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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-272

No. COA21-532

Filed 19 April 2022

Orange County, No. 19 JT 37-38

IN THE MATTER OF:

S.B.

W.J., Jr.

Appeal by respondent-mother from orders entered 9 June 2021 by Judge Sherri Murrell in Orange County District Court. Heard in the Court of Appeals 22 February 2022.

Stephenson & Fleming, LLP, by Deana Fleming, for petitioner-appellee.

Speaks Law Firm, PC, by Garron T. Michael, for respondent-appellant.

Raleigh Divorce Law Firm, by Heather Williams Forshey and Katelyn Heath, for guardian ad litem.

GORE, Judge.

¶ 1 Respondent-mother Janessia Brown appeals from the trial court's order of termination of parental rights and adjudication of her minor children "Sarah" and

"Wesley"[1] (collectively "the children") as abused and neglected juveniles. Respondent-mother argues that the trial court improperly denied her request to waive representation by counsel and represent herself. We affirm the orders.

I. Factual and Procedural Background

¶ 2 On 18 April 2019, the Orange County Department of Social Services ("OCDSS") filed juvenile petitions alleging that the children, then ages 7 and 10, were neglected. The petitions alleged that the children did not receive proper supervision and lived in an environment injurious to their welfare. The filing of the petition arose from the mother's repeatedly leaving the children alone and unsupervised while they were at home. On 22 August 2019, the petitions were amended to add physical abuse, and respective to Sarah, emotional abuse. OCDSS filed notices and motions to terminate respondent-mother's parental rights of both children on 18 September 2020.

¶ 3 On 22 April 2021, this case for termination of parental rights came on for hearing in Orange County District Court. In a pretrial hearing, respondent-mother's court-appointed attorney made a motion to be released as counsel at respondent-mother's request. The trial court swore in respondent-mother and conducted an oral colloquy examination of her by way of an inquisitive dialogue. During its examination, the trial court explained to respondent-mother that she had the right

[1] S.B. and W.B., Jr. will be referred to, respectively, as "Sarah" and "Wesley" which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

to counsel and her counsel was appointed to her for representation in these matters. The court explained the nature and posture of the proceeding. The trial court also asked whether respondent-mother wished to proceed representing herself, to which she twice responded, "I can represent myself."

¶ 4 The trial court heard from petitioner's attorney and respondent-mother's counsel. The attorney for the petitioners noted that respondent-mother's attorney had been actively involved with the case since its onset and suggested that respondent-mother would be "well served" by her attorney.

¶ 5 Ultimately, the trial court denied respondent-mother's waiver of counsel and cited respondent-mother's attorney's proven competency, statutory timelines, court structure, and difficulty a lay person would have in complying with hearing procedure without the assistance of an attorney, to the extent that it would be detrimental to the protection of her legal rights. However, the trial court would allow respondent-mother to communicate with her counsel during the hearing so she could provide her counsel with questions to ask witnesses and otherwise give her input into trial strategy. After denying the waiver of counsel, the trial court also denied respondent-mother's subsequent motion for a continuance. Additionally, during the proceeding, the trial court explained relevant trial procedures to respondent-mother.

¶ 6 At the conclusion of the trial, the court orally terminated respondent-mother's parental rights. Written Orders terminating respondent-mother's parental rights

were entered on 9 June 2021. The trial court concluded that the children were abused and neglected juveniles. Further, the trial court elected to leave the children in the custody of OCDSS and have them remain placed in their current foster home. Respondent-mother timely filed a written notice of appeal.

II. Analysis

¶ 7 Respondent-mother argues that the trial court erred by denying her request to waive counsel and represent herself. We disagree.

¶ 8 Generally, a waiver of counsel requires a knowing and intentional relinquishment of that right. *In re K.M.W.*, 376 N.C. 195, 209, 851 S.E.2d 849, 860 (2020) (citing *State v. Thomas*, 331 N.C. 671, 673-74, 417 S.E.2d 473, 475-76 (1992)). "A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily prescribed criteria . . . ." *Id.* at 209, 851 S.E.2d at 860 (citations omitted). 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 (2021). Although the waiver of the right to counsel in a termination of parental rights proceeding is governed by § 7B-1101.1, § 7B-602 is the companion statute and "its analysis applies equally . . . ." *In re A.Y.*, 225 N.C. App. 29, 37, 737 S.E.2d 160, 165, *disc. rev. denied*, 367 N.C. 235, 748 S.E.2d 539 (2013); *compare* N.C. Gen. Stat. § 7B-1101, *with* N.C. Gen. Stat. § 7B-602. The trial court must determine that the waiver of counsel is knowing and voluntary. *In re A.Y.*, 225 N.C. App. at 39, 737 S.E.2d at 166.

