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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-191

Filed 5 March 2024

Sampson County, Nos. 20 JA 74–78

IN THE MATTER OF: L.E., I.Z.E., G.E., A.E., D.A.

Appeal by Respondent-Mother from orders entered 20 April 2022 by Judge Michael C. Surges and 24 October 2022 by Judge Sarah C. Seaton in Sampson County District Court. Heard in the Court of Appeals 28 November 2023.

BJK Legal, by Benjamin J. Kull, for Respondent-Appellant Mother.

Marie H. Mobley, for Petitioner-Appellee Sampson County Department of Health and Human Services.

Administrative Office of The Courts, by Associate Counsel Matthew D. Wunsche, for Guardian ad Litem.

CARPENTER, Judge.

Respondent-Mother appeals from orders entered 20 April 2022 which adjudicated her children to be neglected and 24 October 2022 (the “Orders”), which granted: custody of A.E (“Alexis”)¹ to her father and ceased reviews; guardianship of

¹ Pseudonyms are used to protect the identities of the juveniles and for ease of reading. See N.C. R. App. P. 42(b).

Opinion of the Court

L.E. (“Lionel”) and G.E. (“George”) to their foster parents; custody of D.A. (“David”) and I.Z.E. (“Isabel”) to the Sampson County Department of Social Services (“SCDSS”); and ceased visitations until Respondent-Mother complied with certain requirements. On appeal, Respondent-Mother argues the trial court: (1) erred by concluding Respondent-Mother had knowingly and voluntarily waived her right to counsel; (2) erred by finding certain facts were supported by the evidence; (3) erred by concluding the five minor children were neglected juveniles; and (4) abused its discretion by imposing a “gatekeeping” restriction on Respondent-Mother’s right to file a motion for modification of the visitation plan. After careful review, because we agree with Respondent-Mother’s first issue concerning waiver of counsel, we do not reach her second and third issues regarding the trial court’s findings of fact and conclusion of neglect; and we conclude the trial court did not impose a “gatekeeping” restriction. Accordingly, we vacate and remand.

I. Factual & Procedural Background

This appeal concerns Respondent-Mother’s five minor children (collectively, the “Children”): Lionel, born in July 2020; Isabel, born in December 2015; George, born in March 2017; Alexis, born in July 2012; and David, born in August 2009. Record evidence tends to show the following. SCDSS has a history of involvement with Respondent-Mother dating back to 2015. Relevant to this appeal, on 26 October 2020, SCDSS received a fourth child-protective-services report concerning Respondent-Mother and the Children. On 27 October 2020, a social worker conducted

Opinion of the Court

a preliminary visit to initiate the report at Respondent-Mother's home; however, Respondent-Mother would only allow the Children to be interviewed as a group, not individually. The social worker noted there were no observable concerns and no disclosures made at that time, so the safety plan was marked safe, but SCDSS continued involvement. During this assessment period, SCDSS staff regularly spoke with Respondent-Mother, as she would call and express concerns. Due to her behavior during these contacts, SCDSS became increasingly concerned about Respondent-Mother's mental health, which a social worker described as "always unpredictable, unstable, erratic" and "paranoid."

On 20 November 2020, SCDSS filed juvenile petitions in Sampson County District Court, alleging emotional abuse, neglect, and dependency, and obtained nonsecure custody of the Children. On 24 November 2020, the trial court determined Respondent-Mother was indigent and appointed her first attorney, Corrine Railey.

On 8 January 2021, the trial court continued nonsecured custody of the Children, and Respondent-Mother was to have supervised visitation at least one hour every other week. At the 11 March 2021 permanency-planning hearing, however, the trial court ceased in-person visitation due to an incident that occurred on or about 26 February 2021, where Respondent-Mother "yelled at social workers in the presence of the [C]hildren, made threats, hit her fists at a child, spoke in tongues, and told the [C]hildren that DSS killed her cousin, leaving the [C]hildren upset and

crying.” SCDSS permitted Respondent-Mother to continue communicating with the Children via electronic or telephonic means.

