Parents Forfeited Their Right to Court-Appointed Counsel in TPR: What Is the Law for Attorney Representation of Parents in A/N/D and TPR Actions?

North Carolina law requires that parents in abuse, neglect, dependency (A/N/D) and termination of parental rights (TPR) cases receive court-appointed counsel if they are indigent. G.S. 7B-602; 7B-1101.1. Parents also have a right to knowingly and voluntarily waive their statutory right to counsel. *Id*. The question of whether a parent may forfeit their right to counsel in a juvenile proceeding based on their behaviors had not been answered until recently. Three appellate opinions address the issue and answer that question. Parents can and have forfeited their statutory right to court-appointed counsel. To get to forfeiture, you first need to understand the rules related to a parent's statutory right to court-appointed counsel.

The Statutory Right to Counsel

Provisional to Confirmed Counsel

When a petition alleging a juvenile is abused, neglected, and/or dependent is filed in district court, the clerk must appoint provisional counsel for each parent named as a respondent in the petition. G.S. 7B-602(a). The court reviews the appointment of provisional counsel at the first hearing in the action. If the parent (1) does not appear, (2) does not qualify due to indigency, (3) retains their own attorney, or (4) waives their right to counsel, provisional counsel is released. *Id.* If none of the four factors apply, the court confirms the attorney's appointment, meaning the attorney is now the attorney of record representing the parent in the case. *Id.* A confirmed attorney may seek to terminate their representation but may only do so by filing a motion to withdraw. The motion must be based on justifiable cause; the attorney must give (or attempt to give) prior notice to their client of their intent to withdraw, and the court determines whether to grant the motion. *See* In re D.E.G., 228 N.C. App. 381 (2013).

As with an A/N/D case, when a TPR petition is filed, the clerk must appoint provisional counsel to the respondent parent. G.S. 7B-1101.1(a). However, if there is an underlying A/N/D case, and a TPR motion (rather than a petition) is filed in the A/N/D action, provisional counsel is not automatically appointed. Instead, the respondent parent may contact the clerk to request provisional counsel or appear at court and request the appointment of counsel. G.S. 7B-1106.1(b)(4); *see* 7B-1101.1(a).

The court in a TPR action reviews the appointment of provisional counsel at the first hearing after the parent has been served. G.S. 7B-1101.1(a). The court applies the same four factors in an A/N/D case to determine whether to release provisional counsel: the parent (1) does not appear, (2) does not qualify due to indigency, (3) retains their own attorney, or (4) waives their right to counsel. *Id.* If one of the factors apply, the court releases provisional counsel, and if none of the

factors apply, the court confirms the attorney's appointment. *Id.*

There are two differences in the A/N/D and TPR statutes to be aware of. First, unlike the TPR statute, the A/N/D statute does not state at the first hearing *after a parent has been served* and does not appear, provisional counsel is released. *Compare* G.S. 7B-602(a) *to* 7B-1101.1(a). Despite the absence of the language – after a parent has been served – in the A/N/D statute courts should consider a parent's due process rights to notice when deciding whether to release provisional counsel at the first hearing where the parent has not been served and does not appear. Second, regardless of whether a TPR petition or motion is filed, when there is an underlying A/N/D action where the respondent parent is represented by an attorney, that attorney continues to represent the parent in the TPR action. *See* G.S. 7B-1106.1(b)(3). The attorney is not provisional counsel. *See In re D.E.G.*, 228 N.C. App. 381. For more information on continued attorney representation in a TPR action and the need for a motion to withdraw, see my colleague's, Timothy Heinle's, post here.

If provisional counsel is released, under both the A/N/D and TPR statute, "the court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding." G.S. 7B-602(a); 7B-1101.1(a). This means the court may reappoint counsel after provisional counsel has been released. One stage where reconsideration can occur is the preadjudication hearing in an A/N/D case and the pretrial hearing in a TPR case. G.S. 7B-800.1(a)(1) (A/N/D); 7B-1108.1(a)(1); *see* In re R.A.F., 384 N.C. 505 (2023) and In re C.T.T., 288 N.C. App. 136 (2023) (both affirming release of provisional counsel in a TPR and looking to G.S. 7B-1108.1). Additionally, at the TPR adjudication hearing, G.S. 7B-1109(b) requires the court to ask if the parents are present and if so whether they are represented by an attorney. If they do not have an attorney and are indigent, the court must ask if they want to be represented and if so, appoint an attorney and continue the hearing so that the attorney can prepare a defense. *Id.; see* In re K.W.M., 376 N.C. 195 (2020).

