

NOT DESIGNATED FOR PUBLICATION

No. 126,539

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interests of M.M. and R.M.,
Minor Children.

MEMORANDUM OPINION

Appeal from Johnson District Court; KATHLEEN SLOAN, judge. Submitted without oral argument.
Opinion filed May 3, 2024. Affirmed.

Dennis J. Stanchik, of Shawnee, for appellant natural mother.

Maria C. Davies, assistant district attorney, and *Stephen M. Howe*, district attorney, for appellee.

Before SCHROEDER, P.J., CLINE and HURST, JJ.

SCHROEDER, J.: The natural mother (Mother) of M.M. (born in 2015) and R.M. (born in 2021) timely appeals the district court's finding determining the children were children in need of care (CINC). Mother claims the district court deprived her of the right to effective assistance of counsel in the CINC proceedings. Our thorough review of the record reflects Mother waived her right to counsel after extensive discussion with the district judge. The district court did not err, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 2022, officers responded to a call and found Mother unresponsive at her home where her four children, ages 16, 6, 2, and 6 months, were also present. Two days later, the State petitioned the Johnson County District Court to find Mother's four

children—including M.M. and R.M. who are the subject of this appeal—to be children in need of care. The State alleged the children were in need of care due to:

- inadequate parental care, control, or subsistence not due solely to a lack of financial means—K.S.A. 38-2202(d)(1);
- being without the care or control necessary for their physical, mental, or emotional health—K.S.A. 38-2202(d)(2);
- physical, mental, or emotional abuse or neglect or sexual abuse—K.S.A. 38-2202(d)(3); and
- residing in the same residence as a sibling or another person under the age of 18 years old who was physically, mentally, or emotionally abused or neglected, or sexually abused—K.S.A. 38-2202(d)(11).

Mother appeared at a temporary custody hearing the same day with appointed counsel. The district court explained Mother's children had an appointed attorney and Mother had the right to an attorney and that one had already been appointed. The court then explained to Mother she could hire her own attorney if she wished, or she could represent herself. However, the district court cautioned that it "strongly encourage[d]" Mother not to represent herself "because these proceedings are very difficult to navigate, both legally and emotionally, because we're talking about your children." Mother responded she would proceed with the court-appointed counsel.

The district court found probable cause to believe all four of Mother's children, including M.M. and R.M., were likely to sustain harm if not immediately removed from Mother's home. The court placed the children in the temporary custody of the Secretary of the Kansas Department for Children and Families (DCF) and stated Mother's case plan tasks would be the orders of the court with the goal of reintegration.

Mother was later granted supervised visits with her children. In August 2022, Mother again appeared with the same appointed counsel and at her request the court continued the CINC proceedings to November 10, 2022.

On September 26, 2022, the district court held a virtual hearing regarding Mother's two-year-old child and released jurisdiction to Missouri so the child could reside with his father. Although Mother was not initially present because she was in the incorrect virtual "lobby," Mother eventually joined the Zoom hearing. Due to a breakdown in communication, the district court permitted Mother's appointed counsel to withdraw. Mother said she wanted to retain her own counsel. The court recommended Mother hire counsel within two weeks to avoid the need for a continuance of the November 10, 2022 adjudication hearing, which Mother did not want. Mother did not attend the scheduling conference in October 2022.

On November 2, 2022, the court held another pretrial conference where Mother appeared without counsel. After a lengthy back-and-forth about Mother's intention or plan to retain counsel, the district court changed the adjudication hearing date to a pretrial scheduling conference date. Mother asked the court if it could appoint her standby counsel "just in case," and the court explained it would be happy to but it would delay the adjudication hearing, which Mother said she did not want. The court agreed to appoint standby counsel to appear at the next hearing who would act as standby counsel if Mother failed to retain counsel and told Mother to either hire counsel or agree to appointed counsel.

Adjudication Hearing

At the CINC adjudication hearing on December 16, 2022, Mother appeared without counsel she had planned to hire. Her standby counsel appeared and assisted Mother during the hearing. For example, standby counsel objected during the State's

direct examination of its first witness. When the district court began to remind standby counsel of her role, the attorney responded, "I'm standby. I'm standby. I just" Thereafter, Mother timely objected to the relevance of a portion of the responding officer's testimony, though her objection was overruled. When it was Mother's turn to cross-examine the officer, she asked several questions about the date of the incident, what the officer observed at the home, how the officer identified the family members present, prior police responses to the home, and the children's condition at the home. The State objected just once, and the court also reminded Mother twice she was cross-examining the officer, not testifying, and she would have the opportunity to testify later.

