2015 IL App (2d) 140788-U
No. 2-14-0788
Order filed February 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re JAEDEN O., a Minor	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 10-JA-154
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. Dana G., Respondent-Appellant, and Steve O., Respondent.)	)	Honorable
	)	Janet R. Holmgren,
	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: In termination of parental rights proceedings, where respondent-mother's counsel had previously represented the minor's father during a permenancy review hearing, counsel did not have a *per se* conflict of interest, because the parent's interests were not adverse when counsel represented either parent.

¶ 2 Respondent, Dana G., appeals the trial court's order terminating her parental rights to the minor, Jaeden O. She argues that her court-appointed counsel had a *per se* conflict of interest by virtue of having previously represented the minor's father, Steve O., during a portion of a permenancy review hearing. For the reasons that follow, we affirm.[1]

[1] Respondent filed her notice of appeal on August 13, 2014. Pursuant to Illinois Supreme

¶ 3 I. BACKGROUND

¶ 4 On May 13, 2010, the State filed a petition alleging that Jaeden was a neglected and dependent minor under sections 2-3 and 2-4 of the Juvenile Court Act of 1987. 705 ILCS 405/2-3(1)(b), 2-4(b) (West 2010). At a hearing that same day, the court appointed assistant public defender Michael Herrmann to represent Steve, who was a respondent and Jaeden's father.[2] Respondent, who is Jaeden's mother, did not attend the hearing, but her aunt, attorney Pamela Fox, entered an appearance for the day. Steve waived his right to a shelter-care hearing and agreed that temporary guardianship and custody of Jaeden could be transferred to the Department of Children and Family Services (Department), with discretion to place him with a relative or in traditional foster care. The court continued the matter for a shelter-care hearing as to respondent mother. On May 21, 2010, the court appointed assistant public defender Eric Arnquist to represent respondent.[3] Respondent waived her right to a shelter-care hearing and agreed to the temporary orders that were already in place.

¶ 5 On October 28, 2010, the State represented to the court that there was an agreement that respondent would stipulate to count III of the petition and that guardianship and custody of Jaeden would be returned to respondent following a transitional period. Herrmann interjected

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Court Rule 311(a)(5) (eff. Feb. 26, 2010), our decision was due on January 12, 2015. Owing to several extensions of time granted to the parties by this court, respondent did not file her reply brief until January 15, 2015. Accordingly, there is good cause for this order not being filed within the 150-day time limit.

[2] Hereinafter, we will refer to respondent father as Steve.

[3] Herrmann and Arnquist were from different conflicts divisions of the Winnebago County public defender's office.

that Steve, who was not in court that day, was requesting that Jaeden stay with the foster parents. The court continued the matter until December 10, 2010, for adjudication and disposition.

¶ 6 On December 10, 2010, respondent mother stipulated to count III of the petition (dependency), and the court ordered the parties to participate in services as if there had also been an adjudication on the neglect counts. The State again recommended returning guardianship and custody to respondent, subject to a five-day transitional period. Steve had no objection to respondent stipulating to the petition, but requested that the matter be continued for a dispositional hearing, because he did not believe that guardianship and custody should be returned to respondent. Over Steve's objection, the court ordered guardianship and custody to be transferred to respondent with a five-day transitional period.

¶ 7 On February 14, 2011, the State filed a motion to modify guardianship and custody to the Department due to concerns about respondent's mental health and use of marijuana. The State presented the motion in court that day, and the parties waived a shelter-care hearing and agreed that temporary custody and guardianship would be transferred back to the Department. When Herrmann requested that Steve's mother be investigated as a possible placement for Jaeden, respondent exclaimed: "No. She has felons in her house." The court transferred temporary custody to the Department without restrictions on its discretion to place Jaeden with responsible relatives or in traditional foster care.

¶ 8 On September 1, 2011, the court held another hearing on the State's motion to modify guardianship and custody. Assistant public defender Amanda Sloniker represented respondent at the hearing.[4] Steve stipulated that he was unable to care for Jaeden, and the court held an

[4] Sloniker was from the same conflicts division as Arnquist, respondent's previous attorney.

evidentiary hearing solely as to respondent. Herrmann cross-examined respondent's therapist, Elise Cadigan, about respondent's use of marijuana, her failure to participate in a recommended program, and her history of suicide attempts and hospitalizations. At the conclusion of the evidence, respondent's attorney argued that respondent was fit, but Steve, through Herrmann, agreed with the State that respondent was unable to care for Jaeden's needs. The court found respondent to be unfit and transferred guardianship and custody to the Department.

