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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-732

Filed 16 April 2024

Guilford County, Nos. 21 JT 608-09

IN THE MATTER OF: M.J.M., E.K.M.

Appeal by respondent from order entered 2 May 2023 by Judge Ashley Watlington-Simms in District Court, Guilford County. Heard in the Court of Appeals 21 March 2024.

*Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.*

*Womble Bond Dickinson (US) LLP, by William D. Curtis and Mason E. Freeman, for guardian ad litem.*

*Richard Croutharmel for respondent-appellant.*

STROUD, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children under North Carolina General Statute Sections 7B-1111(a)(1) for neglect, (a)(2) for willful failure to make reasonable progress, and (a)(6) for incapacity to provide care and supervision. Because we conclude the trial

court erred in allowing Mother's counsel's motion to withdraw, we reverse the termination order and remand.

## **I. Background**

On 4 October 2021, the Guilford County Department of Health and Human Services ("DHHS") filed juvenile petitions alleging M.J.M. ("Mary Jane") and E.K.M. ("Edmond")<sup>1</sup> were neglected and dependent juveniles based on allegations of inappropriate discipline, homelessness, improper supervision, domestic violence, and substance abuse issues. As the parents were unwilling and unable to provide care for the children, DHHS obtained nonsecure custody that same day.

Edward Branscomb was appointed as Mother's counsel on 6 October 2021. Following a hearing on 3 December 2021, the trial court entered an adjudication and disposition order on 18 February 2022. The court adjudicated Mary Jane and Edmond as neglected and dependent juveniles and continued custody of the children with DHHS. The court also ordered Mother to enter into and comply with DHHS's proposed case plan to address identified issues with housing, parenting skills, mental health, substance abuse, and employment. Mother was granted an hour of supervised visitation twice a week.

Following the 23 March 2022 permanency planning hearing, the trial court entered an order on 15 June 2022 setting the children's primary permanent plan to

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<sup>1</sup> Pseudonyms are used for the minor children.

reunification, with a secondary plan of adoption. In its 26 September 2022 order entered after the 12 August 2022 permanency planning hearing, the court changed the primary plan to adoption because of Mother's insufficient progress towards reunification.

On 2 November 2022, DHHS filed a petition alleging grounds existed to terminate Mother's parental rights to Mary Jane and Edmond under North Carolina General Statute Sections 7B-1111(a)(1), (2), and (6). After several continuances, the petition came on for hearing on 21 March 2023. Mother was not present, and before DHHS began presenting evidence, Branscomb made a motion to withdraw:

Your Honor, I had a text from . . . [M]other when I woke up this morning, and we traded texts and I indicated she had the option to come to court in person, she had the option to be on WebEx, and she had the option not to come to court if she's -- want -- didn't want to come. I never got a real response to those options.

I called after about an hour into the court day -- I called and the call went to voicemail. I left a voicemail, and I texted her at 11:11 today asking, "If you're not coming, do I have your okay to withdraw," and she said, "Yes, you do." So, I'm making a motion to withdraw on that basis.

There were no objections, and the court granted the motion based on Branscomb's "lack of contact or personal contact with . . . [M]other, and him notifying her via and through phone communications of his intent to withdraw, and her consenting to the withdrawal[.]"

DHHS presented testimony from the children's social worker. The court

concluded that all grounds alleged in the petition existed and determined that it was in the children's best interests that parental rights be terminated. On 2 May 2023, the court entered an order terminating Mother's parental rights.<sup>2</sup> Mother timely appealed.

## **II. Withdrawal of Counsel**

Mother's sole argument on appeal is that the trial court reversibly erred by allowing her trial counsel to withdraw, "forcing her to represent herself at the termination of parental rights hearing without ensuring she had knowingly and voluntarily waived her right to the assistance of counsel."

In termination of parental rights actions, "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C. Gen. Stat. § 7B-1101.1(a) (2023). A parent can waive appointed 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(a1). However, this examination is not required "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." *In re K.M.W.*, 376 N.C. 195, 209, 851 S.E.2d 849, 860 (2020) (citation, quotation marks, and brackets omitted).

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<sup>2</sup> The order also terminated the parental rights of Mary Jane and Edmond's father, but he is not a party to this appeal.

Our appellate courts have repeatedly recognized that, “[c]onsistently 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.* at 209, 851 S.E.2d at 859 (citation and quotation marks omitted). “[B]efore allowing an attorney to withdraw . . . 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.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013).