When Mother struggled to formulate questions to cross-examine the officer about the condition of the home, her standby counsel asked to assist Mother. The following exchange occurred between Mother and the district court:

"[MOTHER]: I'm sorry, Judge Sloan.

"THE COURT: You have—you're proceeding pro se. I gave you a backup attorney. I know this is hard.

"[MOTHER]: Okay, Judge Sloan, but I remember you said that you didn't recommend that I represent myself, so when you appointed me an attorney, I thought you were appointing me attorney to represent me and not—

"THE COURT: No. We have made that quite clear. I will let [standby counsel] help you, but you insisted and you wanted a backup counsel, but you wanted to do this yourself.

"I know this is hard. This is cross-examination. Get to your question.

"[MOTHER]: I know, Judge Sloan, but I just remember you saying that you didn't recommend that for me.

"THE COURT: I didn't. You insisted. I'm not going to argue with you. This is what you asked for.

"[MOTHER]: Yes.

"THE COURT: Ask your question. This is cross-examination.

"[STANDBY COUNSEL]: [Mother], move on to the next question.

"[MOTHER]: Can you just assist me?

"[STANDBY COUNSEL]: Move on to the next question because this one's been asked and answered basically. Okay?

"[MOTHER]: Well, can you ask the question because—

"[STANDBY COUNSEL]: No. May we have a few minutes, Judge, in a witness room?

"THE COURT: We will take a five-minute break and go off the record."

When the hearing resumed, Mother confirmed she was finished with cross-examination of the officer.

After the State examined the DCF child protection specialist, Mother cross-examined the witness without objection and appeared not to have any issues with forming questions. When the State examined the KVC permanency case manager, Mother timely objected to the relevance of testimony regarding Mother's incarceration during this matter. Standby counsel then briefly notified the district court why this testimony was irrelevant, and the court overruled the objection. Mother then cross-examined the KVC permanency case manager and was objected to five times for asking questions which were previously answered and once for asking about facts not in evidence.

After the State rested, the district court took a brief recess to allow Mother and standby counsel to speak before Mother presented her witnesses. Mother then testified on her own behalf and called her cousin to testify. Each was presented without objections.

The district court found by clear and convincing evidence that three of Mother's children, including M.M. and R.M., were children in need of care pursuant to K.S.A. 38-2202(d)(1), (d)(2), (d)(3), and (d)(11), though the court recited the incorrect statutes in its verbal findings. It designated the dispositional goal as reintegration and ordered Mother be offered a 120-day reintegration plan. The court also ordered Mother to take a urinalysis test immediately after the hearing and scheduled a review hearing for 30 days

after the hearing. The court heard from all parties and specifically asked for standby counsel's input on Mother's behalf regarding a recommendation that, for a brief period, Mother have no contact with the two children subject to this appeal.

Mother appealed the district court's decision as to only M.M. and R.M.

ANALYSIS

Mother claims the district court required her to proceed pro se, violating her right to effective assistance of counsel as provided in K.S.A. 38-2205(b)(1) and as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, Mother appeals the district court's appointment of standby counsel and the lack of clarity as to standby counsel's role during the CINC adjudication hearing. Any argument of ineffective assistance of standby counsel is waived and abandoned for failure to brief the issue. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018) (issue not briefed deemed waived and abandoned); *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (points raised incidentally in briefs and not argued deemed abandoned).

An appellate court reviews the district court's adjudication of a child in need of care by determining whether, after reviewing the evidence in the light most favorable to the State, a rational fact-finder could have found it highly probable, by clear and convincing evidence, that the child was a child in need of care. The appellate court does not reweigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). To the extent Mother's claim raises a question of statutory interpretation, we exercise unlimited review. *In re N.E.*, 316 Kan. 391, 402, 516 P.3d 586 (2022).

