plan as reunification. Respondent did attend the next permanency planning hearing on 29 April 2013, but the court found that she had failed to obtain permanent housing and had not yet completed a psychological evaluation or parenting assessment, and therefore changed the permanent plan to custody with other court-approved caretakers concurrent with reunification. The court also stated that, "[t]he parties have been put on notice on this date, that should [Respondent] continue to fail to make progress, the Court will relieve of further reunification efforts at the next setting in this matter."

Respondent failed to appear at the next permanency planning hearing on 29 July 2013. The court found that there had been no substantial change in circumstances since the previous hearing, that Respondent had not made any progress in alleviating the conditions which led to removal of the juveniles from her home,

and that her attendance at visitations was becoming inconsistent. As a result, the court changed the permanent plan to custody with other court-approved caretakers concurrent with adoption and ordered DSS to pursue adoption and termination of parental rights.

On 15 January 2014, DSS filed a TPR petition against Respondent. On 16 January 2014, Ms. Burke, who had represented Respondent throughout the AND proceedings, was assigned as Respondent's counsel for the TPR proceeding and served with the TPR petition via first-class mail. That same day, in accordance with N.C. Gen. Stat. § 7B-1106, DSS attempted to serve a summons on Respondent at her last known address on Indian Creek Drive in Fayetteville. However, on 23 January 2014, the Cumberland County Sheriff's Office reported that Respondent no longer lived at that address. DSS then came to believe that Respondent lived at an address on Sweetwater Road in Dunn and attempted to serve her there.<sup>3</sup> On 6 February 2014, the Cumberland County Sheriff's Office returned that summons to DSS as well, noting "[t]he defendant[s] do not live at listed address." Nevertheless, on 10

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<sup>3</sup> The record does not indicate why DSS reached this conclusion. Both DSS and the juveniles' guardian *ad litem* submitted supplements to the record pursuant to N.C. R. App. P. 9(b)(5), which are discussed *infra*.

March 2014, DSS again attempted to serve Respondent at the Sweetwater Road address by certified mail package, but the package was returned as "unclaimed" and "unable to forward" on 8 April 2014. On 21 March 2014, DSS finally succeeded in serving Respondent with the help of a process server who went to the Sweetwater Road address and learned that Respondent had another child who was staying there in the care of family members but that Respondent herself was in Fayetteville. The process server reached Respondent by telephone and arranged to meet her at a nearby convenience store, where Respondent was served with the TPR petition and summons.

A pre-trial hearing was held on 2 April 2014. Respondent failed to appear but the district court found that all parties had been properly served and scheduled the TPR hearing for 29 April 2014. On 9 April 2014, DSS sent notice of the date, time, and location of the TPR hearing to Respondent at the Sweetwater Road address in Dunn. Respondent contends she never received this notice.

Neither Respondent nor Melvin's and Hannah's father was present in court when the TPR hearing began on 29 April 2014. Ms. Burke requested a continuance on Respondent's behalf, explaining that

[m]y client has a corresponding case that was on, I believe, yesterday, and she was not here at the call which was very early in the morning, but apparently she did come to court after that. I would simply ask that this case be set. I think that case was set 30 days out. That this case be set 30 days out on the same date.

The district court denied that request but held the matter open to see if the parents would appear.

The district court reconvened the matter the next day, 30 April 2014, and again neither Respondent nor Melvin's and Hannah's father was present. Ms. Burke again asked for a continuance, explaining:

Your Honor, she did have [a] case on Monday. We went ahead—I think it was very close to 8:30 and she did show up after that, and she was given a next court date on that day. So, she did [unintelligible], so I would ask that everything be continued to that court date.

DSS objected to this request for a continuance and stated that it wanted to conduct a permanency planning hearing before starting the TPR hearing. The district court denied Ms. Burke's motion for continuance, prompting her to inquire:

MS. BURKE: Your Honor, then I don't know if I should withdraw or not because [Respondent] sort of maintains contact with me she's coming through the other case. So, Your Honor, [unintelligible] at this point.

THE COURT: She knew to be here. Notice was



given. We held the other case open from yesterday. So, I will allow you to withdraw.

MS. BURKE: At least as to this—

THE COURT: As to this hearing, yes.

MS. BURKE: Would that be in regards to the TPR as well, Your Honor? Because I am in the same position. If the Court's not going to be inclined to continue that, this afternoon.

THE COURT: I'm not going to be inclined to continue it. I'll hold it until we call it, however. Because I don't know how the rest of the docket is going to go.

The district court then conducted a permanency planning hearing. When the TPR hearing started later that afternoon, Ms. Burke suggested that Respondent might have confused the date of the TPR hearing with her other case that had been continued and made another motion to continue the TPR hearing, which the court denied. Ms. Burke then made a motion to withdraw. The trial court inquired if Ms. Burke had been in contact with Respondent since Monday, 28 April 2014. Ms. Burke replied that she had not, and explained that she did not have a phone number for Respondent and that her only known contact information was the Sweetwater Road address where DSS had previously failed in its attempts to serve Respondent. The court then granted Ms. Burke's motion to withdraw and subsequently entered a written order

confirming her withdrawal based on the denial of Ms. Burke's motion to continue and the fact that "the Respondent was served but has failed to appear."

