RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0422-21

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

I.B.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF Z.A.I.B.B., and Z.P.L.B., minors.

Submitted October 18, 2022 – Decided November 28, 2022

Before Judges Sumners, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FG-20-0033-20.

Joseph E. Krakora, Public Defender, attorney for appellant (Lauren M. Derasmo, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; Jessica A. Prentice, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Todd Wilson, Designated Counsel, on the brief).

PER CURIAM

Defendant I.B. (Ingrid)[1] appeals from an order terminating her parental rights as to Z.A.I.B.B. (Zachary), born on February 28, 2018, and Z.P.L.B. (Zoe), born on April 20, 2019. Ingrid argues the trial court erred because it denied her the due process guarantees of Article 1, Paragraph 1 of the New Jersey Constitution by denying her right to counsel, forcing her to proceed self-represented, and by manifesting an extreme bias towards her as a pro se litigant throughout the guardianship trial. Ingrid also argues the trial court erred in finding the New Jersey Division of Child Protection and Permanency proved each of the four prongs of the best interest of the child standard in N.J.S.A. 30:4C-15.1(a).

[1] We use initials and pseudonyms to protect the privacy of individuals and the records of this proceeding. R. 1:38-3(d)(12).

We conclude the trial court erred in allowing Ingrid to represent herself because she did not make a clear and unequivocal waiver of her right to counsel. Additionally, once Ingrid proceeded pro se, she was not afforded full access to the Division's record or to her standby counsel during the remote trial held via Zoom. Thus, we are constrained to reverse and remand for a new trial, and do not address the merits of Ingrid's arguments pursuant to N.J.S.A. 30:4C-15.1(a).

On June 19, 2020, the Division filed a complaint, seeking guardianship of Zachary and Zoe and termination of Ingrid's parental rights; remote hearings were held August 17, 2020, November 4, 2020, and January 12, 2021. Ingrid appeared at these hearings with counsel. Three more hearings occurred March 23, 2021, May 4, 2021, and May 5, 2021 that Ingrid did not attend. Trial was initially scheduled for March 2021 but was adjourned until July 2021.

On January 12, 2021, at Ingrid's request, counsel from the Office of Parental Representation (OPR) requested to withdraw from representing her. Ingrid lacked confidence in OPR counsel's ability to represent her because she believed OPR counsel was simply going along with what the Division sought. The trial court advised Ingrid of the negative ramifications of representing herself in a termination of parental rights (TPR) case and informed OPR counsel she would need to file a motion to withdraw as counsel. It stated:

> Okay. . .. [T]hat's enough on that. Listen, you want to be excused as counsel you have to make a motion. Okay? I have to see the basis for it. That is -- it's in the court rules. You don't . . . get to just stand up suddenly and say I want to be relieved as counsel.

OPR did not make a motion to be relieved as counsel. On March 23, 2021, OPR counsel again informed the trial court Ingrid told her and the OPR she did not want OPR counsel to continue representing her, she had been fired, and requested different counsel be appointed by the OPR. The OPR told her they were not able to provide her different counsel and urged her to retain private counsel.

On June 24, 2021, Ingrid's OPR counsel again informed the trial court Ingrid had fired her. OPR counsel emphasized "I had taken internal steps to assure . . . her right to counsel, . . . that [she] has . . . counsel[,] and . . . the type of representation she wants for a very important matter." OPR counsel also believed Ingrid had hired private counsel at that hearing. The trial court asked Ingrid whether she had hired another attorney. Ingrid responded:

> [INGRID]: I'm trying to hire another attorney[,] but being that [COVID] and the job and such I'm not going to be able to by July 14th. That's why I was trying to adjourn the court date. But I'll have to either represent myself or find some type of representation.
>
> THE COURT: All right. Here's the deal. I'm going to designate today that you are now representing yourself.

> Okay? And . . . therefore -- and as I already indicated, [OPR counsel] will be required to come to court[,] and you will be able to confer with her as we undergo the procedures of trial. So[,] since you're representing yourself [,] you will now be able to submit matters as long as you send copies to everybody. You. . . can write to the Court and say --
>
> [INGRID]: Okay.
>
> THE COURT: -- what you want. But most important at this point is going to be your testimony[,] because it's getting kind of late in the day. So[,] . . . we'll accept those things from you if you want a new date with the Court, because you're representing yourself. Okay.

Following this exchange, the Law Guardian, clearly alarmed, requested clarification as to whether Ingrid had clearly and unequivocally invoked her right to waive her right to counsel:

> [LAW GUARDIAN]: I just want to make sure so that . . . DCPP v. [R.L.M.] is clear on the record today that [Ingrid] is clearly and unequivocally invoking her right knowingly and intelligently, and voluntarily waiving her right to counsel so that we don't have an issue later on that we have encountered. . .. I just wasn't sure that that's what she was saying . . ..
>
> THE COURT: I . . . have heard what she said under oath or under affirmation that she is representing herself. She doesn't have other counsel. And she has terminated her . . . last appointment. . . her designated attorney from the [O]ffice of [P]arental [R]esponsibility. I don't think it's equivocal . . ..