The trial court’s decision to allow a parent’s attorney to withdraw is discretionary; thus, any such determination generally cannot be overturned on appeal unless the trial court’s decision was an abuse of discretion. *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 859. “However, this general rule presupposes that an attorney’s withdrawal has been properly investigated and authorized by the court, so that, where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion.” *Id.* at 209, 851 S.E.2d at 860 (citation, quotation marks, and brackets omitted).

First, it appears that the trial court may have erroneously believed Branscomb was merely acting as provisional counsel before his motion to withdraw. During the pretrial hearing, the DHHS attorney stated Branscomb had “been appointed provisionally” in the termination action. Where an attorney is provisionally

appointed, the trial court “shall dismiss the provisional counsel” if, *inter alia*, the parent does not appear at the hearing or waives his or her right to counsel. N.C. Gen. Stat. § 7B-1101.1(a). However, the parent will only be appointed provisional counsel if he or she is not already represented. *Id.* In this case, Branscomb was appointed on 6 October 2021, four days after the initial juvenile petition was filed, and he continued to represent Mother throughout the underlying neglect and dependency action. The termination summons indicates that if Mother had been appointed an attorney in an underlying abuse, neglect, or dependency action, then that attorney would continue to represent that parent “unless the Court orders otherwise[.]” and Branscomb was listed on the summons as Mother’s attorney. Thus, Branscomb was not provisional counsel, and the trial court was not, as the guardian ad litem argues, “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 N.C. Gen. Stat. § 7B-1101.1(a).” *In re D.E.G.*, 228 N.C. App. at 388, 747 S.E.2d at 285.

Mother argues that Branscomb failed to give her “reasonable and prior notice of his intent to withdraw[.]” as he did not file a written motion to withdraw and only told her about his intent to withdraw on the morning of the termination hearing. She contends that Branscomb’s actions “fail to comport with the concepts of ‘reasonable’ and ‘prior’ notice.” Mother also argues that the trial court did not conduct the necessary inquiry to determine whether her rights were adequately protected. She

contends the court: failed to inquire into whether Branscomb had informed her the termination hearing would proceed in her absence, without her being represented; failed to determine whether she wished to proceed without counsel or intended to waive all representation; failed to inquire into Mother's history of communication with Branscomb; and failed to inquire into her prior involvement in the juvenile action. Mother asserts that the lack of evidence regarding waiver or forfeiture of counsel requires reversal, based on our Supreme Court's holding in *In re K.M.W.*, 376 N.C. 195, 851 S.E.2d 849.

DHHS argues that Branscomb's same-day motion to withdraw and text message exchange with Mother was "reasonable" and "prior" notice, based on *In re T.A.M.*, 378 N.C. 64, 859 S.E.2d 163 (2021). DHHS also contends that under *T.A.M.*, the trial court's inquiry was sufficient to support its decision to allow Branscomb to withdraw. Both DHHS and the GAL contend that the facts of this case differ from those in *K.M.W.*, and instead align more closely with the facts of *T.A.M.* Thus, they argue *T.A.M.* is controlling, and we should affirm the termination order. After careful review of our Supreme Court's decisions, we conclude that *K.M.W.* is most applicable here and requires reversal of the termination order.

In *K.M.W.*, the mother's counsel filed a motion to withdraw, but there was no record of the mother being served with the motion. *In re K.M.W.*, 376 N.C. at 201, 851 S.E.2d at 854. The mother was not present at the hearing on the withdrawal motion, but counsel informed the court that his motion was based on the mother's

request. *Id.* He also asserted that he had attempted to secure her presence at the hearing but had been unsuccessful. *Id.* The trial court granted counsel's motion. *Id.*

Despite having notice of the termination hearing, the mother was not present at the time the matter was called, though she arrived about sixteen minutes later. *Id.* at 201, 851 S.E.2d at 855. The mother proceeded to make objections, present testimony, and make closing arguments during the adjudication portion of the hearing. *Id.* at 201-02, 851 S.E.2d at 855. She then abruptly left at the beginning of the dispositional portion of the hearing, only returning after evidence had concluded. *Id.* at 202, 851 S.E.2d at 855.