During the TPR hearing that followed, DSS offered into evidence the district court's prior orders and Melvin's and Hannah's parents' criminal records, then called for testimony from social worker Anne Saleeby. Ms. Saleeby testified that she had been involved in the case for two years and provided background on Respondent's repeated failure to comply with the court's orders or make any progress toward reunification, noting that Respondent had ceased visiting her children after the court ceased reunification efforts on 29 July 2013. Ms. Saleeby was the sole witness to testify at the TPR hearing. The district court then found by clear, cogent, and convincing evidence that grounds existed to terminate Respondent's parental rights on the bases of neglect, willful failure to make any reasonable or substantial progress toward alleviating the conditions which led to the children's removal from her home, and failure to pay financial support. On disposition, the court found that the likelihood of adoption was high and that the children were in a pre-adoptive home, that they no longer had any bond with their parents, that they had bonded with their foster mother, and that

it was in their best interests to terminate Respondent's parental rights. On 3 July 2014, the district court entered an order terminating Respondent's parental rights.

Respondent filed a *pro se* notice of appeal on 23 May 2014. However, that notice did not include Ms. Burke's signature as required by our Rules of Appellate Procedure. On 13 June 2014, Respondent and Ms. Burke filed an amended notice of appeal containing both of their signatures.

#### *Analysis*

On appeal, Respondent argues that the trial court abused its discretion by: (1) denying her trial counsel's motion to continue the TPR hearing due to Respondent's absence and alleged lack of notice as to the date, time, and location of the hearing; and (2) allowing her trial counsel to withdraw from her representation without first notifying Respondent of her intent to do so. Because we find the issue of Respondent's counsel's withdrawal to be determinative of the outcome in this case, we address only Respondent's second argument.

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (citation and internal quotation marks omitted), *disc. review denied*, 361 N.C.

354, 646 S.E.2d 114 (2007); see also N.C. Gen. Stat. § 7B-1101.1 (2013). It is well established that after making an appearance in a particular case, an attorney may not cease representing a client without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citation omitted). An abuse of discretion occurs only when the trial court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). However, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion" and "must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984). As a result,

before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a [TPR] proceeding when the parent is absent from a hearing,

the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.

*In re D.E.G.*, \_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 280, 284 (2013) (citation omitted).

We acknowledge that one of our General Assembly's goals in enacting a procedure for the termination of parental rights was "to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age . . . ." N.C. Gen. Stat. § 7B-1100.2 (2013). We are always loath to delay that goal. Nevertheless, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982)). Consequently, this Court has consistently vacated or remanded TPR orders when questions of "fundamental fairness" have arisen due to failures to follow basic procedural safeguards. See *id.* (vacating TPR order where issues of lack of proper notice were raised and the respondent-parent's counsel was allowed to withdraw leaving her with no representation at a termination hearing that lasted only 20 minutes); see also, e.g., *D.E.G.*, \_\_ N.C. App. at \_\_, 747 S.E.2d at 286 (vacating and remanding in part a TPR order where the

respondent-parent was not present for the TPR hearing and the district court allowed his counsel to withdraw from his representation without having appeared in court, notified the respondent of his intention to withdraw, or shown good cause for the allowance of his request); *In re S.N.W.*, 204 N.C. App. 556, 561, 698 S.E.2d 76, 79 (2010) (remanding TPR order for determination by the district court regarding efforts by the respondent-parent's counsel to contact, consult, and adequately represent him at the TPR hearing where the respondent was not present and the court after minimal inquiry allowed his counsel, who the record indicated spent a total of 1.1 hours on the case, to not participate at the hearing); *In re K.R.B.*, \_\_ N.C. App. \_\_, 723 S.E.2d 173 (2012) (unpublished), available at 2012 WL 1117863 (vacating and remanding TPR order where the respondent-parent was not present at the hearing and the district court allowed his counsel to withdraw without inquiring into his efforts to contact the respondent prior to the hearing or notify him of his intention to withdraw).<sup>4</sup>

In the present case, the record is devoid of any evidence

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<sup>4</sup> Although Rule 30(e)(3) of our Rules of Appellate Procedure holds that this Court's unpublished decisions do not constitute controlling legal authority, given the factual and procedural similarities between *K.R.B.* and the present case, we find it persuasive and consistent with the precedent established in *K.N.*

whatsoever that Respondent received any notice from her trial counsel that counsel would seek to withdraw from her representation at the start of the TPR hearing. When the court inquired whether she had any contact with Respondent, Ms. Burke replied that she did not know why Respondent was absent, that she had a history of difficulty communicating with Respondent and did not have her telephone number, and that she believed Respondent might have been confused about her court dates. Ms. Burke did state that Respondent had shown up late to court earlier in the week for another matter in which Ms. Burke was representing Respondent, but she offered no elaboration as to what discussion, if any, they had about Respondent's TPR hearing and the potential consequences that might follow if she failed to appear. The trial court then allowed Ms. Burke to withdraw without any further inquiry.