The trial court appointed her former OPR counsel to act as Ingrid's standby counsel to assist her throughout trial. On July 14, 2021, the first day of trial, which was scheduled to be in person, Ingrid requested an adjournment because she was involved in a bike accident. The trial court granted her request, and the trial was moved to September 13, 14, and 15, 2021. At this hearing, the trial court emphasized to Ingrid that her decision to proceed self-represented was a "huge mistake" and "not a very smart choice."

The record does not indicate whether Ingrid ever had or was afforded the opportunity, pursuant to Rule 5:12-3, to inspect the Division's record[2] in the FN or FG matters.

On September 13, 2021, trial commenced, and all the parties appeared in person ready to proceed, except Ingrid. Ingrid appeared virtually, requesting an adjournment, stating she thought the trial was to be held remotely and indicating she "can't proceed [with] an in-court situation." The trial court granted her adjournment and decided a "Zoom trial [was] perfectly acceptable." On

[2] See R. 5:12-3 ("All relevant reports of the Division of Child Protection and Permanency and other reports of experts or other documents upon which the Division intends to rely shall be provided to the court, to counsel for all parties, and to any self-represented party on the first return date of the Order to Show Cause, if then available, or as soon as practicable after they become available. The Division's case file shall also be available for inspection to the attorneys for the parties without court order. All other discovery by any party shall be permitted only by leave of court for good cause shown.").

September 14, 2021, the trial began. Each day of the three-day trial, Ingrid appeared on Zoom, along with her former OPR counsel appearing as standby counsel from a different location.

Throughout trial, Ingrid experienced technological issues due to the remote proceedings, and had to navigate through the remote trial by using her cell phone, because she did not have access to a tablet or computer. During Dr. Katz's testimony, (a Division expert), Ingrid lost connection but was reconnected soon after. Her video feed also cut in and out during McGhee's testimony (a Division caseworker Ingrid called to testify). Trial court staff resolved these issues.

On September 20, 2021, the trial court issued its decision terminating Ingrid's parental rights as to both children pursuant to the four-pronged analysis in N.J.S.A. 30:4C-15.1(a). Ingrid filed this appeal.

Pursuant to the United States and New Jersey constitutions, parents have an undeniable, fundamental right to care for, parent, and maintain a relationship with their children. See Santosky v. Kramer, 455 U.S. 745, 753 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). The right to maintain a parent-child relationship, however, is not absolute; "[a] child is not chattel in which a parent has an untempered property right." N.J. Div. of Youth and Fam.

Servs. v. C.S., 367 N.J. Super. 76, 110 (App. Div. 2004). In parental rights proceedings, the right of a parent to raise their child must be balanced with the "State's parens patriae responsibility to protect the welfare of children." K.H.O., 161 N.J. at 347.

In TPR proceedings, indigent parents are afforded the right to request counsel, and the trial court is obligated to appoint the Office of the Public Defender to represent them. N.J.S.A. 30:4C-15.4(a). In addition, "[a]lthough a parent's decision to appear pro se in this complex and consequential litigation represents poor strategy in all but the rarest case," parents are permitted to proceed self-represented in TPR proceedings. N.J. Div. of Prot. & Permanency v. R.L.M., 236 N.J. 123, 131-32 (2018).

When a parent wishes to proceed pro se, the right must be invoked "clearly and unequivocally." Id. at 132. Because of the complex nature of TPR proceedings "the court should conduct an inquiry 'to ensure the parent understands the nature of the proceeding as well as the problems she may face if she chooses to represent herself.'" Ibid. (quoting In re Adoption of J.E.V., 226 N.J. 90, 114 (2016)). "The judge should take appropriate steps, which may include the appointment of standby counsel, so that the parent's decision to represent himself or herself does not disrupt the trial." Ibid. The gravamen of

the inquiry "is whether the parent-litigant is capable of making a knowing and intelligent waiver of the right to counsel and thereafter proceed pro se in a manner that will not disrupt or impede the orderly administration of the trial." N.J. Div. of Child Prot. & Permanency v. A.O.J., 464 N.J. Super. 21, 47 (App. Div. 2020).

In A.O.J., the parent made multiple complaints to the court concerning issues she perceived with her OPR counsel. Ibid. The trial court continued without making any sort of inquiry into the validity of A.O.J.'s complaints. Ibid. Instead, it merely made strong recommendations to A.O.J. to retain counsel. Id. at 47-48. We concluded the suggestion to retain counsel was "nothing more than an empty gesture[,]" and there was nothing the court could reasonably have inferred from these complaints to conclude A.O.J. made a clear and intelligent waiver of her right to counsel. Id. at 48. The court noted what the Supreme Court made clear in R.L.M.:

> A parent's complaint about his or her attorney, or his or her plan to replace current counsel with another attorney, is not an invocation of the right of self-representation. As we have noted in a criminal appeal, "[t]he need for an unequivocal request for self-representation by a defendant is a necessary prerequisite to the determination that the defendant is making a knowing and intelligent waiver of the right to counsel."

> [Ibid. (alteration in original) (first quoting R.L.M., 236 N.J. at 149-50 (and then quoting State v. Figueroa, 186 N.J. 589, 593 n.1 (2006))).]