A parent has a fundamental liberty interest in making decisions regarding the care, custody, and control of his or her child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). As such, a parent is entitled to due process before being deprived of the right to the care, custody, and control of his or her child. *In re J.D.C.*, 284 Kan. at 166. Another panel of this court elaborated on the significance of a parent's constitutionally protected liberty interest in the relationship with his or her child:

"[A] CINC is not the ultimate disposition of [the parent-child relationship]—unlike an unfitness finding or termination of . . . parental rights—it is 'the first necessary step' on the path towards severing the bonds between [the parent and child], because if a court refuses to find a child a CINC, any further proceedings under the revised Kansas code for care of children . . . cease. The significance of a CINC finding is also apparent due to the clear and convincing standard of evidence required to adjudicate a child a CINC. [Citations omitted.]" *In re J.L.*, 57 Kan. App. 2d 60, 65, 449 P.3d 762 (2019).

Mother claims: "For reasons that are equally unapparent from an examination of the record on appeal, [she] was required to proceed with 'standby counsel' for trial on the State's petition." Our examination of the record shows Mother waived her right to counsel and chose to proceed with standby counsel.

Mother asserts: "In determining the precise nature of procedural protections afforded by the Fourteenth Amendment, the court must apply a balancing test first enunciated by the [C]ourt in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)." That is, we must consider:

"(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the [statutory] procedures used, and probable value, if any, of additional procedural safeguards; and (3) . . . the fiscal and administrative burdens that the additional or substitute [procedural safeguards] would entail." 424 U.S. at 321.

Further, K.S.A. 38-2205(b)(1) states:

"(b) *Attorney for parent or custodian.* A parent of a child alleged or adjudged to be a child in need of care may be represented by an attorney, in connection with all proceedings under this code. At the first hearing in connection with proceedings under this code, the court shall distribute a pamphlet, designed by the court, to the parents of a child alleged or adjudged to be a child in need of care, to advise the parents of their rights in connection with all proceedings under this code.

(1) If at any stage of the proceedings a parent desires but is financially unable to employ an attorney, the court shall appoint an attorney for the parent. It shall not be necessary to appoint an attorney to represent a parent who fails or refuses to attend the hearing after having been properly served with process in accordance with K.S.A. 38-2237, and amendments thereto. A parent or custodian who is not a minor, a mentally ill person or a disabled person may waive counsel either in writing or on the record."

While indigent parents and custodians in CINC proceedings are statutorily entitled to court-appointed counsel, the right may be waived in writing or on the record and the parents and/or custodians can proceed pro se. K.S.A. 38-2205(b)(1); see *In re J.A.H.*, 285 Kan. 375, 384, 172 P.3d 1 (2007) (Father waived statutory right to counsel when he asked his counsel to be removed so he could proceed pro se and he did not request new counsel). Here, Mother has not alleged the district court failed to follow a specific procedural process but merely somehow wrongly permitted her to waive her right to counsel. A right she absolutely has.

At Mother's first appearance, the district court appointed her counsel and informed her of her right to appointed counsel. In September 2022, a few months before the adjudication hearing, Mother's original appointed counsel moved to withdraw, claiming a breakdown in communication with Mother. The court asked Mother her position on the request, and Mother said, "[Y]es, so I am allowing him to withdraw." At that time, the court reminded Mother the CINC adjudication hearing was scheduled for November 10, 2022, and asked her if she intended to hire an attorney or "are you asking for a court-

appointed attorney?" Mother said, "I am trying to seek my own legal representation or I am trying to stand as a pro [se] if possible and have a limited scope representation." The court warned Mother she should hire counsel within the next two weeks or risk delaying the adjudication hearing and set a scheduling conference for October 11, 2022, "to determine whether or not [Mother's attorney] is going to ask for a continuance of your Child In Need of Care case because they're not going to be able to be prepared in time a month later." The court explained to Mother she should either "hire an attorney or you will have to come to that hearing to ask for a court-appointed attorney."

Mother failed to appear at the October scheduling conference. At a pretrial conference on November 2, 2022, about one week before the scheduled CINC adjudication hearing, Mother appeared pro se and said she was still trying to hire private counsel. Mother explained she spoke to an attorney the day before who Mother might want to hire, and Mother said the attorney "told me to find out if there was possible if you guys would give a continuance." But Mother then said, "I really don't want to continue it out." The district court explained if Mother hired an attorney, the attorney needed to enter an appearance and request a continuance if needed.