¶ 9 This Court has previously held that a trial court's examination for a respondent's knowing and voluntary waiver request is sufficient when the court engages in a colloquy or inquiry and explains the nature of the proceeding. *See id.* ("The trial court undertook a fairly lengthy dialogue with respondent mother to determine her awareness of her right to counsel and the consequences of waiving that right."); *In re J.K.P.*, 238 N.C. App. 334, 335, 767 S.E.2d 119, 121 (2014) ("The trial court engaged in a lengthy colloquy with Respondent about her desire to proceed *pro se* and her understanding of the consequences . . . ."). In *In re J.K.P.*, this Court also explained the nature of the proceeding to the respondent. *Id.* at 336, 767 S.E.2d at 121. This Court held that the trial court properly concluded that the respondent voluntarily chose to represent herself at trial even though her decision may have been

unwise but it "must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* at 342, 767 S.E.2d at 124 (quoting *Faretta v. California*, 422 U.S. 806, 834, 45 L. Ed. 2d 562, 581 (1975) (internal quotation marks omitted) (discussing the right to self-representation in criminal proceedings)).

¶ 10 Comparatively, in *In re K.M.W.*, the respondent appeared at the termination of parental rights hearing, albeit tardy, but her appearance gave the trial court the opportunity to observe the statutory requirements of § 7B-1101.1(a1), wherein the court could determine if respondent knowingly and voluntarily waived her statutory right to counsel. 376 N.C. at 212, 851 S.E.2d at 862. Our Supreme Court held that the trial court erred by failing to meet its obligation to inquire into the respondent's self-representation at the hearing without having examined the respondent and making the required findings of fact to show that respondent knowingly and voluntarily wished to appear *pro se*. *Id.*

¶ 11 In the instant case, the trial court made the following specific findings in its denial of respondent-mother's request:

> a. Respondent mother's counsel of record is a well-respected, excellent lawyer who regularly practices in juvenile court and understands the specialized area of law related to child welfare and termination of parental rights and advocates zealously for her clients.
> b. Respondent mother's counsel of record understands juvenile law, including necessary statutory timelines related to termination of parental rights, the elements of grounds to terminate parental rights.

> c. Respondent mother's counsel of records [sic.] has an understanding and competency related to trial procedure, including, but not limited to the N.C. Rules of Civil Procedure, N.C. Rules of Evidence, and N.C. Rules of Court.
> d. Respondent mother as an unrepresented person without the benefit of a law degree will have difficulty being able to follow and adhere to trial procedure to the extent that it could be detrimental to protection of her legal rights.
> e. Respondent mother can communicate with her counsel during the hearing to tell her questions to ask witnesses and otherwise provide input into trial strategy, including testifying on her behalf.

Additionally, during the hearing, the court explained to respondent-mother the nature and posture of the proceeding. The trial court told respondent-mother that she had the right to counsel and that her counsel was appointed to her for representation in these matters. Inquiry was also made into whether respondent-mother wished to proceed representing herself, to which she twice responded, "I can represent myself."

¶ 12 The colloquy made by the trial court during its examination of respondent-mother was a sufficient inquiry into whether the respondent-mother knowingly and voluntarily requested the waiver of counsel. Moreover, respondent-mother also concedes that "the trial court did conduct at least a form of an examination into the knowing and voluntary nature of her intent to represent herself during the termination hearing."

¶ 13 Respondent-mother asserts in her brief that this Court in *In re J.K.P.*, "adopted a hardline rule" from the United States Supreme Court regarding self-representation and "applied it to an individual's knowing and voluntary decision to represent themselves in a termination proceeding." Respondent-mother contends that the trial court erred in denying her right to proceed without unwanted legal representation and under the trial court's analysis, no parent could ever represent themselves despite having a right to do just that. We disagree.

¶ 14 The procedures of self-representation afforded to criminal defendants are not applicable in termination of parental rights hearings. The difference between a defendant and a respondent-parent has been articulated by our Supreme Court stating:

> The language of N.C.G.S. § 15A-1242 unambiguously indicates that the provisions of the statute apply in the criminal context and not in TPR proceedings. While section 15A-1242 specifically states that a "defendant" can waive counsel, a parent in termination proceedings is referred to as "respondent," not "defendant." In addition, the statute makes no mention of parents or termination proceedings. We also note that the legislature placed section 15A-1242 in N.C.G.S. Chapter 15A, which is titled "Criminal Procedure Act." If the legislature had intended for the standards articulated in section 15A-1242 to apply in the TPR context, the legislature could have included such language in Article 11 ("Termination of Parental Rights") of Chapter 7B ("Juvenile Code").

