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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-641

No. 22-288

Filed 20 September 2022

Forsyth County, Nos. 19 JT 101–103, 107

IN THE MATTER OF: J.M., D.J., C.J., J.T.

Appeal by Respondent-Mother from order entered 29 November 2021 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 6 September 2022.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford, for respondent-appellant mother.

Matthew D. Wunsche for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Mother appeals from an order captioned Juvenile Order Terminating Parental Rights, which terminated her parental rights in J.M. (Jack)[1], D.J. (Dianne), C.J. (Charlie), and J.T. (Julie) (collectively "the children"). The Record

[1] Pseudonyms stipulated to by the parties pursuant to N.C.R. App. P. 3.1 and N.C.R. App. P. 42 to help protect the identity of the children and for ease of reading.

before us tends to reflect the following:

¶ 2 On 7 May 2019, Forsyth County Department of Social Services (DSS) obtained nonsecure custody of the children and filed juvenile petitions alleging Jack, Dianne, and Charlie to be neglected juveniles and Julie to be a neglected and abused juvenile. Following a hearing on 4 November 2019, the trial court entered an order on 19 December 2019 adjudicating the children to be neglected juveniles.

¶ 3 Following a Permanency Planning Hearing on 5 June 2020, the trial court entered an order on 6 July 2020 finding that Respondent-Mother had made minimal progress since the last court date. Following another Permanency Planning Hearing on 25 November 2020, the trial court entered an order on 12 January 2021 changing the primary permanent plan to adoption with a secondary plan of guardianship.

¶ 4 On 14 May 2021, DSS filed a Petition to terminate Respondent-Mother's parental rights to Jack, Dianne, Charlie, and Julie. DSS alleged grounds existed to terminate Respondent-Mother's parental rights for neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), and for willfully leaving the children in foster care or placement outside the home for more than twelve months without making reasonable progress to correct the conditions that led to their removal, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), as grounds for termination.

¶ 5 The Petition first came on for hearing in Forsyth County District Court on 29 September 2021. Respondent-Mother, who was

represented by counsel, was present for the hearing. Counsel for Respondent-Mother moved to continue the hearing, and the trial court allowed the motion. The hearing on DSS's petition to terminate Respondent-Mother's parental rights was continued until 13 October 2021.

¶ 6 On 13 October 2021, DSS's Petition again came on for hearing. Respondent-Mother did not appear for this hearing. Trial counsel for Respondent-Mother was present and made a motion to continue the hearing, which was opposed by DSS and the Guardian ad litem. The trial court denied the motion to continue. Respondent-Mother's counsel then made a motion to withdraw as counsel for Respondent-Mother, and the trial court allowed the motion to withdraw.

¶ 7 The trial court entered an order on 29 November 2021 adjudicating the existence of both grounds for termination alleged by DSS. The trial court also concluded it was in the children's best interests to terminate Respondent-Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1110(a). Respondent-Mother timely filed notice of appeal.

Issue

¶ 8 The issue on appeal is whether the trial court erred in allowing trial counsel for Respondent-Mother to withdraw where the Record fails to disclose any showing the trial court inquired into trial counsel's efforts to contact Respondent-Mother or provide Respondent-Mother with notice of counsel's intent to withdraw.

Analysis

¶ 9 In Respondent-Mother's sole challenge to the trial court's Termination of Parental Rights Order, Respondent-Mother argues the trial court erred by allowing her trial counsel to withdraw from representing her at the termination hearing. Specifically, Respondent-Mother contends she was deprived of fundamentally fair procedures where the trial failed to conduct an appropriate inquiry into counsel's efforts to contact Respondent-Mother and failed to inquire into whether trial counsel had given Respondent-Mother notice of her intent to withdraw.

¶ 10 The North Carolina Supreme Court has recently reiterated a parent in termination of parental rights proceeding has a statutory right to counsel that may be waived only after proper inquiry by a trial court:

> In order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings. More specifically, N.C.G.S. § 1101.1(a) provides that "[t]he parent [in a termination of parental rights proceeding] has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." Although parents eligible for the appointment of counsel in termination of parental rights proceedings may waive their right to counsel, they are entitled to do so only "after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C.G.S. § 7B-1101.1(a1).

In re K.M.W., 376 N.C. 195, 208-09, 851 S.E.2d 849, 859 (2020) (alteration in original).

"Consistently with the provisions of N.C.G.S. § 7B-1101.1(a1), Rule 16 of the General Rules of Practice prohibits an attorney from withdrawing from his or her representation of a client in the absence of "(1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." *Id.* (quoting N.C. Gen. R. Pract. Super. and Dist. Ct. 16.).

¶ 11 "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 when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (citation omitted).

