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NO. COA11-747
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

IN THE MATTER OF:

	Cleveland County
D.G.	Nos. 08 JT 9
L.G.	08 JT 10

Appeal by respondents from order entered 12 April 2011 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 21 November 2011.

Charles E. Wilson, Jr. for petitioner-appellee.

Richard Croutharmel for respondent-appellant mother.

David A. Perez for respondent-appellant father.

Womble Carlyle Sandridge & Rice, PLLC, by Murray C. Greason, III, for guardian ad litem.

GEER, Judge.

Respondent mother and respondent father each appeal from an order terminating their parental rights as to D.G. ("Doug") and L.G. ("Luke").¹ Respondent mother's sole argument on appeal is that the trial court erred in refusing to grant her request for

¹The pseudonyms "Doug" and "Luke" are used throughout this opinion to protect the minors' privacy and for ease of reading.

a continuance of the termination of parental rights ("TPR") hearing. We hold that the trial court could have reasonably concluded that respondent mother knew of the hearing and voluntarily chose not to attend and, in any event, respondent mother has failed to show that she was prejudiced by this ruling. We, therefore, affirm the trial court's order as to respondent mother.

Respondent father primarily contends that the trial court lacked subject matter jurisdiction to enter the order terminating his parental rights because the underlying order adjudicating the children as neglected and granting custody to Cleveland County Department of Social Services ("DSS") was an improper consent judgment. Even assuming, without finding, that the adjudication and disposition order was an improper consent judgment, our case law establishes that defendant's argument raises only a question of the sufficiency of the evidence to support the order and not a question of subject matter jurisdiction. As a result, respondent father's contention represents an impermissible collateral attack on the initial adjudication and disposition order and is not a basis for overturning the decision below. Because we find respondent father's remaining arguments equally unpersuasive, we also affirm the trial court's order as to respondent father.

Facts

On 23 January 2008, DSS filed a petition alleging that Doug and Luke were neglected juveniles due to respondent parents' ongoing issues with substance abuse and domestic violence. Additionally, DSS alleged that respondent mother suffered from bipolar disorder, had failed to take her recommended medication, and had previously been hospitalized because she was making suicidal threats.

An adjudicatory hearing was held on 23 April 2008. Respondent father did not appear at the hearing because he could not be located. Respondent mother stipulated to the admission into evidence of the petition and further stipulated that on the basis of the petition, the juveniles were neglected juveniles. Accordingly, the trial court adjudicated Doug and Luke neglected juveniles.

Two years later, on 4 May 2010, DSS filed petitions to terminate respondents' parental rights. Respondent mother was served with the summons and petition on 6 May 2010, while respondent father was served with the summons and petition on 7 May 2010. The trial court conducted a pretrial hearing regarding the TPR petition on 30 June 2010. Although the evidentiary hearing was originally calendared for 18 August

2010, the hearing was continued multiple times either because counsel for respondent father had been unable to secure respondent father's attendance at the hearing due to his incarceration in South Carolina or because there was insufficient time for the hearing on the specified court date. The court began the evidentiary hearing on 2 February 2011 and heard the testimony of only one witness because of lack of time. The hearing was supposed to continue on 2 March 2011 but had to be continued because of scheduling conflicts of respondents' counsel and insufficient time. The hearing was concluded on 17 March 2011.

On 12 April 2011, the trial court entered an order terminating respondents' parental rights. The trial court concluded that grounds existed to terminate respondent mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) (2009) (neglect) and § 7B-1111(a)(2) (willfully leaving children in foster care for more than 12 months without reasonable progress in correcting conditions that led to removal of children). With respect to respondent father, the court found not only that grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (2), but also that respondent father had willfully abandoned his children for six months preceding the filing of the TPR petition under N.C. Gen. Stat. § 7B-

1111(a)(7). The court then made the findings of fact required by N.C. Gen. Stat. § 7B-1110(a) (2009) and determined, based on those findings, that termination of respondents' parental rights was in the best interests of the children. Respondents timely appealed to this Court from the order terminating their parental rights.

Discussion

A termination of parental rights proceeding involves two separate phases: an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, "the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). This Court determines on appeal whether "the court's findings of fact are based upon clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

Upon determining that one or more grounds exist to terminate parental rights, a court must then engage in the dispositional phase, in which it decides whether termination of parental rights is in the best interests of the child. See N.C.

Gen. Stat. § 7B-1110(a). The court's decision that a parent's rights should be terminated may be reviewed only for abuse of discretion. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 407 (2003).

In this case, neither respondent challenges the trial court's findings of fact or conclusions of law in either the adjudicatory phase or dispositional phase. The parents do not argue that the trial court erred in concluding that grounds existed to terminate their parental rights or that termination of those rights was an abuse of discretion. Instead, both parents argue that the trial court erred in denying their motions to continue the TPR hearing. Respondent father further argues that the trial court lacked subject matter jurisdiction.

Turning first to the motions to continue, respondent mother's counsel sought a continuance at the 2 February 2011 TPR hearing. Counsel for respondent mother stated that he was making the motion to continue "for the record" because of respondent mother's absence from the hearing, but acknowledged that he had information suggesting that respondent mother was aware of the court date. The trial court denied that motion and proceeded to take testimony of a single witness. Although respondent mother was not present at the resumption of the TPR hearing on 17 March 2011, counsel did not renew the motion to

continue. He reported to the court that he had not had any contact with respondent mother since the 2 February 2011 hearing and that it was his understanding that respondent mother was reluctant to come to court because of pending warrants.