¶ 9 Sloniker appeared in court for respondent, and Herrmann appeared for Steve, on numerous occasions thereafter. According to our review of the record, from September 1, 2011, until the time that his parental rights were terminated in August 2014, Steve attended only 3 of 24 court dates. Specifically, Steve attended a status on respondent's progress on December 6, 2011. He also attended court on February 28, 2012, which was the originally scheduled date for the first permenancy review. The last time that he appeared in court was at the first permenancy review on April 30, 2012.[5] The record reflects that Steve only sporadically contacted his caseworkers and did not regularly participate in services. Herrmann's comments in court indicate that his contact with Steve became sporadic as well.

¶ 10 The second permenancy review hearing spanned four dates between October 29, 2012, and February 11, 2013. Herrmann arrived late to the second of these court dates on November 19, 2012, having been held to a trial in another courtroom. At the beginning of the hearing, in

[5] Steve's attorney presented no evidence at the first permenancy review. In his closing argument, Steve, through Herrmann, requested that the court find that respondent had exerted reasonable efforts. He also noted that there was a question as to whether respondent's mental health issues were so significant that she could not parent Jaeden, but he offered no opinion on that matter.

Herrmann's absence, the court inquired whether Steve would "have anything to do with the testimony that would be forthcoming," and Sloniker responded that her witness "would be testifying solely as to [respondent]." The court then asked whether it could "have counsel stand in," and Sloniker said that she did not have any objection as long as there was no conflict. The court requested attorney Bradley Tengler, who apparently was already in the courtroom, to "stand in for Mike Herrmann today," and Tengler agreed. Sloniker then called Cadigan as a witness. Following direct examination, the State and the attorney for the Court Appointed Special Advocate (CASA) cross-examined Cadigan. Herrmann entered the courtroom as counsel for CASA was concluding her cross-examination. The court asked Herrmann whether he had any questions for the witness, and he indicated that he did not. Tengler then exited the courtroom without having asked a question of the witness or otherwise having spoken a word on the record. The entire course of Tengler's representation of Steve is recorded on 21 pages of the transcript. Herrmann did not present any evidence or make an argument on Steve's behalf at the second permenancy review. Nor did Herrmann do so at the third permenancy review on September 30, 2013.

¶ 11 Sloniker continued to represent respondent until November 4, 2013, when respondent voiced concerns that she had not been adequately represented. At that time, the court stated that, while it believed that respondent had been well-represented, it did not believe that respondent and Sloniker could work together in a manner necessary to properly respond to the forthcoming termination petition. The court appointed Tengler to represent respondent and indicated that notice should be sent to him to appear at the next court date.

¶ 12 On December 2, 2013, the State filed a petition to terminate respondent's and Steve's parental rights. During the arraignment on the petition, Herrmann said that he had not spoken

with Steve in more than six months. At all times thereafter, Tengler represented respondent and Herrmann continued to represent Steve, who did not appear in court.

¶ 13 Herrmann did not present any evidence on Steve's behalf during the unfitness or best interest hearings. For his brief closing argument during the unfitness portion of the proceedings, Herrmann noted that Steve had brought Jaeden Christmas presents, and therefore requested that the court find that the State had not met its burden with respect to unfitness. However, Herrmann did not offer an argument at the best interest hearing, stating: "Your Honor, my client is not here, he's not been here for any of the proceedings, the termination. He's clearly instructed me as to what his intentions are, so I have no argument, Your Honor."

¶ 14 On March 31, 2014, the court found respondent and Steve to be unfit. On August 4, 2014, the court found that it was in Jaeden's best interest to terminate respondent's and Steve's parental rights. Respondent timely appeals.

¶ 15 II. ANALYSIS

¶ 16 Respondent argues that she received ineffective assistance of counsel, because Tengler had a *per se* conflict of interest by virtue of having previously represented Steve during a portion of the second permenancy review hearing. According to respondent, the alleged *per se* conflict requires this court to presume prejudice and to reverse and remand the matter for further proceedings on the termination petition.