¶ 15

In re P.D.R., 365 N.C. 533, 538, 723 S.E.2d 335, 338 (2012). The statutory language

of § 7B-1101.1(a1) "clearly states that the trial court *may* allow the parent to proceed *pro se*, and it is well established that the use of the word 'may' in a statute implies the use of discretion." *In re J.R.*, 250 N.C. App. 195, 199, 791 S.E.2d 922, 925 (2016) (emphasis in original); s*ee In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory.").

¶ 16 The statutory history of Chapter 7B further supports the trial court's use of discretion. Prior to 1 July 1998, adjudication hearings for juvenile abuse, neglect, and dependency were governed by N.C. Gen. Stat. § 7A-631, which stated that "the judge shall protect the following rights of the juvenile and his parent to assure due process of law: . . . *the right of self-representation* . . . ." *J.R.*, 250 N.C. App. at 199, 791 S.E.2d at 925 (citing *Thrift v. Buncombe Cnty. DSS*, 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000) (emphasis in original) (quoting N.C. Gen. Stat. § 7A-631)). Subchapter XI of Chapter 7A was repealed effective 1 July 1999. 1998 N.C. Sess. Laws ch. 202, § 5. This Court has held that the removal of prior statutory language established that the privilege was no longer protected by statute because of its repeal. *In re Pittman*, 149 N.C. App. 756, 761, 561 S.E.2d 560, 565, *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). In *In re J.R.*, this Court held that "by removing the language specifically requiring the trial court to protect the right of self-representation, the General Assembly also eliminated any

statutory right to self-representation." 250 N.C. App. at 200, 791 S.E.2d at 925. This Court held that the applicable Chapter 7B statutory language "does not require the trial court to allow parents to waive counsel and represent themselves, but rather gives the court the *discretion* to do so." *Id.* (emphasis in original).

¶ 17 "Having determined that the trial court was not required, either by statute or the [United States nor the North Carolina] Constitution, to allow respondent-mother to proceed *pro se*, we must still consider whether the court abused its discretion by denying respondent-mother's request." *Id.* at 201, 791 S.E.2d at 926. "[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, with any such decision being subject to reversal on appeal only in the event that the trial court's ruling constitutes an abuse of discretion." *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 859 (citations omitted). *See also In re M.J.R.B.*, 377 N.C. 453, 457, 2021-NCSC-62, ¶ 10. "Absent an abuse of discretion, we will not disturb the trial court's choice. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d. at 926 (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (alteration in original)).

¶ 18 In the case *sub judice*, we hold the trial court fulfilled its obligation to make an inquiry into the knowingness and voluntariness of respondent-mother's request to

waive counsel by making sufficient findings of fact regarding the issue. Even if the trial court found respondent-mother's waiver to be knowing and voluntary, the trial court had discretion under § 7B-1101.1(a1) to deny her request and for her to proceed with the assistance of counsel. To accommodate respondent-mother, the court showed flexibility with court decorum and allowed for respondent-mother to communicate questions with her counsel. During the proceeding, the court also explained trial procedures to respondent-mother, an accommodation commonly given to respondents whose requests to proceed pro se are denied. See In re *P.D.R.*, 365 N.C. at 535, 723 S.E.2d at 337 ("The trial court also explained that respondent could cross-examine witnesses presented by petitioner and present her case at the conclusion of petitioner's case."); *In re M.J.R.B.*, 377 N.C. at 456-57, 2021-NCSC-62, ¶ 8 ("[The trial] court denied the respondents to discharge their counsel but told them they would be allowed to ask additional questions of witnesses personally if their attorney did not ask a question they wanted."). The trial court's analysis and ultimate conclusion from the bench reflected a serious consideration given to respondent-mother's concerns. Although the trial court, acting in its discretion, denied her request, the trial court found that she would be better represented in the matter with the assistance of counsel. Nothing in the record suggests that the ruling by the trial court was "so arbitrary that it could not have been the result of a reasoned decision,"

and therefore, it should not be disturbed. *In re J.R.*, 250 N.C. App. at 201, 791 S.E.2d. at 926 (citation omitted).

III. Conclusion

¶ 19 For the foregoing reasons, we affirm the orders of the trial court.

AFFIRMED.

Judges Inman and ZACHARY concur.

Report per Rule 30(e).