On 1 April 2021, Attorney Railey filed a motion to withdraw as Respondent-Mother’s attorney, citing Respondent-Mother’s contact with her office requesting “a new lawyer” and that she “could no longer provide effective representation to Respondent-Mother.” On 8 April 2021, the trial court appointed Attorney Penny Bell to represent Respondent-Mother and allowed Attorney Railey to withdraw.

On 19 May 2021, Attorney Bell filed a motion to withdraw as Respondent-Mother’s attorney after Respondent-Mother informed her that “she no longer desire[d] to have [Attorney Bell] represent her and that she desires to represent herself.” Attorney Bell’s motion also noted Respondent-Mother’s continued threats to call the North Carolina State Bar if Attorney Bell “did not do what [Respondent-Mother] wants.” Respondent-Mother also threatened Attorney Bell and stated that “she does not trust [Attorney Bell] or her staff” and “does not want [Attorney Bell] to represent her any further,” noting she either wanted “to represent herself or have her father represent her.”

On 18 June 2021, the Honorable Michael C. Surles appointed a third lawyer, Attorney Stephanie Villaver, to represent Respondent-Mother. In an order filed 17 August 2021, Judge Surles made the following relevant findings of fact:

1. That the Respondent Mother is currently represented by Attorney Penny K. Bell.

Opinion of the Court

2. That Attorney Penny K. Bell has filed a motion to be released as counsel of record for the Respondent Mother.
3. That the Respondent Mother has already been appointed counsel prior to the appointment of Attorney Penny K. Bell and said prior attorney also filed a motion to be released as counsel of record.
4. That the Respondent Mother has displayed a desire to choose her court-appointed counsel which is not allowed under the law.
5. That in light of the significant differences of opinion as to how to proceed between the Respondent Mother and her current counsel this Court released Attorney Penny K. Bell.
6. That Attorney Stephanie Villaver was appointed as substitute legal counsel for the Respondent Mother.

The trial court's order also stated, "Attorney Stephanie Villaver will be the last attorney appointed for the Respondent Mother."

On 30 June 2021, Attorney Villaver filed a motion to withdraw as counsel for Respondent-Mother. The motion came before the Honorable Mario M. White on 26 August 2021, the same day the case was scheduled for adjudication. During the motion hearing, Attorney Villaver and Respondent-Mother explained issues concerning discovery, their disagreements as to legal strategies, and their ability, or lack thereof, to work together on this matter. After the trial court explained the role of court-appointed trial counsel to Respondent-Mother, and the fact that the attorney and client need not always agree with each other, the following exchange ensued:

Opinion of the Court

THE COURT: Okay. I understand—I guess my question is right now, are you telling me that you and Ms. Villaver cannot work together on this matter? Is that what you're telling me?

RESPONDENT MOTHER: I never had a chance to—in this case I never said we couldn't. She wanted to withdraw, but I had things that I would like to—I wanted to get—to subpoena my witnesses. I wasn't—she kept telling me that it's too late to subpoena my witnesses which I wasn't able to subpoena my witnesses, Ms. Corinne Railey, or Ms. Penny— while I was trying to exercise my rights—my civil rights to be able to have my witnesses testify to the allegations that I was being accused of which are falsified. I'm just trying to be able to file motions and I wasn't given that. I just needed some—if she was representing me the way that it was supposed to be then we wouldn't have a misunderstanding but I didn't think it was that far out of a misunderstanding. I'm not here to trust or have faith in anyone. I'm just here to, like you said, get counsel and receive proper representation.

THE COURT: So, this the third attorney on the list—this is the third attorney that's been appointed. My concern, [Respondent-Mother], is—is we're running out of attorneys.

RESPONDENT MOTHER: Well, she told me if she withdrew, then she would ask that I be able to represent myself and also be able to have counsel help me file motions and—

THE COURT: Well, what I'm going to do is Ms. Villaver, is I'm going to allow you to withdraw. I'm going to appoint you as standby counsel. And so if she has any questions, she can ask you questions. But she can conduct her own hearings and you can kind of guide her on how things are done, but you're not representing her. So I'll just appoint you as stand-by counsel so she can consult with you as to how—you understand that, [Respondent-Mother]?

Opinion of the Court

RESPONDENT MOTHER: No. I don't understand.