¶ 12 "However, this 'general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court,' so that, '[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion.' " *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (quoting *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984)). Thus, "before allowing an attorney to withdraw . . . , 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.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) (citation omitted).

¶ 13 The Record on Appeal does not contain a transcript of the 13 October 2021 termination hearing. It appears that while the 13 October 2021 hearing was recorded, there was a technical error that resulted in the recording being erased or lost before a transcript was prepared. Instead, the parties have provided a narrative transcript of the 13 October 2021 hearing. This narrative transcript indicates that while counsel for Respondent-Mother was present, Respondent-Mother did not appear for the hearing. Counsel for Respondent-Mother moved the trial court to continue the hearing, which was opposed by DSS and the Guardian ad litem, and the trial court denied the motion to continue. Counsel for Respondent-Mother then made a motion to withdraw as counsel due to Respondent-Mother's absence at the termination hearing. The trial court allowed counsel's motion to withdraw. The trial court proceeded to conduct the hearing in the absence of both Respondent-Mother and counsel for Respondent-Mother. A DSS social worker and the Guardian ad litem for the children testified.

¶ 14 The Record before us is devoid of any evidence counsel for Respondent-Mother provided Respondent-Mother with notice of her intent to withdraw from representation prior to the 13 October 2021 hearing. Moreover, the Record unfortunately fails to show the trial court inquired into what efforts, if any, counsel for Respondent-Mother made to contact Respondent-Mother and to inform Respondent-Mother of her intention to withdraw from representation. The narrative

transcript shows only that counsel moved to withdraw because Respondent-Mother did not appear at the 13 October 2021 hearing.

¶ 15 As such, we are compelled to conclude on this Record the trial court erred by allowing Respondent-Mother's counsel to withdraw from representation without conducting an adequate inquiry into the circumstances surrounding the making of the motion to withdraw as counsel. *See In re D.E.G.*, 228 N.C. App. at 387, 747 S.E.2d at 284-85 (holding the trial court erred in allowing the respondent-father's counsel to withdraw from representation where the record provided no indication counsel made any effort to notify the respondent-father of his intention to seek leave of court to withdraw from representation and "only minimal information bearing on the issue" of whether counsel had a "justifiable basis for his request for leave to withdraw"); *see also In re M.G.*, 239 N.C. App. 77, 85, 767 S.E.2d 436, 442 (2015) (holding the trial court erred in allowing the respondent's counsel to withdraw from representation "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").

¶ 16 In an attempt to persuade this Court to reach a different result, DSS and the Guardian ad litem argue the instant case is analogous to *In re T.A.M.*, 378 N.C. 64, 2021-NCSC-77, in which the North Carolina Supreme Court held the trial court did

not abuse its discretion in allowing the respondent-father's counsel's motion to withdraw. The record in *In re T.A.M.*, however, showed the respondent-father had been advised numerous times of "his responsibility to attend all trial court hearings and maintain communication with his court appointed attorney[,]" *id.* at ¶ 22, but made "no apparent effort to observe the trial court's advisement to attend hearings [and] admitted he did not want to receive mail from DSS or other interested parties[.]" *Id.* at ¶ 30. When the respondent-father failed to appear at the hearing on the petition to termination his parental rights, the trial court engaged in a colloquy with the respondent-father's counsel, addressing the motion to withdraw filed more than a week prior to the hearing. *Id.* at ¶ 27. Counsel for the respondent-father informed the trial court that she had spoken with the respondent-father that day, and he did not object to his attorney's withdrawal as counsel. *Id.*

¶ 17 The present case is distinguishable from *In re T.A.M.* Respondent-Mother attended the majority of the hearings in the underlying neglect case and attended the first scheduled hearing on DSS's petition to terminate her parental rights on 29 September 2021. Most notably, the Record here contains nothing to show the trial court made a reasoned decision to allow trial counsel to withdraw and proceed with the termination hearing with Respondent-Mother unrepresented and in absentia.

¶ 18 Thus, the Record before us is insufficient to establish the trial court made adequate inquiry into whether Respondent-Mother had notice of trial counsel's intent

to withdraw or trial counsel's efforts to contact Respondent-Mother. Therefore, on this Record, we are compelled to conclude the trial court erred in allowing trial counsel for Respondent-Mother to withdraw and in, then, proceeding with the Termination of Parental Rights hearing. Consequently, we are, in turn, compelled to vacate the trial court's 29 November 2021 Order terminating Respondent-Mother's parental rights in the children and remand this matter for a new hearing.

Conclusion

¶ 19 Accordingly, for the foregoing reasons, the Juvenile Order Terminating Parental Rights entered 29 November 2021 is vacated, and this matter is remanded for a new termination of parental rights hearing.

VACATED AND REMANDED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).