A Respondent Parent's Right to Retain Counsel: Lessons from a New Court of Appeals Decision, In re A.K.

A recent decision by the North Carolina Court of Appeals considers the right of a respondent parent in a juvenile abuse, neglect, or dependency (AND) proceeding to hire counsel of their own choosing and what standards, if any, a retained attorney must meet to be allowed to represent a parent. *In re A.K.*, __ N.C. App. __ (August 6, 2024). The case also includes discussion of the procedures for appointing a Rule 17 guardian ad litem to a respondent parent – an issue I will explore in a later post. This post focuses on what the opinion in *A.K.* does – and does not – tell us about a parent's right to hire counsel.

A Parent's Right to Counsel, Generally

When an AND petition or a petition to terminate parental rights (TPR) is filed, the juvenile's parent has a statutory right to counsel, absent certain exceptions. *See* G.S. 7B-602(a); 7B-1101.1(a). Provisional counsel must be appointed for each parent named in the petition but must be dismissed at the first hearing if one of these statutory factors applies: the parent fails to appear at the hearing, the parent has retained private counsel, the parent is not indigent, or the parent knowingly and voluntarily waives their right to counsel. G.S. 7B-602(a)(a1); 7B-1101.1(a)(a1). If none of the statutory factors are satisfied, the court must confirm the appointed counsel. G.S. 7B-602(a); 7B-1101.1(a).

The remainder of this post will consider the right to retained counsel in the AND context. My colleague, Sara DePasquale, and I have each previously published posts related to provisional counsel at a TPR proceeding. One post, which can be found here, considered how to determine whether a parent attorney was provisional or confirmed, and what it means for withdrawal by the attorney. The other post explored issues related to waiver and forfeiture of counsel by parents at TPR, and can be found here.

A New Court of Appeals Decision: *In re A.K.*

Background. Recently, the Court of Appeals published its decision in *In re A.K.*, __ N.C. App__ (August 6, 2024). The case involves a neglect petition that was filed by Guilford County DSS and alleged domestic discord, mental health issues, and concerns over the children's welfare and lack of access to education and medical services. When the petition was filed, the court appointed provisional counsel to the respondent mother pursuant to G.S. 7B-602(a). While initially represented by provisionally appointed counsel at the continued nonsecure custody hearing, two days prior to the first setting for pre-adjudication, adjudication, and disposition, a private attorney retained by the respondent mother filed a notice of appearance and served the notice on opposing counsel and the child's GAL.

After discussing mother's representation, the court continued the hearing and sua sponte appointed a Rule 17 GAL for mother. No decision on mother's counsel was made. At the next scheduled hearing, the trial court addressed the mother's request to be represented by her retained attorney. The trial court noted that not everyone is qualified to work in an AND proceeding "because of its specialized nature," making it "extremely different" from other courts. Sl. Op. at 17. After conducting an inquiry, the court determined that the attorney did not meet the requirements set forth by the judicial district's local rules for court-appointed attorneys and was unqualified to appear in AND court. The trial court stated that the retained counsel's lack of qualifications was severe enough that the court was concerned it "most likely would end up terminating [mother's] parental rights," despite DSS having expressed that reunification was the goal. Sl. Op. at 18.

In its adjudication order, the court found that (1) mother's retained attorney lacked sufficient knowledge of the juvenile laws and lacked the experience and competence necessary to represent parents in AND matters, and (2) representation by her retained counsel was not in the mother's best interests. The order explained the court's concerns that the mother would "suffer irreparable harm to her parental rights," and thus found that "despite the fact that [this attorney] is retained…his representation would be detrimental." Sl. Op. at 16. The court released the retained attorney and ordered that appointed counsel remain in the case.

The juveniles were adjudicated neglected, and a disposition order was later entered. The respondent mother timely appealed both orders.

The appeal. Among other issues raised on appeal, the mother argued that parents have a right to hire an attorney of their choosing, and that by denying her that right, the court failed to comply with G.S. 7B-602(a) and violated her due process and constitutional rights.

Standard of review. Addressing the applicable standard of review, the Court of Appeals noted that it was unable to find prior cases dealing with a trial court's refusal to allow a respondent parent to be represented by a retained attorney who had filed notice of his appearance and attended the hearing. Looking to *In re K.M.W*., 376 N.C. 195 (2020), the Court applied a *de novo* standard of review since the issue involved a conclusion of law addressing the parent's right to counsel based on statutory criteria. A de novo standard of review is also applied "where constitutional rights are implicated." Sl. Op. at 12. The Court distinguished the present case from cases that applied an abuse of discretion standard when a parent sought a continuance to allow time to hire private counsel, or where a respondent seeks to replace a court-appointed attorney with another appointed counsel. *Id*.