The failures to comply with basic procedural safeguards in the present case raise the same questions of fundamental fairness as those this Court addressed in prior cases such as *K.N.*, *D.E.G.*, and *S.N.W.* In fact, these concerns are exacerbated here by the difficulties DSS encountered in serving Respondent with the summons and notice of hearing. We note that although the record before us does not provide a clear explanation for

these issues, we can infer that Respondent was unusually difficult to reach given her lack of stable permanent housing and that DSS made a good-faith effort to serve the notice and summons for the TPR proceeding against her. In an attempt to clarify these issues, both DSS and the juveniles' guardian *ad litem* sought to supplement the record pursuant to N.C.R. App. P. 9(b)(5).<sup>5</sup> However, because both these supplements contain

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<sup>5</sup> In its Rule 9(b)(5) supplement, DSS purports to show that: during the proceedings involving Melvin and Hannah, Respondent gave birth to another child; that DSS obtained an order for nonsecure custody of that child based on allegations of neglect and dependency; that the child was placed in the custody of his paternal grandmother who resided at the Sweetwater Road address in Dunn; and that during a face-to-face visit at that residence on 21 February 2014, a social worker came to believe that Respondent was residing there. DSS asserts that this is why so many fruitless attempts were made to serve Respondent at the Sweetwater Road address, with the implication being that the failure of those attempts resulted from Respondent acting in bad faith to avoid being served. However, the Rule 9(b)(5) supplement filed by the juveniles' guardian *ad litem* cites the same information as a basis for vacating and remanding the TPR order for defective notice of the TPR hearing because it tends to show that DSS was notified during the 21 February 2014 home visit that Respondent was planning to move to a new address on Dunn Road in Fayetteville at the beginning of March. Indeed, the order for nonsecure custody of Respondent's new child featured in both supplements lists the Dunn Road address in Fayetteville as Respondent's address, yet in April, DSS erroneously mailed the notice of the date, time, and location of the TPR hearing, required by N.C. Gen. Stat. § 7B-1106(b)(5), to the Sweetwater Road address, which may well explain Respondent's confusion over her court dates that Ms. Burke alluded to just before withdrawing at the start of the TPR hearing, as well as Respondent's failure to appear for the TPR hearing in this case.



documents from another case that were not before the trial court in this case and raise issues that were never considered by the trial court, the documents in these supplements are not properly before us in this appeal. Thus, we cannot consider them, and we strongly admonish counsel for DSS and the guardian *ad litem* not to file materials with this Court that were not before the trial court. Nevertheless, we can and do conclude that the district court erred when it granted Ms. Burke's request to withdraw after conducting a superficial inquiry that failed to confirm all three of the prerequisites that our Supreme Court held in *Smith* must be satisfied before an attorney is allowed to withdraw from representing a client after making an appearance on her behalf.

DSS attempts to persuade us to reach a different result by arguing that the district court did not err by allowing Ms. Burke to withdraw because it was required to do so by N.C. Gen. Stat. § 7B-1101.1(a) given Respondent's failure to appear at the TPR hearing. DSS's argument is premised on the basic legal principle, recognized by our Supreme Court's decision in *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), that TPR proceedings are independent from any underlying abuse, neglect, or dependency proceedings. Thus, DSS asserts that although Ms.

Burke served as Respondent's appointed counsel in the AND proceedings, her role in the TPR proceedings was only provisional, and section 7B-1101.1(a), which governs the appointment of provisional counsel in TPR proceedings, requires the court to dismiss a respondent-parent's provisional counsel if the respondent-parent "[d]oes not appear at the hearing." N.C. Gen. Stat. § 7B-1101.1(a)(1) (2013). However, this Court previously considered the very same argument in our *D.E.G.* decision, where we rejected it because it rests on a selective reading of the statute that ignores the fact that "the appointment of provisional counsel is unnecessary in the event that 'the parent is already represented by counsel.'" \_\_ N.C. App. at \_\_, 747 S.E.2d at 285 (quoting N.C. Gen. Stat. § 7B-1101.1(a)). Here, as in *D.E.G.*, the summons served upon Respondent clearly indicated that her trial counsel, who had represented her throughout the underlying proceedings, would continue to represent her in the TPR proceeding. Thus, because she was already represented by Ms. Burke, Respondent had no need for provisional counsel, Ms. Burke did not assume a provisional role in the TPR proceeding, and the trial court was not "excused from the necessity for compliance with the usual procedures required prior to the entry of an order allowing a parent's

counsel to withdraw in this case by virtue of the provisions of [section 7B-1101.1(a)(1)]." *Id.*

Therefore, because the district court erred in allowing Ms. Burke to withdraw from representing Respondent without first confirming that Respondent had been notified of Ms. Burke's intention to do so, we conclude that the TPR order must be vacated and this case remanded for further proceedings consistent with this opinion.

VACATED and REMANDED.

Judges STEELMAN and GEER concur.