In discussing whether Mother intended to hire counsel, the district court explained the State could not provide Mother with discovery directly. So even if Mother proceeded pro se, she would need standby counsel to receive discovery. The court repeatedly tried to get Mother to decide whether she wanted to hire an attorney, have counsel appointed, or proceed pro se with standby counsel: "I need to either know if you're either going to hire an attorney or I need to appoint a standby attorney for you, appoint another attorney for you. But, I mean, as I said, we've been at this since June, and we need to get this resolved." Mother eventually asked if the court could appoint her standby counsel "just in case," to which the court said it could appoint standby counsel or was "more than happy to appoint [Mother] another attorney" but noted it would need to reschedule the adjudication hearing to allow time for the attorney to get ready.

Mother did not want the adjudication hearing date to be postponed and explained that "I am prepared personally" and asked the court to appoint someone

"to stand in with me, to present my evidence because the only reason I needed discovery because everything I plan to do is cross-examine my own witnesses and all my questions and everything I've done on my own. . . . So, really, I just need someone who I guess stands in and gets my discovery, honestly. . . . I've worked hard on my own case, I really have."

Mother again requested to keep the adjudication hearing date as set. The court ultimately changed the November 10, 2022 adjudication hearing date to a pretrial scheduling conference and told Mother it would appoint standby counsel to be present for the pretrial hearing and allow Mother additional time to hire private counsel. In the event Mother retained her own counsel, the court would dismiss the standby counsel.

As explained above, after the district court allowed Mother's original court-appointed counsel to withdraw, the district court repeatedly offered to appoint Mother new counsel, explained the risk and difficulty of proceeding pro se, and cautioned Mother against it at multiple steps in the process. Mother failed to heed all warnings and said she wanted to hire private counsel—even identifying the attorney—or proceed pro se. Mother voluntarily waived her right to appointed counsel on the record after the district court fully advised her of the right, including warning her of the risk. See *In re J.A.H.*, 285 Kan. at 384. There was little more the court could have done, and it is clear Mother wanted to proceed pro se, as she had worked hard preparing for the hearing. Mother knowingly and voluntarily waived her right to counsel on the record. The district court did not violate her statutory or due process right to counsel.

Again, Mother does not assert on appeal her standby counsel was ineffective. To the extent Mother does make such claim, she merely suggests: "It is well established under Kansas law that once a district court appoints counsel in CINC proceedings, appointed counsel must be effective." But a point raised incidentally and not argued is deemed waived and abandoned. *Russell*, 306 Kan. at 1089.

Affirmed.

* * *

HURST, J., concurring: Although I agree that the district court properly allowed Mother to waive her right to counsel and proceed pro se, I believe that issue benefits from a fuller discussion of the waiver requirements. Additionally, I write separately to address Mother's claim of ineffective assistance of counsel. While Mother's briefing lacks specificity and clarity, it essentially asserts two arguments: (1) The district court improperly "required" Mother to proceed pro se, and (2) Mother's standby counsel was ineffective—in part—because Mother did not understand standby counsel's role. Given the lack of precedent on the issue and Appellee's understanding of the argument, I cannot say that Mother's claim of ineffective assistance of standby counsel—although obtuse and unavailing—is abandoned or waived. While superior briefing always benefits appeal, the difference between abandonment and unpersuasive briefing is one of degree.

I. MOTHER WAIVED HER STATUTORY RIGHT TO COUNSEL

The issue of whether Mother waived her right to counsel in the CINC proceeding requires an analysis of how that waiver must be achieved. Though not absolute, Mother's right to the care, custody, and control of her children is a fundamental liberty interest protected by the Fourteenth Amendment, and she is entitled to due process of law before those rights are impeded. *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). A narrow

majority of the United States Supreme Court found that indigent parents in particularly complex proceedings have a constitutional right to counsel pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, the Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding. See *Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

In line with *Lassiter*, and before the creation of the statutory right to counsel explained below, the Kansas Supreme Court found that "[i]n deprived child hearings the district court should safeguard the due process rights of an indigent parent and have counsel appointed . . . when the circumstances appear to require it . . ." *In re Cooper*, 230 Kan. 57, 69, 631 P.2d 632 (1981), *superseded by statute on other grounds as recognized by In re J.A.H.*, 285 Kan. 375, 172 P.3d 1 (2007). "Constitutional due process requires the state to appoint counsel for an indigent parent in a deprived child hearing . . . whenever the parent . . . faces a substantial possibility of loss of custody and permanent severance of parental rights or prolonged separation from the child." 230 Kan. at 68-69. Therefore, prior to the creation of the statutory right to counsel in CINC proceedings, courts determined the constitutional right to counsel on a case-by-case basis. See *Lassiter*, 452 U.S. at 31.