Qualifications of retained counsel. In response to concerns raised about his qualifications to represent the mother in an AND matter, mother's retained counsel argued that there were no special standards he needed to meet because he was retained and not court appointed. The Court of Appeals agreed. The Court pointed to the local rules of the judicial district which set the requirements, experience, and training necessary for an attorney to be considered for appointment

to a parent in an AND matter. Those rules do not apply to privately retained counsel, however. Addressing the required qualifications for a privately retained attorney, the Court stated, "[t]he only required credential or qualification for an attorney to represent a respondent-parent is a valid license to practice law in North Carolina." Sl. Op. At 19. DSS argued that trial courts have inherent authority over the attorneys appearing before, but the Court explained that inherent authority applies to unethical or potentially unethical behavior by an attorney. In this case, the mother's retained counsel had acted appropriately and there were no concerns about unethical behavior.

Similarly, the Court rejected an argument by DSS that allowing an inexperienced attorney to represent a parent may violate the Rules of Professional Conduct, specifically Rule 1.1, Competence. The Court reasoned that a lack of experience by an attorney who is otherwise licensed to practice law in North Carolina is not a sufficient basis to deny a motion to substitute counsel. Every attorney is new to a specific area of law at first, the Court said. While agreeing that AND proceedings are specialized in nature, the Court held that a trial court's inherent authority over the attorneys who appear before it does not go so far as to give courts the unrestrained authority to deny retained counsel based only on that attorney's lack of particular experience.

Holding. Whether the trial court "simply failed to comply" with the statutory requirement that trial courts "shall dismiss" provisional counsel under certain conditions, or whether the court misapprehended the law as it relates to qualifications necessary to serve as a parent attorney, the Court of Appeals held that the trial court erred in denying the respondent mother representation by retained counsel. Sl. Op. at 22.

Takeaways, limits, and open questions

Through *In re A.K.*, the Court of Appeals has reaffirmed the right of parents in AND proceedings to retain an attorney of their choosing. When a parent exercises that right, trial courts must dismiss provisionally appointed counsel for the parent, without considering the possible lack of AND experience on the part of the privately retained counsel. Local rules that govern court appointed counsel in AND proceedings do not apply to privately retained counsel and do not limit a parent's right to hire counsel.

Note that the Court of Appeals' ruling in *In re A.K.* does not change the Rules of Professional Conduct, including Rule 1.1 on competence. Attorneys must be competent, meaning they must have "the legal knowledge, skill, thoroughness, and preparation reasonably necessary" to represent a client. N.C. R. of Prof'l Cond., R. 1.1. But there is no requirement that a lawyer have "special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar," and in fact a new lawyer may be as competent as a seasoned one. *Id*. at Cmt. [2]. Additionally, a lawyer may act to represent a client where competence is achievable through preparation. *Id*. at Cmt. [4]. If the lawyer is not competent, they may associate with a lawyer who is. *Id*.

Remember too, the holding in *In re A.K.* does not necessarily apply to situations where a parent is requesting additional time to hire an attorney, or to a parent who wants the court to substitute one appointed attorney with a different appointed attorney. Other situations or questions that were not necessarily addressed by *In re A.K.* include:

- If a judicial district has local rules that establish minimum qualifications for *retained* attorneys to represent clients in AND proceedings, what effect would those rules have, if any, on a parent's right to retain counsel? Could a court prevent a licensed attorney who is retained but is otherwise "unqualified" under the local rules to appear on behalf of a parent?
- *In re A.K.* dealt with the appointment of provisional counsel under G.S. 7B-602(a) and the release of said counsel if a parent hires an attorney prior to the first hearing. What if a parent hires private counsel later in the proceeding, after provisional counsel had been confirmed? Or what if the parent has been determined to have forfeited counsel and later tries to hire their own attorney? Does the timing relative to the proceeding affect the parent's right to be represented by privately retained counsel of the parent's choosing?
- The question of a party's mental capacity to hire counsel is a significant one, and is an issue faced by all courts and not just in AND proceedings. For reasons that are beyond the scope of this post, a Rule 17 GAL was appointed to the respondent mother in *In re A.K.*, and in a way that concerned the Court of Appeals but was not ultimately an issue ruled on by the Court. In a future post, I will address the Rule 17 GAL lessons to be found in *K.*, but questions remain as to whether a parent who has been appointed a Rule 17 GAL has the capacity and right to hire their own counsel (and whether the court must accept that counsel)?

Reach out to me anytime at Heinle@sog.unc.edu if you have questions or want to discuss issues related to this post or your own cases.