For both A/N/D and TPR actions, appointments of counsel are made in accordance with the rules adopted by the North Carolina Office of Indigent Defense Services. G.S. 7B-602(a); 7B-1101.1(a).

Knowing and Voluntary Waiver

Both G.S. 7B-602 (A/N/D) and 7B-1101.1 (TPR) provide that when a parent qualifies for appointed counsel, the court may allow the parent to proceed without counsel. The court must first examine the parent on the record and make findings of fact sufficient to show that the parent's waiver of counsel is knowing and voluntary. G.S. 7B-602(a1); 7B-1101.1(a1); *see In re K.M.W.*, 376 N.C. 195 (TPR); In re J.M., 273 N.C. App. 280 (2020) (remanding for entry of written findings of fact about whether mother's waiver of counsel was knowing and voluntary). The court of appeals has determined that the required court inquiry regarding a parent's knowing and voluntary waiver is

sufficient when the trial court engages in "a fairly lengthy dialogue with [a respondent parent] to determine her awareness of her right to counsel and the consequences of waiving that right." *In re J.M.*, 273 N.C. App. at 289 (quoting *In re A.Y.*, 225, N.C. App. 29, 39 (2013); determining mother's waiver was knowing and voluntary). Whether a parent has waived their right to counsel is a conclusion of law. *In re K.M.W.*, 376 N.C. 195.

The AOC has a form for a "Waiver of Parent's Right to Counsel" that applies to A/N/D and TPR proceedings. AOC-J-143.

The court should clarify with the parent whether their waiver is for all counsel such that the parent intends to represent themselves or whether the waiver is for court-appointed counsel because the parent is privately retaining counsel. *See In re K.M.W.*, 376 N.C. 195 (reversing TPR; mother's waiver was only for court-appointed counsel not all counsel; when retained counsel was permitted to withdraw, waiver was not to represent herself).

Although a parent may represent themselves, the court of appeals has held that a parent does not have a statutory or constitutional right to self-representation in an A/N/D proceeding. The court exercises discretion in deciding whether to allow a parent to waive counsel and represent themselves. *See* In re J.R., 250 N.C. App. 195 (2016) (holding no abuse of discretion when the court denied mother's request to proceed pro se given possibility of criminal charges arising from the same incident and finding that her waiver was not knowing and voluntary because she was influenced and possibly coerced by her abusive boyfriend to waive counsel). Presumably, this holding applies to TPR actions as well.

Forfeiture of Counsel

Although parents have a statutory right to counsel, that right is not absolute when there is a forfeiture. See In re D.T.P., ___ N.C. App. ___ (2023). A forfeiture of counsel is based upon the respondent parent's behavior. The parent's actions must be "egregious dilatory or abusive conduct" that "totally undermine[s] the purposes of the right itself by making representation impossible and seeking to prevent the trial from happening at all." *In re K.M.W.*, 376 N.C. at 209 (quoting *State v. Simpkins*, 373 N.C. 530, 541 (2020) and *quoted in In re D.T.P.*, Sl. Op. at 8)). Whether a respondent has forfeited their right to counsel is a conclusion of law and is reviewed do novo. *In re K.M.W.*, 376 N.C. 195.

A forfeiture of counsel differs from a waiver of counsel. Unlike a waiver, which involves an intentional and knowing relinquishment of the right to counsel, a forfeiture of counsel is based on the respondent's actions. A forfeiture of counsel does not require that the trial court make an inquiry about a respondent's knowing and voluntary waiver. Instead, the court concludes there is a forfeiture based on findings, supported by evidence, about the parent's conduct. Presumably, because the parent forfeited their right to counsel, the court would not have to make the inquiry under G.S. 7B-1109 at a TPR hearing as to whether the parent desires court appointed counsel

resulting in an appointment of counsel and continuance of the case.

