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To Be or Not to Be: How to Know When a Parent Attorney in a TPR Is Provisional Counsel and What That Means for Withdrawing



This entry was contributed by Timothy Heinle on April 9, 2021 at 3:15 pm and is filed under Child Welfare Law.

Consider the common scenario in which a proceeding under Article 11 of G.S. Chapter 7B is filed to terminate a parent's rights to their child. How and when an attorney is appointed for the respondent parent in a termination of parental rights proceeding (TPR), whether the attorney is provisional or confirmed, and how the attorney may withdraw, depends on a few factors. Ongoing confusion on these points has led to several appeals in recent years, including a new ruling by our Supreme Court. *See In re K.M.W.*, 376 N.C. 195 (2020). This post reviews the governing principles under North Carolina case law and statutes.

Appointment of Counsel

Underlying Matter. Often, if a Department of Social Services (DSS) believes that a child is abused, neglected, or dependent, the agency will file a petition in district court. G.S. 7B-402. In some instances, this proceeding leads to the later filing of a TPR petition by DSS to aid in achieving a permanent plan for the child. When a TPR petition is filed, the original juvenile abuse, neglect, or dependency action is casually referred to as the "underlying matter." It is not necessary that there be an underlying matter for a TPR to be filed; however, the existence (or nonexistence) of an underlying matter, and whether a parent has an attorney in that underlying matter, are important factors in the questions this post explores.

The statutory right to counsel. To ensure that a parent's due process rights in a TPR are protected, a parent has a statutory right to counsel. G.S. 7B-1101.1(a); *In re K.M.W.*, 376 N.C. 195 (2020). "When a petition [for a TPR] is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent named in the petition." G.S. 7B-1101.1(a). At the first hearing held after a parent is served, the court decides to dismiss or confirm the attorney's appointment depending on several considerations, including whether the parent appears at the hearing, is indigent, has retained counsel, or makes a knowing and voluntary waiver of the right to counsel. *Id.*

TPRs initiated by motion. If there is an underlying matter, a TPR may be commenced by the filing of a motion in that proceeding rather than by a separate petition. G.S. 7B-1102. The procedure for appointing counsel to a respondent parent in a TPR differs when the proceeding is brought by motion in the underlying matter. There, notice to the parent of the TPR motion must indicate “that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.” G.S. 7B-1106.1(b)(4). This means that if the parent has an attorney in the underlying proceeding, the same attorney represents the respondent parent in the TPR. If the parent does not have an attorney in the underlying proceeding, the parent must request an attorney, who is considered provisional until confirmed by the court. This request requirement differs from TPR cases initiated by petition, in which an attorney is automatically appointed for the parent. (Whether it is reasonable to require that a parent request an attorney when a TPR begins by motion rather than by petition is a question worth considering but is beyond the scope of this post.)

The attorney in the underlying matter is not provisional counsel in the TPR. Unless a court orders otherwise, the statutes indicate that an attorney for a parent in an underlying proceeding continues representation as the non-provisional attorney for the respondent parent in the TPR. In other words, the same attorney is confirmed counsel in both the underlying and TPR proceedings, whether the TPR is initiated by petition or motion. *See, e.g.,* G.S. 7B-1101.1(a) (requiring a clerk to appoint provisional counsel “unless the parent is already represented by counsel”); G.S. 7B-1106(a2) (requiring service of a TPR on an attorney if the “attorney has been appointed for a respondent pursuant to G.S. 7B-602 and has not been relieved of responsibility”); G.S. 7B-1106(b)(4) (requiring notice to a parent that “is not already represented by appointed counsel” of how to request counsel); G.S. 7B-1106.1(b)(3) (requiring whenever a motion for a TPR is filed, notice “that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court”).

Our appellate courts have recognized that a parent’s attorney in an underlying proceeding ordinarily continues as non-provisional counsel in a subsequent TPR. In *In re D.E.G.*, 228 N.C. App. 381, 388 (2013), the Court of Appeals held that in a TPR “the appointment of provisional counsel is unnecessary in the event that ‘the parent is already represented by counsel’” in an underlying proceeding. Two years later, in *In re M.G.*, 239 N.C. App. 77, 86 (2015), the Court of Appeals held that a parent’s attorney in an underlying action does “not assume a provisional role in the TPR” and, thus, the court was not “excused from the necessity for compliance with the usual procedures required” before permitting withdrawal.

Withdrawal of Appointed Counsel

How does an attorney’s status as provisional or confirmed in a TPR affect an attorney who needs to withdraw? What must the attorney and court each do before the attorney may withdraw?

Notice to the client. “When the State moves to destroy weakened familial bonds”—that is, terminate parental rights—“it must provide the parents with fundamentally fair procedures.” *In re K.M.W.*, 376 N.C. 195, 208 (2020). For example, an attorney who has entered an appearance cannot withdraw without “(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court.” *Smith v. Bryant*, 264 N.C. 208, 211 (1965). “[W]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion and must grant the party affected a reasonable continuance or deny the attorney’s motion for withdrawal.” *In re D.E.G.*, 228 N.C. App. 381, 386 (2013) (citation and internal quotation marks omitted). This requirement is consistent with the obligations under the Rules of Professional Conduct for attorneys terminating representation of a client. *See* N.C. Rules of Professional Conduct r.1.16 (N.C. State Bar 2003).

At the new hearing date, if the parent is present, the court would decide whether (1) the attorney should be permitted to withdraw, (2) the parent is making a knowing and voluntary waiver of their right to counsel, (3) new counsel should be appointed, and (4) the TPR hearing should proceed or be continued to allow for time to prepare. If the parent is not present at the new hearing date, the court could decide whether to grant the motion to withdraw and whether to proceed with the TPR. The court must ask what efforts the attorney made to provide notice of the intent to withdraw “before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate” in a TPR.” *In re D.E.G.*, 228 N.C. App. at 386-87; *see also In re M.G.*, 239 N.C. App. at 84-5 (vacating a TPR order where the court improperly allowed counsel to withdraw “after conducting a superficial inquiry” and without receiving “any evidence whatsoever” that the client had prior notice); *In re K.M.W.*, 376 N.C. at 211 (holding that an attorney at a TPR was improperly permitted to withdraw, despite explaining that he was doing so at the client’s request, when the client was not present, the certificate of service on the withdrawal motion showed that only DSS had been served with a copy, and the court did not inquire further about whether the client was given notice).

What It All Means

If a parent has counsel in an underlying matter, and a TPR petition or motion is filed, the same attorney will represent the respondent parent in the TPR. The attorney is not provisional. If the attorney moves to withdraw, there must be justifiable cause, notice given—or sufficient efforts to give notice—to the client of the attorney’s intent, and court approval. The court does not have discretion to allow the withdrawal if the attorney has not provided the client notice.

If there is no underlying action, or there is one but for whatever reason the parent is unrepresented, an attorney appointed to the respondent parent in the TPR is provisional. The court would then confirm or release the provisional counsel. G.S. 7B-1101.1(a).

Below is a diagram illustrating these principles. Please reach out to me if you would like help figuring out the appropriate steps in your case.

This entry was tagged with the following terms: abuse, abuse neglect and dependency, court appointed counsel, neglect, provisional counsel, termination of parental rights.

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