¶ 17 As an initial matter, respondent concedes that she did not raise this issue in the trial court and that her argument ordinarily would be deemed forfeited. However, "forfeiture is a limitation on the parties, not the reviewing court." *In re Darius G.*, 406 Ill. App. 3d 727, 732 (2010). In *Darius G.*, we relaxed the forfeiture rule in order to "address a plain error affecting the fundamental fairness of a proceeding; maintain a uniform body of precedent; and reach a just

result." (Internal citations omitted.) 406 Ill. App. 3d at 732; see also *In re Tamera W.*, 2012 IL App (2d) 111131, ¶ 30 (addressing the merits of the appeal despite the forfeiture, because "[t]he termination of parental rights affects a fundamental liberty interest"). Accordingly, we overlook the forfeiture and address the merits of this appeal. Where, as in the present case, the facts are undisputed, we review *de novo* the issue of whether counsel labored under a *per se* conflict of interest. *People v. Hernandez*, 231 Ill. 2d 134, 144 (2008).

¶ 18 "[T]he *per se* conflict-of-interest inquiry originated in criminal law and is based upon a criminal defendant's sixth amendment right to effective assistance, *i.e.*, conflict-free representation." *Darius G.*, 406 Ill. App. 3d at 732. In the criminal context, there are three types of *per se* conflicts which require reversal: "(1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant." (Internal citations omitted.) *Hernandez*, 231 Ill. 2d at 143-44. If counsel has a *per se* conflict that is not waived by the defendant, this is grounds for automatic reversal, even absent a showing of actual prejudice. *Hernandez*, 231 Ill. 2d at 143.

¶ 19 Courts have recognized that the *per se* conflict of interest rule may apply in termination of parental rights cases. For example, in *In re S.G.*, 347 Ill. App. 3d 476 (2004), the court held that the respondent-mother's counsel had a *per se* conflict where he had previously served as the minors' guardian *ad litem* in the same termination proceedings. The court explained that our supreme court "has recognized that in cases where a conflict is created by defense counsel's prior or contemporaneous association with either the prosecution or the victim, the effect of counsel's conflict may be so subtle or imperceptible that the record on appeal may not reveal the

extent of the influence." *S.G.*, 347 Ill. App. 3d at 479. In such circumstances, "the complainant will not be able to demonstrate that counsel acted unreasonably or that the outcome of the case would have been different absent the conflict," a concern which compelled the supreme court to recognize the *per se* rule. *S.G.*, 347 Ill. App. 3d at 479.

¶ 20 The court in *S.G.* held that the mother's counsel had a *per se* conflict of interest, reasoning that the same concerns which led the supreme court to recognize the *per se* rule in the criminal context were present in this case. Specifically, counsel had "represented parties with adverse objectives at different times in the same proceedings," and the State did not dispute that the minors' interests were "diametrically opposed" to their mother's interests. *S.G.*, 347 Ill. App. 3d at 481. Additionally, the court feared that "[t]he record may not reflect the nature and extent of the conflict's effect on [counsel's] advocacy, thereby eliminating any possibility that [the mother] could establish prejudice." *S.G.*, 347 Ill. App. 3d at 481. The court rejected the State's attempt to highlight the brevity of counsel's prior representation of the minors, noting that the *per se* rule addresses concerns about "what is not in the record[] or what is incapable of being reflected by the record." *S.G.*, 347 Ill. App. 3d at 481.

¶ 21 Respondent relies primarily on *Darius G.*, in which we embraced *S.G.*'s analysis and held that the respondent-mother's counsel had a *per se* conflict where he represented the mother at the arraignment on the petition to terminate her parental rights and then subsequently represented the minor at a pretrial conference. We took into consideration that "off-the-record confidential communications" between the mother and her counsel "likely occurred," that counsel "likely learned information that he would not otherwise have learned," and that counsel might have "formed an opinion of her that he would not otherwise have had the opportunity to formulate." *Darius G.*, 406 Ill. App. 3d at 735. We explained that it was reasonable to assume that counsel

"at a minimum interviewed [the mother] and reviewed her file," which placed him in the unique position of being able to use during his subsequent representation of the minor any information that he may have gleaned that respondent was unfit or that her rights should be terminated. *Darius G.*, 406 Ill. App. 3d at 735. Additionally, although counsel only appeared at one hearing for the mother and at one hearing for the minor and did not "perform any substantive, on-the record representation," we reasoned that "[i]t is the off-the-record conduct that would have impacted [counsel's] decisions to act as he *did* on the record." (Emphasis in original.) *Darius G.*, 406 Ill. App. 3d at 737.