MS. VILLAYER: So he's letting you—your own motions, I'm going to—so you can speak for yourself. Remember what we originally talked about. So originally, Judge, we— or at one point we originally, I was going to withdraw and then she wanted to handle it but then I think—I think is what you wanted. So I help you—

RESPONDENT MOTHER: No. This is not what I wanted. This is all I have left. I wasn't able to get represented properly by Ms. Corinne Railey and—

MS. VILLAYER: No—I was going to—you get to speak to the Judge. He's saying I will help you draft and get ready for Court.

RESPONDENT MOTHER: Like filing the motions?

MS. VILLAYER: Yes.

RESPONDENT MOTHER: Subpoenas?

MS. VILLAYER: Yes. Although I'm not—

RESPONDENT MOTHER: That's what I was—

MS. VILLAYER: And you get to talk directly to everyone.

RESPONDENT MOTHER: Okay.

MS. VILLAYER: So then I don't have to—

THE COURT: You understand that you will be representing yourself. Ms. Villayer will be there to help you draft motions, help you draft subpoenas, but when it comes to Court you will be representing yourself. Ms. Villayer will be in the chair behind you and if you have any questions, you can go back and ask her questions but she will not be conducting the hearing. So she will not be asking questions on your behalf. She'll not be speaking

Opinion of the Court

with department of social services on your behalf. You'll have to do it on your own. You understand that?

RESPONDENT MOTHER: Yes.

THE COURT: Okay. All right. So I'm going to allow Ms. Villaver to withdraw. Appoint Ms. Villaver as standby counsel. And in light of that, . . . I'm going to probably continue this matter.

At the conclusion of the motion hearing, the trial court released Attorney Villaver as court-appointed counsel and appointed her as "stand by counsel" to assist Respondent-Mother as an advisor until the adjudication of the case. The trial court also continued the adjudication hearing to 2 December 2021 to accommodate Respondent-Mother's request for time to subpoena witnesses and give birth. On that same day, Respondent-Mother signed a "Waiver of Parent's Right to Counsel" form, but she failed to indicate on the form whether she was declining a court-appointed attorney and hiring her own attorney, or whether she intended to represent herself.

On 7 September 2021, the trial court entered an "Order to Withdraw and Appointment to Legal Advisor," which allowed Attorney Villaver to withdraw as Respondent-Mother's attorney, and ordered that Respondent-Mother "is hereby to represent herself pro se with Attorney Stephanie Villaver as legal advisor until adjudication in the above cases."

On 5 November 2021, the trial court entered an "Order of Continuance and Appointment of Standby Counsel," finding that Respondent-Mother "desires to

Opinion of the Court

represent herself in this action but does desire the assistance of an attorney to assist in filing documents and motions,” and appointed Attorney Villaver as “standby counsel” to assist Respondent-Mother with the filing of motions, subpoenas, or other discovery documents.

On 16 December 2021, the Honorable William B. Sutton, Jr. held a pre-adjudication hearing and scheduled the case for adjudication on 10 February 2022. Respondent-Mother requested a continuance, which was denied. On 10 February 2022, adjudication began before Judge Surles. During the adjudication hearing, SCDSS called four witnesses who testified to: SCDSS’s involvement with Respondent-Mother since 2015; their continued recommendations for Respondent-Mother to obtain mental-health counseling; her unwillingness to cooperate with SCDSS; her “unpredictable,” “irate,” and “paranoid” behavior; her refusal to agree to a safety plan with SCDSS; her refusal to allow SCDSS to interview the Children individually; her previous diagnoses of “post-traumatic stress disorder and major depressive recurrent, severe without psychotic features,” and “unspecified depressive disorder and unspecified anxiety disorder”; and her refusal to agree to any further mental-health evaluations or treatments.

At the conclusion of SCDSS’s evidence, Respondent-Mother requested a continuance of the case, so she could take a Covid test and contact additional witnesses. The trial court continued the case until 24 February 2022 and authorized

Opinion of the Court

a necessary medical procedure for Lionel, to which Respondent-Mother was unwilling to consent.

On 24 February 2022, Respondent-Mother failed to appear. Although Respondent-Mother said she was under a Covid quarantine, she failed to produce any corroborating evidence.

