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NO. COA07-919

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

IN THE MATTER OF:

B.M.

Lee County
No. 05 J 24

Appeal by respondent-father from order entered 10 May 2007 by Judge Robert W. Bryant, Jr. in Lee County District Court. Heard in the Court of Appeals 26 November 2007.

Beverly D. Basden for Lee County Department of Social Services petitioner-appellee.

Elizabeth Boone for Guardian ad Litem petitioner-appellee.

Winifred H. Dillon for respondent-father appellant.

McCULLOUGH, Judge.

Respondent appeals from the trial court's order terminating his rights as the father of minor child B.M. On appeal respondent argues the trial court lacked subject matter jurisdiction because (1) no summons was issued to or served on the juvenile, and (2) the Lee County Department of Social Services ("DSS") lacked standing to bring the termination action. We find the trial court lacked subject matter jurisdiction, and we therefore vacate the order of the trial court.

B.M. was born to respondent and Deborah Ingraham¹, who were not married, in New York. The three lived in New York until early 2004 when B.M. and her mother moved to North Carolina, with respondent remaining in New York. On 20 April 2005, DSS filed a juvenile petition alleging neglect after an incident in which the mother left B.M. with a friend and did not return when expected. DSS was granted non-secure custody and B.M. was placed first with a family friend and then in foster care. On 26 April 2005, the mother consented to continued non-secure custody with DSS. At that time the trial court noted the father had not been identified or located.

The adjudication hearing was held on 24 May 2005, during which the mother, her attorney, and her guardian ad litem "consented and stipulated" to an adjudication of neglect. The trial court made several findings of fact regarding the mother and her lack of ability to care for the minor child. The court concluded its findings of fact by stating "[t]he Court with the consent of the parties determines that there is clear and convincing evidence that the child is neglected due to abandonment."

During the first review hearing held on 19 July 2005, DSS reported to the trial court that it was unable to locate respondent-father. Although the mother informed DSS that he was either in Brooklyn or Albany, she was unable to provide DSS with his contact information. The trial court made a finding of fact in

¹ Ms. Ingraham is not a party to this appeal.

its review order that the father had not yet been located. A summons was issued on 26 July 2006 but no service was made on respondent. After a permanency planning hearing on 18 October 2005, the trial court noted that respondent could not be found, and ordered DSS to cease reunification efforts with the mother. The permanent plan for the minor child was changed to adoption, and the court recommended that DSS proceed with termination of the mother's parental rights. On 19 December 2005, DSS filed a motion to terminate parental rights as to both the mother and respondent. In its motion, DSS noted that respondent recently contacted the agency with a new phone number and address. The trial court continued the matter as to respondent to allow him sufficient time to reply to the motion. The trial court did, however, take evidence on the motion to terminate the mother's parental rights and on 21 February 2006 issued an order terminating her parental rights as to B.M.

Another continuance was granted to respondent to allow time to file an answer. Respondent filed an answer on 11 April 2006, denying the material allegations in the motion filed by DSS. In addition, respondent argued that the trial court lacked subject matter jurisdiction over the matter and that the trial court had not established personal jurisdiction over him. Respondent's motion to dismiss the DSS motion was granted by the trial court in an order entered 24 May 2006 for lack of subject matter jurisdiction. Thereafter, DSS filed a petition to terminate respondent's parental rights and the petition was served on

respondent along with a notice of hearing on 21 July 2006. The grounds for termination were neglect, failure to pay a reasonable portion of the cost of care for the child, failure to legitimate the child, and willful abandonment. Respondent filed another motion on 11 August 2006 seeking to have reunification efforts renewed between respondent and the minor child and to have DSS investigate the option of placing the child with one of respondent's relatives. Respondent also filed an answer to the petition on 15 September 2006 denying the material allegations in the petition, arguing that the court lacked subject matter jurisdiction over the matter, and requesting that the petition be dismissed. The trial court continued the matter in an order entered 4 October 2006 to allow DSS to make reasonable efforts to reunify the minor child with respondent as well as to conduct home studies of respondent's cousin for possible placement. A permanency planning hearing was held on 4 December 2006 after which the trial court ordered DSS to cease reunification efforts with respondent and to proceed with the termination of respondent's parental rights. Defendant filed a motion on 16 March 2007 requesting that DSS place the minor child with his cousin.