On appeal, the mother argued that she received no notice of her counsel's intention to withdraw and that the trial court failed to make proper inquiry about whether she wished to waive counsel entirely. *Id.* "After examining the unique circumstances" of the case, our Supreme Court concluded that the trial court erred by allowing counsel's motion to withdraw and permitting the mother "to represent herself at the termination hearing without ensuring that she had knowingly and voluntarily waived her right to the assistance of counsel." *Id.* at 210, 851 S.E.2d at 860. While acknowledging that waiver is not required in cases where a parent has forfeited his or her right to counsel, the Court reaffirmed that the trial court was still required to "inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *Id.* Our Supreme Court determined the trial court's inquiry was insufficient, as it failed to inquire as to



whether the mother had notice of her retained counsel's intent to withdraw, whether her request for him to withdraw was based on her "inability to pay for his services[.]" and "what efforts [counsel] had made to ensure that [the mother] understood the implications of the action that he proposed to take or to protect her statutory right to the assistance of counsel." *Id.* at 211, 851 S.E.2d at 861. Because of this "very limited inquiry[.]" the Court concluded the trial court erred in allowing the motion to withdraw. *Id.* The Court further determined that, although the mother's "level of engagement with the proceedings . . . was certainly less than exemplary, nothing in [the mother's] conduct had the repeatedly disruptive effect necessary to constitute the 'egregious' conduct that is required to support a determination that [the mother] had forfeited her statutory right to counsel." *Id.* at 212-13, 851 S.E.2d at 862. Accordingly, our Supreme Court reversed and remanded the matter for a new termination hearing. *Id.* at 215, 851 S.E.2d at 863.

Six months later, our Supreme Court affirmed the termination orders in *In re T.A.M.*, 378 N.C. at 81, 859 S.E.2d at 174. There, the father's whereabouts were unknown when the petitions to terminate parental rights were filed, so he was served by publication. *Id.* at 70, 859 S.E.2d at 167. The father's counsel filed a motion to withdraw since the father had failed to maintain contact with her. *Id.* at 72, 859 S.E.2d at 169. The trial court allowed the motion at a continuance hearing at which the father was not present. *Id.* The father failed to appear at the next continuance hearing, but when he appeared at the subsequent one, the trial court re-appointed

the same attorney to represent him. *Id.* At that time, the court advised the father of his responsibility to maintain contact with his attorney and attend all hearings. *Id.* The court cautioned the father that if he failed to do so, his counsel “may ask and be permitted to withdraw as his attorney of record, and the case may proceed without him being represented by an attorney.” *Id.* at 73, 859 S.E.2d at 169.

A few months later, the father’s counsel filed another motion to withdraw based on the father’s continued failure to communicate, which left his counsel unable to know his wishes and represent him. *Id.* The father failed to appear at the termination hearing, where his counsel’s motion was addressed during pre-hearing matters. *Id.* The father’s counsel told the court she had spoken with the father earlier that day and informed him that if he did not appear at the hearing she would withdraw, and the case would proceed in his absence. *Id.* She also stated that the father did not object to her motion to withdraw. *Id.* The trial court granted her motion, and the termination hearing proceeded without the father present or represented. *Id.*

Our Supreme Court determined that the father’s conduct was “distinguishable” from the mother’s conduct in *K.M.W.*, “and, when coupled with the respective counsel’s execution of their responsibilities and the respective trial courts’ responses to the unique circumstances, the two cases and their respective outcomes are appropriately distinguishable as well.” *Id.* at 74, 859 S.E.2d at 170. The Court noted the father failed to appear at the termination hearing and “made no apparent

effort to observe the trial court's advisements to attend hearings, admitted he did not want to receive mail from DSS or other interested parties, and verbally consented to his attorney's withdrawal as counsel." *Id.* (emphasis omitted). Thus, the Court declined to apply the holding in *K.W.M.* and overruled the father's argument. *Id.*

Unlike in *T.A.M.*, the record here contains no evidence that Branscomb gave Mother prior notice of his intent to withdraw. *See id.* at 73, 859 S.E.2d at 169. There is no evidence that the trial court had previously advised Mother of the potential consequences for failing to remain in contact with her counsel or attend all the hearings. The only potential notice in the record is on the petition to terminate parental rights, which states that if the parents failed to attend any hearings, the trial court "may" release their appointed counsel "without further notice[.]" Even if we were to accept that as prior notice, we cannot conclude that it was reasonable notice. Unlike the father in *T.A.M.*, there is no indication Mother was informed that if her counsel withdrew, the termination hearing would proceed without her present or represented. *See id.* at 73, 859 S.E.2d at 169.