Three recent appellate opinions address forfeiture of a parent's right to court-appointed counsel in a juvenile proceeding. The first two opinions were published by the North Carolina Supreme Court and briefly discussed forfeiture while focusing more on the attorneys' motions to withdraw without prior notice to their clients. In looking at the facts in each case, the supreme court determined the parents' conduct was not a forfeiture because their conduct was not egregious, dilatory, or abusive. *See* In re L.Z.S., 383 N.C. 309 (2022) (reversing order allowing attorney to withdraw; reversing permanency planning order eliminating reunification; father not maintaining consistent communication with his attorney and DSS is not conduct rising to forfeiture); *In re K.M.W*., 376 N.C. 195 (reversing trial court's order allowing attorney to withdraw; reversing TPR; mother's late arrival at the hearing, briefly leaving hearing, and not maintaining consistent contact with her attorney is not a forfeiture). But in the most recent opinion, the issue was forfeiture of counsel. In *In re D.T.P*., ___ N.C. App. ___, the court of appeals affirmed the district court's conclusion that both parents' separately and together forfeited their right to court-appointed counsel in a TPR.

In re D.T.P. started in 2017, when a juvenile neglect petition was filed in district court. During that neglect action, each parent had multiple attorney appointments and attorney motions to withdraw that were granted. A TPR was filed in 2021, and mother and father had court-appointed counsel. Ultimately, both attorneys filed a motion to withdraw that was granted because mother and father, acting pro se, filed a civil action against their attorneys (and others). The court held a hearing to address the status of parent's representation, where the parents represented themselves and testified. At the conclusion of that hearing, the court issued a memo that determined "the [Parents], by their intentional acts, have forfeited the right to Court appointed counsel." Sl. Op. at 4. Later, the TPR hearing was held, and the parents represented themselves. After hearing, the court entered TPR orders for each parent and a "Forfeiture Order." Sl. Op. at 5. The parents appealed.

The court of appeals examined the trial court's findings in the Forfeiture Order, which included (1) the father had five different attorneys and the mother six; (2) the parents had a calculated plan to delay the court proceedings consisting of several invalid appeals to the court of appeals and the U.S. Supreme Court, all of which were dismissed; (3) the parents used the practice of having their attorneys file motions to withdraw at or near the time of the TPR hearing so that new attorneys would be appointed to delay the TPR hearing; and (4) the parents filed a lawsuit against their attorneys to cause the attorneys to file a motion to withdraw; the lawsuit was dismissed. The court of appeals determined the findings were supported by evidence including the parents' notices of appeal, several motions for and orders of withdrawal, several appointment of counsel orders, the lawsuit the parents filed against their attorneys, and the parents' testimony acknowledging they knew attorney withdrawal resulted in a delay of the hearing.

Based on its findings, the trial court concluded, and the court of appeals affirmed, that the parents forfeited their right to counsel. The order determined that the parent's conduct was egregious, dilatory, and abusive; undermined the purpose of the right to counsel by making representation

impossible; and sought to prevent the TPR from occurring in a timely manner. The order further decreed “respondent parents shall not have new court appointed attorneys appointed in the matters pending before this Court.” Sl. Op. at 6.

Reading these cases together, the parent’s actions are crucial. Just as important is the process for determining whether a parent has forfeited their right to counsel. The process in *In re D.T.P*. involved (1) holding a separate hearing that was held before the TPR adjudicatory hearing to address the status of parent representation, which allowed the parents time to prepare a defense on their own, (2) specific and detailed findings about the parent’s conduct, which were all supported by evidence, (3) ultimate findings about the type of conduct (egregious, dilatory, abusive), and the impact on the hearing (delay) and attorney representation (impossible), and (4) the conclusion of forfeiture.

We now know a parent can forfeit their statutory right to court-appointed counsel in an A/N/D and TPR proceeding. Most cases involving forfeiture are in the criminal arena and may provide guidance on a party’s conduct and whether it rises to the level for forfeiture. For more information about forfeiture of counsel, see my colleague’s, Brittany Bromell’s post: N.C. Supreme Court Weighs in Again, on Forfeiture of Counsel.