¶ 22 In summarizing our holding, we asserted that "[a] clear rule better informs attorneys that, while multiple attorneys from the public defender's office may substitute to represent the same client, the *same* attorney may not during the proceedings appear on behalf of *different* clients." (Emphasis in original.) *Darius G.*, 406 Ill. App. 3d at 738. We added that "a clear rule will inform the trial court not to accept an appearance from an attorney who already, at some point during the proceedings, appeared on behalf of another party." *Darius G.*, 406 Ill. App. 3d at 738.

¶ 23 We clarified the reach of *Darius G.*'s holding in *In re A.F.*, 2012 IL App (2d) 111079. In that case, we declined to apply the *per se* rule where different attorneys from the same conflicts division of the public defender's office represented the mother and the respondent-father in the termination proceedings. *A.F.*, 2012 IL App (2d) 111079, ¶¶ 2, 24. We distinguished the matter from *Darius G*, explaining:

> "Specifically, the application of the *per se* conflict rule in *Darius G.* * * * was premised on the reasonable presumption that [the] attorney had confidential communications and reviewed the case file while representing each of the adversarial parties and could have

> later used that information against one party when representing the other. However, such a presumption is not appropriate when the alleged conflict involves two attorneys from the same conflicts division representing adversarial parties in the same proceedings, as opposed to the same individual attorney representing adversarial parties in the same proceedings." *A.F.*, 2012 IL App (2d) 111079, ¶ 24.

Additionally, unlike in *Darius G.*, there was no indication that the father's counsel had reviewed the mother's file or communicated with her before representing the father. *A.F.*, 2012 IL App (2d) 111079, ¶ 29. We said that "limiting the *per se* conflict rule in termination proceedings to situations where the same attorney represents adverse parties in the same proceeding strikes the appropriate balance between ensuring conflict-free representation and protecting the best interests of minors by providing stability and finality to termination proceedings." *A.F.*, 2012 IL App (2d) 111079, ¶ 32.

¶ 24 The State relies on *In re N.L.*, 2014 IL App (3d) 140172, in which the court held that there was not a *per se* conflict of interest where the same attorney simultaneously represented both the respondent-father and the mother in termination proceedings. Importantly, the father in that case had agreed to be represented by mother's counsel, and the court concluded that the parties' interests were not adverse until the time that counsel moved to withdraw from representing the father. *N.L.*, 2014 IL App (3d) 140172, ¶¶ 4, 51. The court recognized that "[i]mplicit in the right to effective assistance of counsel is the right to undivided loyalty from one's attorney," but noted that "joint representation is not a *per se* violation of this right to effective counsel." *N.L.*, 2014 IL App (3d) 140172, ¶ 47. Instead, "the statutory right to counsel in juvenile proceedings is violated when one attorney is appointed to represent parties with conflicting interests." *N.L.*, 2014 IL App (3d) 140172, ¶ 47 (quoting *In re Johnson*, 102 Ill. App.

3d 1005, 1011-12 (1981)). The court rejected the father's attempts to demonstrate that his interests were adverse to the mother's and distinguished *Darius G.* on the basis that the parties here "were not adverse clients." *N.L.*, 2014 IL App (3d) 140172, ¶ 50.

¶ 25 In her brief, respondent argues that *Darius G.* stands for the proposition that the same attorney may not appear on behalf of different clients in the same proceedings, and that there is a *per se* conflict of interest when this occurs. The State argues that respondent "conflates joint representation with *per se* conflicts," noting that respondent "does not argue that she and Steve had adverse interests." The State attempts to distinguish the present case from cases where attorneys have represented both a parent and the minor, noting that parents and children have "antagonistic interests" during termination proceedings. According to the State, this case is similar to *N.L.*, because respondent's and Steve's interests did not conflict. The State admits that there was a dispute between the parties early in the case when Steve opposed transferring guardianship to respondent. However, the State suggests, the restoration of respondent's guardianship was "quite short lived," and "Steve's involvement with the case appears to have ended in the permanency phase in 2012."