On 10 March 2022, the adjudication hearing resumed. Respondent-Mother called the following witnesses: Ashley Bullard, a social worker; Cora Smith, a friend of Respondent-Mother; Kenneth Evans, Respondent-Mother's father; Margaret McKoy, Respondent-Mother's former therapist; Dawanda Wood, Respondent-Mother's neighbor; and Respondent-Mother, herself.

At the conclusion of all the evidence, SCDSS conceded they had not met their burden of proof as to abuse or dependency but asked the trial court to adjudicate as to neglect. That same day, the trial court also conducted a brief hearing on SCDSS's motion concerning medication for Isabel and to suspend Respondent-Mother's visitation. The trial court heard evidence from SCDSS social workers regarding Respondent-Mother's in-person visitation, which resumed in December of 2021. The trial court approved SCDSS's request to authorize medications for Isabel and to temporarily suspend Respondent-Mother's visitation. On 20 April 2022, the trial court entered an adjudication order finding the Children to be neglected.

On 2 August 2022, the case came on for a disposition hearing before the Honorable Sarah C. Seaton. Respondent-Mother was not present, despite Attorney

Opinion of the Court

Villaver reporting that Respondent-Mother had confirmed the hearing date and time via text message. The trial court received evidence as to Respondent-Mother's progress since the filing of the 20 November 2020 petitions. On 4 January 2021, Respondent-Mother entered into a service agreement with SCDSS and agreed to complete parenting classes, attend mental-health counseling, obtain and maintain employment, submit to random drug screens, maintain stable housing, complete a substance-abuse assessment, and abide by all recommendations of treatment providers. Social workers testified that Respondent-Mother started parenting classes, but they had no evidence of completion; she was uncooperative in signing releases; she began but was no longer attending mental-health counseling; she was employed at Ruby Tuesdays, but as of 18 April 2022, she was no longer employed there; and Respondent-Mother avoided or refused SCDSS's requests for drug screens except one occasion (29 December 2021), which produced a positive test for cannabinoids.

In the disposition order, the trial court granted custody of Alexis to her father and ceased reviews, granted guardianship of Lionel and George to their foster parents, and granted SCDSS custody of David and Isabel. The trial court ceased visitation, finding that it was not in the best interests of the Children for Respondent-Mother to have visitation due to ongoing emotional harm. If Respondent-Mother "provides documentation that she is on medication prescribed by a psychiatrist and

Opinion of the Court

is participating in therapy the [Respondent-Mother] may motion the Court for visitation.”

On 22 November 2022, Respondent-Mother entered written notice of appeal in all five cases.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(3) (2021).

III. Issues

The issues on appeal are whether: (1) the trial court erred in concluding Respondent-Mother knowingly and voluntarily waived her right to counsel; (2) certain findings of fact are supported by the evidence; (3) the trial court erred in concluding the Children were neglected; and (4) the trial court abused its discretion by imposing a gatekeeping restriction on Respondent-Mother’s right to file a motion to modify the visitation plan.

IV. Analysis

As an initial matter, because Respondent-Mother’s first issue concerning waiver of counsel is dispositive, we analyze Respondent-Mother’s first and fourth issues, and do not reach her second and third issues regarding the trial court’s findings of fact and conclusion of neglect.

A. Gatekeeping Order

Opinion of the Court

Respondent-Mother argues the trial court abused its discretion by imposing a restriction on her right to file a motion for modification of the visitation plan. We disagree.

This Court reviews the trial court's imposition of a gatekeeper order for abuse of discretion. *See Fatta v. M & M Properties Mgmt., Inc.*, 224 N.C. App. 18, 29, 735 S.E.2d 836, 844 (2012). A trial court may be reversed for abuse of discretion only upon a showing that its actions are "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

Here, the trial court ruled in each case "[t]hat if the [Respondent-Mother] provides documentation that she is on medication prescribed by a psychiatrist and is participating in therapy the [Respondent-Mother] may motion the Court for visitation." A review of the challenged provisions reveals the trial court did not impose a pre-filing injunction or "gatekeeper order" prohibiting Respondent-Mother from filing a motion for modification of visitation. Rather, the trial court was simply forecasting the evidence it would require before it would be inclined to modify visitation. A candid, prospective statement like this inures to Respondent-Mother's favor and was therefore supported by reason. *See Clark*, 301 N.C. at 129, 271 S.E.2d at 63.