We determined reversal was necessary because the court's decision finding A.O.J. waived her right to be represented by counsel was unfounded.

We find Ingrid did not make a clear and unequivocal waiver of her right to counsel and the trial court erred in allowing her to proceed self-represented. Initially, on January 12, March 23, and June 24, 2021, when the issue of Ingrid's dissatisfaction with her counsel was raised to the trial court, the court made no effort to engage in a colloquy that would result in an intelligent and knowing waiver. It first told OPR counsel she would not be allowed to withdraw from representation without a motion, then subsequently decided, sua sponte, Ingrid would proceed self-represented. Even after the Law Guardian raised the issue of the lack of an unequivocal waiver, the trial court still did not engage Ingrid in any colloquy. From the record, it is clear Ingrid did not wish to represent herself and did not understand what self-representation would entail. In fact, immediately after the trial court deemed Ingrid self-represented, Ingrid asked the court to order the Division to pay for a private attorney:

> [INGRID]: Being that this case is all over the place and so all the evidence that I have and everybody's worried about me having evidence, which I do have, is [the Division] able to pay for my private lawyer[?]

> THE COURT: No. [The Division] is not going to pay for your private lawyer. . . . [Y]ou've been given a lawyer from the beginning of this case from the [OPR].
>
> [INGRID]: I understand.
>
> THE COURT: I'm sorry?
>
> [INGRID]: I understand that. But she's not -- she hasn't been representing me the way she's supposed to.
>
> THE COURT: So, then your choice is to represent yourself . . . or hire someone else. So . . . those are the choices that you have.

While Ingrid wanted to terminate counsel, it is clear she did not wish to proceed self-represented. The Supreme Court has made clear a parent's complaints or plan to replace their attorney does not equate to the clear and unequivocal request required for a knowing and intelligent waiver of counsel. R.L.M., 236 N.J. at 149. We conclude Ingrid did not clearly and unequivocally waive her right to counsel and the trial court's decision to designate Ingrid as self-represented denied her the due process guarantees of the New Jersey and United States constitutions, necessitating reversal.

The fact that Ingrid raises this issue for the first time on appeal does not change our result. When an issue is raised for the first time on appeal, we apply the plain error rule in Rule 2:10-2, which states "[a]ny error or omission shall

be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result[.]" "The mere possibility of an unjust result is not enough." State v. Funderburg, 225 N.J. 66, 79 (2016). The plain error standard requires a finding of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable doubt . . . as to whether the error led the jury to a result it otherwise might not have reached[.]" State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting Funderburg, 225 N.J. at 79).

The trial court's error of designating Ingrid as self-represented was "clearly capable of producing an unjust result." R. 2:10-2. While authorized by N.J.S.A. 30:4C-15.4, a parent's decision to represent themselves in such complex litigation as TPR is a critical decision. R.L.M., 236 N.J. at 131-32; In re Adoption of J.E.V., 442 N.J. Super. 472,481 (App. Div. 2015) ("After the elimination of the death penalty, we can think of no legal consequence of greater magnitude than the termination of parental rights."). The trial court itself noted to Ingrid it has "never seen someone who represented themself . . . in a termination case be successful." Because of TPR proceedings' complex nature and considering the fundamental right to maintain one's parent-child

relationship, Ingrid's lack of counsel was clearly capable of producing an unjust result, and the trial court committed plain error.

We also note the trial court failed to provide adequate safeguards to ensure Ingrid's due process rights were maintained throughout trial once it deemed her self-represented. Cf. A.O.J., 464 N.J. Super. at 48-49. Specifically, although the court correctly appointed former OPR counsel as standby counsel and agreed to proceed remotely at Ingrid's urging, we find Ingrid's due process rights were violated because the remote trial did not afford Ingrid the opportunity to consult with standby counsel during the trial. The parties consented to having a remote trial, at Ingrid's request, despite originally planning to proceed in-person. Although Ingrid had been appointed standby counsel, she had no access to standby counsel because they were appearing from different locations. There is no record of a breakout room being made available to Ingrid and her standby counsel or directive that they appear from the same physical location during trial. Finally, the Division concedes the record is devoid of any indication Ingrid was given an opportunity to examine the Division's complete record prior to trial. After she was designated as self-represented, she was presented with the evidence the Division selected to use at trial against her but had no opportunity to review the record for any exculpatory or favorable evidence.

We recognize Zachary and Zoe have been in temporary placement for three years, long past the twelve months outlined to achieve permanency in the Adoption and Safe Families Act guidelines, see 42 U.S.C. § 675(5)(C), and remanding this matter for a new trial will cause further delay in their permanency. However, a parent's fundamental right to maintain the parent-child relationship necessitates the implementation of safeguards to ensure due process is maintained throughout the entirety of a termination of parental rights trial. Therefore, we are constrained to reverse and remand for a new trial. We do not address the merits of Ingrid's arguments pursuant to N.J.S.A. 30:4C-15.1(a). Because the trial judge made credibility findings, we remand for trial before another judge.

Reversed and remanded for a new trial. We do not retain jurisdiction.