*Adoption of Raissa*, 93 Mass. App. Ct. 447 (2018)

Summary by Katy Krywonis, CAFL Training Unit

This case provides an overview of waiver of counsel by conduct. The mother argued that she was denied due process because the judge required her to proceed to trial without counsel. The Appeals Court concluded that the mother waived her right to counsel because she was adequately warned about her behavior but persisted in misconduct that delayed the proceedings.

*Facts:* The mother was arrested at the scene of a car accident and held without bail on related charges. No one could be located to take immediate custody of Raissa, so DCF filed a care and protection petition. Eight attorneys were successively appointed to represent the mother in the care and protection proceeding. The mother either fired or failed to communicate with them, and they were each permitted to withdraw. After the appointment and withdrawal of five attorneys, the judge conducted a colloquy with the mother in which he warned that she would have to cooperate with her sixth attorney because she would not be appointed another one and would consequently have to proceed pro se. The judge explained the difficulties with self-representation and the important stakes involved. Despite this warning, the judge later appointed two additional attorneys to represent the mother, whom she also fired. The judge then found that that mother had engaged in the same behavior which he previously warned would result in the loss of counsel. The judge concluded that the mother waived her right to counsel through her conduct, and proceeded to trial. He appointed standby counsel to assist the mother at trial. Raissa’s father was granted permanent custody of her. The mother was deemed unfit and her parental rights were terminated.

*Discussion:* Children and indigent parents have a constitutional right to counsel in termination of parental rights proceedings. The right to counsel is not absolute though. A parent may be deemed to have waived their right to counsel by their conduct. Waiver by conduct may occur where (1) the judge expressly warns the parent that their behavior will result in the loss of their right to counsel and explains the consequences of proceeding without counsel, and (2) the parent then engages in the misconduct about which they were warned. The parent’s acts must be “highly disruptive of orderly or safe proceedings” to be deemed waiver by conduct. They do not need to be violent or threatening. The judge must weigh the parent’s constitutional protections against the interest of judicial efficiency and the rights of the child.

Here, seven of the eight attorneys stated that they were moving to withdraw at the mother’s direction. The judge was entitled to credit their affidavits. The judge’s colloquy with the mother was clearly focused on the number of attorneys who had been appointed and withdrawn due to an irretrievable breakdown in communication. Although it is preferable to give or repeat the warning close to the time of trial, the Appeals Court noted that this was “an unusual and protracted situation” in which the judge showed “extraordinary patience” in appointing additional attorneys after warning the mother that her continued failure to cooperate with her attorney would result in her proceeding pro se. This warning was adequate given the mother’s particular circumstances. She had prior experience with court proceedings. She also had a college degree and was described as “very bright and articulate.” The repeated changes in counsel interfered with the orderly administration of the proceedings because each new attorney needed to become familiar with the mother and the case, necessitating a continuance of the trial.

*Practice Tip:* For more about limits on the right to counsel in care and protection proceedings, counsel should review Adoption of Rory, 80 Mass. App. Ct. 454 (2011), Adoption of Imelda, 72 Mass. App. Ct. 354 (2008), Adoption of Olivia, 53 Mass. App. Ct. 670 (2002), and Care and Protection of Marina, 424 Mass. 1003 (1997).