Our holding that the trial court did not impose a gatekeeping restriction is further bolstered by the trial court's explicit language in two of the orders, "[t]hat pursuant to N.C. Gen. Stat. § 7B-905.1(d), all parties are hereby informed that they

have the right to file a motion for review of any visitation plan.” This demonstrates the trial court’s awareness of the statutory right to request review of the visitation plan and provided Respondent-Mother with notice of that right.

B. Waiver of Counsel

Respondent-Mother argues the trial court reversibly erred by failing to examine Respondent-Mother and make findings of fact showing she knowingly and voluntarily waived her right to counsel. We agree.

“In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right.” N.C. Gen. Stat. § 7B-602(a) (2021). An indigent parent may opt to waive that right and “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,” and this may be done verbally on the record. *Id.* at § 7B-602(a1) (emphasis added). The question of whether a trial court properly concluded that a parent waived or forfeited their right to counsel under the Juvenile Code is reviewed de novo. *See In re K.M.W.*, 376 N.C. 195, 209–10, 851 S.E.2d 849, 860 (2020).

While there is a criminal statutory provision for standby counsel, *see* N.C. Gen. Stat. § 15A-1243, there is no similar provision in juvenile cases, *see* NC Gen Stat § 7B-1101.1. It has occurred, however, in a limited number of cases. *See In re P.D.R.*, 365 N.C. 533, 538, 723 S.E.2d 335, 338 (2012). *But see In re J.M.*, 273 N.C. App. 280,

Opinion of the Court

285–90, 847 S.E.2d 916, 920–22 (2020) (discussing without disapproval, the provision of standby counsel before remanding on a different basis).²

Here, Attorney Villaver’s “Motion to Withdraw as Counsel of Record,” argued that she was “unable to adequately prepare for upcoming court matters” because she was “unable to render effective legal services and provide adequate legal defense,” and was “severely challenged to communicate legal defense within the required time for scheduled court matters.” Attorney Villaver’s motion, however, did not indicate that Respondent-Mother requested Attorney Villaver’s withdrawal as court-appointed counsel, nor did it indicate that Respondent-Mother requested to represent herself in these proceedings.

Similarly, at the 26 August 2021 motion hearing, Attorney Villaver stated that her request to withdraw concerned discovery and staffing issues, disagreements or misunderstandings between her and Respondent-Mother as to legal strategies, and their ability, or lack thereof, to work together on this matter. The trial court’s colloquy with Respondent-Mother, likewise, focused on whether Respondent-Mother could continue to work with Attorney Villaver and explained the consequences of withdrawal. The trial court did not, however, examine Respondent-Mother as to whether she understood her right to counsel or whether she was voluntarily waiving

² Although not directly challenged on appeal, we simply note North Carolina law appears to be unsettled on whether standby counsel comports with a parent’s right to counsel in juvenile abuse-and-neglect proceedings.

Opinion of the Court

that right prior to allowing Attorney Villaver to withdraw and appointing her as “standby counsel.” By granting Attorney Villaver’s withdrawal and appointing her as “standby counsel” without a thorough colloquy, the trial court unilaterally made a decision that was Respondent-Mother’s alone to make, leaving Respondent-Mother no alternative but to proceed pro se.

Although the evidence tends to reflect a disconnect between Respondent-Mother’s words and conduct on this issue, we are limited to reviewing her words, which consistently state she wanted representation. Notably, when the trial court asked Respondent-Mother about her ability to continue working with Attorney Villaver, Respondent-Mother said, “I’m just here to, like you said, get counsel and receive proper representation.” And after the trial court explained the consequences of Attorney Villaver’s withdrawal and appointment as “standby counsel,” Respondent-Mother replied: “No. This is not what I wanted. This is all I have left. I wasn’t able to get represented properly by Ms. Corinne Railey and” Ultimately, Respondent-Mother answered “Yes” when the trial court asked if she understood she will represent herself and Attorney Villaver will be there to help her draft motions and subpoenas. But we cannot conclude this was a proper colloquy exploring whether Respondent-Mother knowingly and voluntarily waived her right to counsel. *See In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 859; N.C. Gen. Stat. § 7B-602(a1).