Rather than continuing to engage in this case-by-case analysis, the Kansas Legislature enacted a statutory right to counsel in all CINC proceedings. Parents of children alleged (as was the case here) or adjudicated to be children in need of care now have a statutory right to counsel as follows:

"(b) *Attorney for parent or custodian.* A parent of a child alleged or adjudged to be a child in need of care may be represented by an attorney, in connection with all proceedings under this code. . . .

(1) If at any stage of the proceedings a parent desires but is financially unable to employ an attorney, the court shall appoint an attorney for the parent. . . . A parent or custodian who is not a minor, a mentally ill person or a disabled person may waive counsel either in writing or on the record." K.S.A. 38-2205(b)(1).

Although the statutory right to counsel eliminates the district courts' need to determine the constitutional right to counsel on a case-by-case basis—it did not eliminate the existence of that constitutional right in some cases. See *In re J.A.H.*, 285 Kan. at 384 (finding that the "factor-focused analysis arising out of *Cooper* is no longer necessary" to determine "whether the statutory right to counsel has been denied"). It merely expanded the right to counsel to include cases where the constitutional right to counsel would not otherwise exist.

While indigent parents and custodians in CINC proceedings are now statutorily entitled to court appointed counsel, they may still waive that right and proceed pro se. See K.S.A. 38-2205(b)(1) (In a CINC proceeding, "A parent or custodian . . . may waive counsel either in writing or on the record."). The right to counsel, be it statutory or constitutional, does not usurp a parent's right to self-representation. See *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (finding the Sixth Amendment includes the right to self-representation); see also *In re J.A.H.*, 285 Kan. at 384 (Father waived statutory right to counsel when he asked his counsel to be removed so he could proceed pro se and he did not request new counsel). The issue here is how that right may be waived.

In criminal proceedings, the due process right to counsel is so fundamental that a court must provide specific warnings prior to accepting a defendant's waiver of their right to counsel. *State v. Burden*, 311 Kan. 859, 863-64, 467 P.3d 495 (2020). It is "the defendant's interest in personal freedom, and not simply" their constitutional rights, which triggers the right to appointment of counsel. *Lassiter*, 452 U.S. at 25. However,

because the constitutional right to counsel in parental deprivation proceedings does not stem from the Sixth Amendment, it stands to reason that there is a different threshold for waiver of the right to counsel in such proceedings. See *Lassiter*, 452 U.S. at 26-27 (finding that "fundamental fairness" requires appointment of counsel to an indigent litigant "only when, if he loses, he may be deprived of his physical liberty"); see also *State v. Jenkins*, 263 Kan. 351, 365-66, 950 P.2d 1338 (1997) (applying a less stringent standard for obtaining waiver of a right to counsel when the possible sanction for contempt did not include incarceration).

In *Cooper*, the court found that when a parent or custodian has a constitutional right to counsel in child deprivation proceedings, the parent "may voluntarily waive their rights to appointed counsel after being fully advised of their rights. Such waiver should be entered on the record of the proceedings" 230 Kan. at 67-68. However, since the enactment of the statutory right to counsel in K.S.A. 38-2205, the Kansas Supreme Court has yet to address whether the waiver standard in *Cooper* applies to the statutory right to counsel in CINC proceedings. But the Kansas Supreme Court has assessed waiver of the statutory right to counsel in other contexts.

In DUI diversion proceedings, which are considered contractual in nature, the statutory right to counsel may be knowingly and voluntarily waived, but such waiver need not be on the record before a judge and does not require that the petitioner be advised of their right to counsel. *State v. Tims*, 302 Kan. 536, 544-47, 355 P.3d 660 (2015). However, waiver of the statutory right to counsel in pre-trial criminal proceedings pursuant to K.S.A. 22-4503 may require more. See *State v. Lawson*, 296 Kan. 1084, 297 P.3d 1164 (2013). In *Lawson*, the court explained that "after the statutory right to counsel has attached, the defendant's uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court." 296 Kan. at 1098.