¶ 26 In her reply brief, respondent argues that she had a conflict with Steve regarding guardianship and custody of Jaeden, emphasizing that Steve objected in court on October 28, 2010, and December 10, 2010, to Jaeden being returned to her. Respondent also notes that at the September 1, 2011, hearing[6] on the State's motion to modify guardianship and custody, Steve elicited testimony "that was contrary to [her] position," such as highlighting her use of cannabis while she had custody of Jaeden. According to respondent, the conflict between the parties distinguishes this case from *N.L.*, and instead implicates the rule of *Darius G.*

[6] Respondent incorrectly asserts that this hearing occurred on January 11, 2011.

¶ 27 We have carefully reviewed the record, and it is readily apparent, as explained below, that Steve's interests were not adverse to respondent's when Tengler stood in for Herrmann on November 19, 2012. Nor were the parties' interests adverse at any point thereafter. Accordingly, this case is more analogous to *N.L.* than to *Darius G.*, and we hold that, under these facts, Tengler did not have a *per se* conflict of interest.

¶ 28 As previously explained, this court has clarified that the *per se* rule applies in the termination context "where the same attorney represents adverse parties in the same proceeding." *A.F.*, 2012 IL App (2d) 111079, ¶ 32. Here, respondent's interests were adverse to Steve's at certain points early in the proceedings, well before Tengler became involved with the case. Specifically, while respondent sought custody and guardianship of Jaeden, Steve preferred a placement with the foster parents or with Steve's mother. Steve also disagreed with respondent at a dispositional hearing on September 1, 2011, as to whether respondent was a fit parent.

¶ 29 However, over time, Steve stopped participating in court proceedings, failed to regularly engage in services, and spoke with social workers and his attorney only sporadically. From September 1, 2011, until his parental rights were terminated on August 4, 2014, Steve attended only 3 of 24 court dates. At the court appearances that Steve did attend, he did not advance any position that was contrary to respondent's, and he even argued to the court at the first permenancy review that respondent had exerted reasonable efforts.

¶ 30 By the time Tengler stood in for Herrmann during the second permenancy review on November 19, 2012, Steve had not attended court in almost seven months. The focus of the proceedings had shifted entirely to respondent's ability to parent Jaeden, and Herrmann, due to Steve's absence from the proceedings, had little to say on Steve's behalf. For example, Herrmann did not introduce evidence or present any argument at the second or third permenancy

reviews. Once the State filed the termination petition, Herrmann did not present evidence on Steve's behalf at the unfitness or best interest hearings. While Herrmann suggested that the State did not carry its burden on the unfitness issue in light of evidence that Steve had brought Jaeden Christmas presents, Herrmann declined to make an argument regarding Jaeden's best interests. Under these circumstances, Steve's interests were not adverse to respondent's when Tengler represented Steve, and their interests were not adverse when Tengler represented respondent on the termination petition. Therefore, Tengler did not "represent[] adverse parties in the same proceeding." *A.F.*, 2012 IL App (2d) 111079, ¶ 32.

¶ 31 Additionally, one of the concerns that convinced this court to apply the *per se* rule in *Darius G.* was the reasonable likelihood that counsel in that case had reviewed the mother's file, spoken with her, and had an opportunity to form an opinion of her prior to representing an adverse party (the minor). *Darius G.*, 406 Ill. App. 3d at 735. In the present case, Steve was routinely absent from court and maintained only sporadic contact with Herrmann, his attorney. On November 19, 2012, Tengler was called upon to stand in for Herrmann simply because he happened to be in the courtroom at the time, and Tengler left as soon as Herrmann returned. Indeed, Tengler's representation of Steve was minimal, encompassing only 21 pages of the transcript. Under these facts, it would not be reasonable to assume that Tengler reviewed Steve's file, spoke with him at any point, or had an opportunity to form an opinion of either Steve or respondent prior to representing respondent almost one year later. Accordingly, there is also no reason to suspect that Tengler had any opportunity for any other off-the-record conduct during his brief stand-in representation of Steve that might have impacted his subsequent representation of respondent.

¶ 32 We hold that under the circumstances respondent's counsel did not labor under a *per se* conflict of interest. Consequently, we reject respondent's ineffective-assistance-of-counsel claim.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 35 Affirmed.