Beyond examining Respondent-Mother to determine whether she sought to waive her right to counsel and proceed pro se, the trial court must make “findings of

Opinion of the Court

fact sufficient to show that the waiver [was] knowing and voluntary.” N.C. Gen. Stat. § 7B-602(a1). Here, the record is devoid of oral or written findings of fact demonstrating that Respondent-Mother’s purported waiver was knowing and voluntary.

First, the record does not contain any findings of fact made during the 26 August 2021 hearing on Attorney Villaver’s motion to withdraw. Next, on the “Waiver of Parent’s Right to Counsel” form signed by Respondent-Mother, neither box is checked to indicate whether Respondent-Mother intended to hire her own lawyer or represent herself. Additionally, the “Findings of Fact” section of the form, which is completed by the trial court, does not contain any findings of fact, but simply states—“Stephanie Villaver appointed as stand by counsel.” The “Conclusions of Law” section of the form has the box checked: “The parent’s waiver is knowing and voluntary”; but the “Order” section does not have a box checked indicting whether the parent “may proceed without appointed counsel” or “may proceed without the assistance of counsel.” In short, the “Waiver of Parent’s Right to Counsel” form contains several clerical errors and no findings, which is insufficient.

Lastly, the trial court’s 7 September 2021 and 5 November 2021 orders allowed Attorney Villaver’s withdrawal, appointed her as “legal advisor” or “standby counsel” for Respondent-Mother, and stated Respondent-Mother was to “represent herself pro se with Attorney Stephanie Villaver as legal advisor until adjudication in the above

Opinion of the Court

cases.” But, these orders similarly lack findings of fact regarding Respondent-Mother’s knowing and voluntary waiver of counsel and decision to proceed pro se.

Although the record reflects the trial court’s concern that Attorney Villaver was Respondent-Mother’s third court-appointed attorney, it stopped short of finding or concluding that Respondent-Mother’s actions forfeited her right to counsel. While Respondent-Mother’s conduct ranged from unpredictable to disrespectful at times, we cannot conclude Respondent-Mother forfeited her right to counsel thereby alleviating the trial court of conducting a colloquy for knowing and voluntary waiver. There is insufficient evidence that Respondent-Mother’s actions made legal representation impossible so as to prevent a trial from occurring. *See, e.g., In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (“The trial court is not required to abide by the . . . directive to engage in a colloquy regarding a knowing waiver’ where the litigant has forfeited his right to counsel by engaging in ‘actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all.’”) (quoting *State v. Simpkins*, 373 N.C. 530, 536–38, 838 S.E.2d 439, 446–47 (2020)). We recognize the high number of continuances in this case and acknowledge the trial court’s discretion to manage its calendar for judicial economy; however, when it relates to appropriate legal representation, the trial court still needs to make the proper examination and findings of fact for waiver of a parent’s statutory right to counsel. *See* N.C. Gen. Stat. § 7B-602(a1).

Based upon the foregoing, the trial court failed to examine Respondent-Mother

Opinion of the Court

and make the required findings of fact sufficient to show Respondent-Mother knowingly and voluntarily waived her right to counsel under N.C. Gen. Stat. § 7B-602(a1). Therefore, we vacate and remand for the trial court to first address the status of Respondent-Mother's legal representation, followed by a new adjudication hearing. *See In re J.M.*, 273 N.C. App. at 290, 847 S.E.2d at 922.

V. Conclusion

The trial court did not conduct an examination and make the required findings of fact to support its conclusion that Respondent-Mother knowingly and voluntarily waived her right to counsel, and, therefore, we do not reach the remaining issues. We also conclude the trial court did not impose a "gatekeeping" restriction on Respondent-Mother's right to file a motion for modification of the visitation plan. Accordingly, we vacate and remand. On remand, the trial court shall first address the status of Respondent-Mother's legal representation, followed by a new adjudication hearing.

VACATED AND REMANDED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).