Mother claims she was "entitled to the fullest procedural protection afforded by the Fourteenth Amendment." Proceedings to terminate parental rights present different consequences than criminal proceedings, and "[a] due process violation exists only when a claimant is able to establish that he or she was denied a specific procedural protection to which he or she is entitled." *In re J.D.C.*, 284 Kan. 155, Syl. ¶ 7, 166 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976], and *Winston v. Kansas Dept. of SRS*, 274 Kan. 396, 409-10, 49 P.3d 1274 [2002]); see *Lassiter*, 452 U.S. at 28-29. The question of whether due process has been violated in a particular case is one of law, reviewable de novo on appeal. *In re J.D.C.*, 284 Kan. 155, Syl. ¶ 7; see also *In re D.R.*, No. 119,119, 2018 WL 5851604, at *6-7 (Kan. App. 2018) (unpublished opinion) (analyzed sufficiency of waiver of counsel in CINC proceeding using the *Mathews* factors).

Assuming, without deciding, that Mother had both a statutory and constitutional right to counsel, this court should apply the standard articulated in *Cooper* to determine whether the district court violated Mother's due process rights by permitting her to proceed to trial pro se. Mother has not alleged that the district court failed to follow a specific procedural process but merely that it wrongly permitted her to waive her right to counsel. As explained in *Cooper*, a party may "voluntarily" waive their constitutional right to court appointed counsel in child deprivation proceedings "after being fully advised of their rights" if such is entered on the record. *In re Cooper*, 230 Kan. at 67-68. The district court was not required to follow the procedural formality dictated by the Sixth Amendment in criminal proceedings to obtain Mother's waiver of counsel, and fully accomplished the necessary waiver. See *Lassiter*, 452 U.S. at 26-27; *In re D.R.*, 2018 WL 5851604, at *6.

As explained in the majority's fact recitation, after Mother consented to her original court-appointed counsel's withdrawal the district court repeatedly offered to appoint Mother new counsel and explained the risk and difficulty of proceeding pro se

and cautioned Mother against it at multiple steps in the process. Mother failed to heed all warnings and said she wanted to hire private counsel—even identifying the attorney—or proceed pro se. It is clear that Mother voluntarily waived her right to appointed counsel on the record after the district court fully advised her of the right, including warning her of the risk. See *In re Cooper*, 230 Kan. at 67-68; see also *In re J.A.H.*, 285 Kan. at 384-85 (where, in addition to other factors, Father's desire that his appointed attorney withdraw evidenced his request to proceed pro se). There was little more the court could have done, and it is clear Mother wanted to proceed pro se. Mother knowingly and voluntarily waived her right to counsel on the record and the court did not violate her statutory or due process right to counsel.

II. MOTHER'S STANDBY COUNSEL WAS NOT INEFFECTIVE

Mother claims that the court-appointed standby counsel was ineffective for failing to explain their scope and limitations to Mother. She claims:

"It is well established under Kansas law that once a district court appoints counsel in CINC proceedings, appointed counsel must be effective. See *In the Interest of CP*, 281 P.3d 180 (Kan.App. 2012). Cf., *McIntyre v. State*, 403 P.3d 1231, 1236 (Kan. App. 2017) ("to establish a statutory right to counsel but then refuse to require some modicum of competence by such counsel, seems repugnant to the obvious legislative intent).

"It stands to reason that the concept of standby counsel that is not adequately explained to a litigant and does not give standby counsel any direction as to that counsel's role in the proceedings does not and cannot constitute effective assistance of counsel as required pursuant to the provisions of K.S.A. 38-2205(b)(1)."

...

"In the case before this court, there is nothing in the record on appeal to support the contention that standby counsel for Appellant understood her role at trial. Standby counsel found it necessary to ask the district court at one point whether she could come to the assistance of the Appellant. The record indicates that Appellant and her counsel took

a break at the conclusion of Appellant's testimony to discuss whether Appellant wished to present any further testimony as her own witness."

Although Mother claims the issue is "well established," it does not appear that the Kansas Supreme Court has addressed whether the right to counsel in CINC proceedings includes a constitutional right to effective assistance of counsel. However, other panels of this court have found that the statutory right to counsel in proceedings involving the deprivation of parental rights requires that the appointed counsel be effective. See *In re F.G.*, No. 114,602, 2016 WL 4259928, at *12 (Kan. App. 2016) (unpublished opinion); *In re Rushing*, 9 Kan. App. 2d 541, 545, 684 P.2d 445 (1984) (party statutorily entitled to counsel was also entitled to effective assistance of that counsel); see also *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