As in *K.M.W.*, the trial court here failed to conduct a sufficient inquiry to ascertain whether Mother's rights were being adequately protected.<sup>3</sup> Mother's text

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<sup>3</sup> In contrast with Mother's counsel's motion to withdraw, we note that Father's counsel made a motion to withdraw first. Father's counsel advised the trial court that Father had had "very sporadic limited" contact with her and did not show up for prior hearings. She advised him in a letter a month prior to the termination hearing she would move to withdraw if he was not present at the hearing, and he did not contact her after this letter.

message assenting to Branscomb's withdrawal is not sufficient waiver of counsel when the record does not show she was aware of the consequences of withdrawal. *See In re K.M.W.*, 376 N.C. at 211, 851 S.E.2d at 861. Similarly, Mother's behavior throughout the proceedings does not support a determination that she forfeited her right to counsel. *See id.* at 212-13, 851 S.E.2d at 862. There is no indication that Mother failed to maintain sufficient contact with Branscomb. Though her level of engagement with the proceedings was "less than exemplary," there is no indication she was purposefully avoiding participation like the father in *T.A.M.*

Mother was present at all the hearings in the underlying juvenile action and at the first calendar setting for hearing of the termination petition in November 2022, which resulted in a continuance because the Parents' "time to answer the pleadings has not yet expired." The hearing on the termination petition was continued two more times. On 10 January 2023, the trial court allowed Father's counsel's request for continuance due to her illness and resulting inability to meet with Father to prepare for the hearing. On 21 February 2023, DHHS asked for continuance of the termination hearing based on the unexpected unavailability of the social worker. The hearing was held at the next setting on 21 March 2023. There is no indication in the record that Mother engaged in any dilatory action or that she had failed to cooperate with her counsel in any manner prior to appearing on 21 March 2023. We also note that according to the trial court's finding of fact, Mother's counsel informed Mother she had "an *option* to appear via open court, WebEx, or she could not show up at all."

(Emphasis added.) There is no indication Mother was advised that these are not equivalent “options;” appearing in person or by WebEx would allow Mother to be present for the hearing and to testify if she chose to do so, while not showing up at all would be a waiver of her own right to participate in the hearing and actually resulted in her counsel’s withdrawal as well.

In *In re L.Z.S.*, our Supreme Court determined a more serious lack of engagement, including the father’s failure to maintain contact with counsel or attend any hearings following his release from prison, could not “be deemed to be so egregious, dilatory, or abusive . . . so as to constitute a waiver or forfeiture of counsel[.]” 383 N.C. 309, 317, 881 S.E.2d 82, 88 (2022). In *L.Z.S.*, the father’s counsel filed a motion to withdraw on the same day of a permanency planning hearing. *Id.* at 313, 881 S.E.2d at 85. The motion detailed the father’s failure to appear at multiple hearings and to maintain contact, despite counsel’s requests. *Id.* The record did not indicate that the father was served with notice of his counsel’s intent to withdraw. *Id.* The trial court allowed the motion, and the permanency planning hearing continued without the father present or represented. *Id.* at 313, 881 S.E.2d at 85.

Our Supreme Court concluded the father’s failure to attend hearings and communicate with counsel was not “so egregious, dilatory, or abusive here so as to constitute a waiver or forfeiture of counsel[.]” *Id.* at 317, 881 S.E.2d at 88. The Court also determined the father did not receive adequate notice, as the motion was made the same day. *Id.* at 317-18, 881 S.E.2d at 88. Accordingly, the Court concluded that

the trial court erred by allowing counsel to withdraw. *Id.* at 322, 881 S.E.2d at 90-91.

As our Supreme Court recognized, cases involving waiver of counsel are incredibly fact-specific, and slight variations may result in differing outcomes. However,

the principle which is consistently implemented in, and commonly shown by, all of them is that the trial court's discretion to allow a respondent-parent's counsel to withdraw from representation only comes into play when the parent has been provided adequate notice of counsel's intent to seek leave of court to withdraw and the trial court has adequately inquired into the basis for counsel's withdrawal motion.

*Id.* at 321, 881 S.E.2d at 90 (citation, quotation marks, and brackets omitted). Based on our Supreme Court's holdings in *K.M.W.* and *L.Z.S.*, we conclude that the trial court erred in allowing Branscomb to withdraw

without proper notice evident in the record of the attorney's intent to withdraw as counsel and without making further inquiry about the circumstances regarding the motion, in the absence of [Mother] at a hearing at which [s]he had a statutory right to counsel, had not waived or forfeited counsel, and consequently did not have counsel to represent h[er] parental interests.

*Id.* at 322, 881 S.E.2d at 91. This error requires reversing the termination order and remanding for a new termination hearing. *See in re K.M.W.*, 376 N.C. at 215, 851 S.E.2d at 863.

### **III. Conclusion**

IN RE: M.J.M., E.K.M.

*Opinion of the Court*

As the trial court erred in allowing Branscomb's motion to withdraw, we reverse the trial court's termination order and remand the case for further proceedings not inconsistent with this opinion, including a new termination hearing.

REVERSED AND REMANDED.

Judges FLOOD and STADING concur.

Report per Rule 30(e).