The termination hearing was held on 20 March 2007. Respondent did not appear but was represented by counsel and a guardian ad litem. The trial court entered its order on 10 May 2007 and determined that it had subject matter jurisdiction and jurisdiction over respondent. The court concluded that respondent neglected the minor child, the child is dependent such that respondent is

incapable of providing for her care and supervision, respondent willfully abandoned the minor child, and that termination of respondent's parental rights is in the best interest of the minor child.

Respondent makes two arguments on appeal: (1) the trial court lacked subject matter jurisdiction because no summons was served on the juvenile, and (2) the trial court lacked subject matter jurisdiction because DSS lacked standing to bring the termination action.

Respondent first argues the trial court lacked subject matter jurisdiction over the matter because when the petition to terminate parental rights was filed, no summons was issued to the juvenile. When a petition for termination of parental rights is filed, a summons must be issued and served on certain parties, including the parents of the child and the child. N.C. Gen. Stat. § 7B-1106(a)(1), (5) (2005). Any summons or other pleadings "directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed[.]" N.C. Gen. Stat. § 7B-1106(a). In the instant case, appellees concede and it appears from the record that the child's guardian ad litem was not served with the petition. Respondent contends the trial court therefore had no authority to act in this matter and cites to *In re C.T. & R.S.*, __ N.C. App. __, 643 S.E.2d 23 (2007) to support his argument.

Initially, we note that the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is

alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200 (2005). "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201 (2005). The trial court also has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services[.]" N.C. Gen. Stat. § 7B-1101 (2005). However, a "trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.'" *In re A.B.D.*, 173 N.C. App. 77, 86, 617 S.E.2d 707, 714 (2005) (quoting *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003)). There must be some act "invoking the judicial power of the court with respect to the matter in question.'" *In re C.T. & R.S.*, __ N.C. App. at __, 643 S.E.2d at 25 (quoting *In re A.B.D.*, 173 N.C. App. at 86-87, 617 S.E.2d at 714).

In *In re C.T. & R.S.*, the Forsyth County Department of Social Services filed a petition to terminate parental rights as to two children, C.T. and R.S., and captioned the petition with both names. *Id.* at __, 643 S.E.2d at 24. The summons issued to the respondent-mother only referenced C.T., not R.S., however, and the respondent-mother argued this defect meant the trial court had no subject matter jurisdiction as it pertained to R.S. *Id.* This

Court cited *In re Mitchell*, 126 N.C. App. 432, 485 S.E.2d 623 (1997), for the proposition that failure to issue a summons deprives the trial court of subject matter jurisdiction. *In re C.T. & R.S.*, __ N.C. App. at __, 643 S.E.2d at 25. In *Mitchell*, we stated,

In a juvenile action, the petition is the pleading; the summons is the process. The issuance and service of process is the means by which the court obtains jurisdiction. Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action.

Mitchell, 126 N.C. App. at 433, 485 S.E.2d at 624 (citations omitted). Relying on this precedent, this Court in *C.T. & R.S.* vacated the trial court's order terminating parental rights as to R.S. for lack of subject matter jurisdiction. *In re C.T. & R.S.*, __ N.C. App. at __, 643 S.E.2d at 25. The trial court's order terminating the mother's rights as to C.T. was affirmed. *Id.* at __, 643 S.E.2d at 28.

Appellees argue that respondent in this case has no right to raise the issue of whether the juvenile was properly served with a summons, and that the guardian ad litem in any case waived any defenses of insufficiency of process by making appearances in the case and by not objecting to the lack of jurisdiction. The appellees further argue that § 7B-1106 was not meant to confer subject matter jurisdiction, but rather, personal jurisdiction over the parties to the action, and personal jurisdiction may be waived by making an appearance in the case. Similar arguments were considered by this Court in *C.T. & R.S.* and rejected on the basis

that the issue at hand was subject matter jurisdiction, not personal jurisdiction. *Id.* at ___, 643 S.E.2d at 25.

We agree with respondent that this Court's recent decision in *C.T. & R.S.* is on point and thus controlling on this issue. We therefore hold that the trial court did not have subject matter jurisdiction over this matter because the juvenile was not properly served with a summons as required by § 7B-1106. The trial court's order terminating respondent's parental rights is vacated.

Since we have held the trial court's order must be vacated for lack of subject matter jurisdiction, we need not address his second issue regarding lack of standing by DSS to bring this action for termination of parental rights.

Vacated.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).