While the constitutionally protected right to effective assistance of counsel afforded criminal defendants largely derives from the Sixth Amendment, the fundamental rights in child deprivation cases protected by the Fourteenth Amendment likewise affords procedural protections. See *In re B.J.*, No. 125,727, 2023 WL 5320946, at *13 (Kan. App. 2023) (unpublished opinion); *In re J.A.*, No. 125,516, 2023 WL 3775096, at *13-17 (Kan. App. 2023) (unpublished opinion) (Atcheson, J., concurring) (arguing for adoption of the *Strickland* test for effective assistance of counsel in termination proceedings). As Judge Atcheson points out in his concurrence, the risk of termination of parental rights does not inflict the same potential loss of freedom as a criminal proceeding, "but it severs the most profound and intimate of blood relationships. And it does so irrevocably. The State must prove its case to a district court judge by clear and convincing evidence—a more formidable hurdle than in typical civil cases, though not as exacting a standard as in criminal prosecutions." *In re J.A.*, 2023 WL 3775096, at *14 (Atcheson, J., concurring).

The Kansas Supreme Court has found that in civil proceedings where a statutory right to counsel exists, that counsel must have a minimum level of competence. *Brown v.*

State, 278 Kan. 481, 483-84, 101 P.3d 1201 (2004) (where there is a statutory right to counsel in a civil matter, the appointment should be more than a "useless formality" and should be held to a level of competence); *Mundy v. State*, 307 Kan. 280, 296, 408 P.3d 965 (2018) (applying *Strickland* principles to defendant's claim that counsel appointed pursuant to statute for civil K.S.A. 60-1507 proceeding was deficient). Additionally, the Kansas Supreme Court has concluded that the Due Process Clause of the Fourteenth Amendment entitles criminal defendants to effective assistance of counsel in probation revocation proceedings. *State v. Galaviz*, 296 Kan. 168, 177, 291 P.3d 62 (2012).

Like the court's finding of Fourteenth Amendment protections in *Galaviz*, parents and custodians in CINC proceedings are entitled to effective assistance of statutorily appointed counsel. See 296 Kan. at 177. Because Mother has a constitutionally protected right to effective assistance of statutorily appointed standby counsel, the *Strickland* test requires this court to analyze: (1) whether counsel's performance was deficient, and, if so, (2) whether there is a reasonable probability that the results would have been different without counsel's errors. *State v. Evans*, 315 Kan. 211, 217-18, 506 P.3d 260 (2022). This test requires the court to find a deficiency in counsel's representation and resulting prejudice before finding counsel ineffective.

Under the first step, Mother must establish that her standby counsel's performance was deficient in that it "fell below an objective standard of reasonableness when considering the totality of the circumstances." *Evans*, 315 Kan. at 218. As Appellee points out, Mother failed to demonstrate that her standby counsel fell below the requisite standards. Standby counsel's responsibilities at trial differ from fully appointed counsel, which has been more fully explained in the context of a criminal trial. In those cases, standby counsel assists the pro se defendant to overcome routine procedural or evidentiary obstacles that the defendant wants to complete, helps the defendant comply with basic rules or procedure, and makes some objections and motions. *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *United States v.*

McDermott, 64 F.3d 1448, 1453 (10th Cir. 1995). Standby counsel can "assist defendants representing themselves to the extent they ask for help and to provide input" but "[t]heir role is not to manage the proceedings or make unsolicited substantive contributions, something that would be inconsistent with the defendant's election of self-representation." *State v. Rassel*, No. 107,336, 2013 WL 1688930, at *2 (Kan. App. 2013) (unpublished opinion) (citing *McKaskle*, 465 U.S. at 177-78).

At trial, the district court appointed standby counsel to assist Mother and ensure she received discovery. Mother does not allege standby counsel failed to assist her with discovery, just that standby counsel failed to explain their role. Mother questioned witnesses, provided her own evidence, and sought guidance from standby counsel when she felt necessary. Standby counsel objected on Mother's behalf, to which the district court reminded her of the limits of the standby counsel role, advised Mother when she had trouble with a cross-examination, and asked for a break to speak to Mother. Mother's actions at trial demonstrate that she understood her role as a pro se litigant, standby counsel's role, the evidence against her, and the risks of proceeding pro se.

Mother fails to show that standby counsel's performance fell below the objective standard of reasonableness, and thus failed to prove the first prong of the *Strickland* test. Having failed to prove standby counsel acted deficiently, Mother cannot show any prejudice resulted from standby counsel's performance in the second prong of the *Strickland* test. Mother failed to show that she received ineffective assistance of standby counsel in her CINC proceedings.