Although respondent father was not present at the 2 February 2011 hearing, his attorney told the court that she was not seeking a continuance. The attorney advised the court that respondent father was aware of the court date. At the 17 March 2011 continuation of that hearing, however, counsel for respondent father notified the court that she had been contacted that morning by respondent father's mother, who had told her that respondent father was in jail in South Carolina but that respondent father's mother planned to post his bond that same day. Counsel requested a continuance to allow respondent father to participate in the hearing, but acknowledged that respondent father had corresponded with her by letter and had been aware of the 17 March 2011 court date. The trial court denied respondent father's motion.

N.C. Gen. Stat. § 7B-803 (2009) provides:

The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery.

Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

"A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (internal citations omitted).

Here, the children had been in DSS custody for over three years, the TPR petition had been pending for almost a year, multiple continuances had already been granted (some in order to enable respondent father's attendance), and the trial court had information sufficient to indicate that both parents were aware of the court dates for the TPR hearing. We cannot conclude that the trial court abused its discretion in determining that extraordinary circumstances did not exist to grant either parent's motion to continue.

Moreover, neither respondent has cited any actual prejudice from the denial of their motion to continue or their absence from the proceedings. Given the information provided by respondent mother's counsel at the 17 March 2011 hearing --

which respondent mother also did not attend -- it is unlikely that continuing the 2 February 2011 hearing would have resulted in respondent mother's attendance at a rescheduled TPR hearing. With respect to respondent father, he had not attended any of the prior hearings, including the 2 February 2011 initial day of the TPR hearing.

Further, counsel was present for each parent and had the opportunity to fully cross-examine all of the witnesses and present any opposing evidence. Respondents have made no effort to show how their presence would have made termination of their parental rights less likely. *See In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400 ("When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal."), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992).

Consequently, we hold that the trial court did not abuse its discretion in denying respondent parents' motions to continue. Because respondent mother makes no other argument on appeal, we affirm the trial court's order terminating her parental rights.

Respondent father makes two arguments on appeal regarding the trial court's subject matter jurisdiction. First, respondent father argues that the trial court lacked subject matter jurisdiction over the TPR proceedings because the TPR petition did not allege specific facts sufficient to support termination of his parental rights. See N.C. Gen. Stat. § 7B-1104(6) (2009) (providing that petition to terminate parental rights must set forth "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist"). Respondent father did not, however, at the trial level move to dismiss the petition as failing to properly allege facts as required by N.C. Gen. Stat. § 7B-1104(6).

This Court has already held that an argument that a TPR petition failed to allege sufficient facts under N.C. Gen. Stat. § 7B-1104(6) may not be raised for the first time on appeal. *In re H.L.A.D.*, 184 N.C. App. 381, 392, 646 S.E.2d 425, 433-34 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). A challenge to the legal sufficiency of the petition must be raised by a motion pursuant to Rule 12(b)(6) of the Rules of Civil Procedure made at the trial level. *Id.*, 646 S.E.2d at 434. Because respondent father failed to properly preserve for

appeal the issue of the sufficiency of the petition, we do not address it.

Respondent father next argues that the trial court lacked subject matter jurisdiction to terminate his parental rights because the order adjudicating the juveniles neglected and granting custody to DSS was void. Respondent father contends that DSS, as a result, did not properly have custody of the children and, therefore, did not have standing to file the petition to terminate his parental rights.

Respondent father asserts that the initial adjudication order was an improper consent judgment. Because respondent father was not present at the hearing and did not consent to the neglect adjudication, respondent father correctly argues that the court could not enter a consent judgment adjudicating the children neglected. See N.C. Gen. Stat. § 7B-902 (2009) ("Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.")²; *In re J.R.*, 163 N.C.

²N.C. Gen. Stat. § 7B-902 has since been repealed, but the text of § 7B-902 now appears in N.C. Gen. Stat. § 7B-801(b1). See 2011 N.C. Sess. Laws ch. 295 §§ 5, 8.

App. 201, 202, 592 S.E.2d 746, 747 (2004) (holding that "the consent of one parent to a finding of neglect does not give rise to a valid consent judgment in the absence of the other parent."); *In re Thrift*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 397 (2000) (holding that father's stipulation in absence of mother was insufficient to support consent adjudication order).

DSS and the guardian ad litem, however, dispute whether the order was intended to be a consent judgment. We need not address that issue, however, because even assuming, without deciding, that the trial court erred in entering the initial adjudication of neglect, any such error would not affect the validity of the order for purposes of this proceeding to terminate respondent father's parental rights.

As this Court has noted, once the order adjudicating the minor children neglected was entered, "the proper avenues for Respondent to attack the adjudication of neglect . . . were 1) appeal [of that order] . . . or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60." *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987). Respondent father did not, however, appeal the initial neglect adjudication and disposition or seek any other relief from that order.

Respondent father is, therefore, making a collateral attack on the initial adjudication order. See *In re Webber*, 201 N.C.

App. 212, 219, 689 S.E.2d 468, 474 (2009) ("A collateral attack is one in which a party is not entitled to the relief requested unless the judgment in another action is adjudicated invalid." (internal quotation marks omitted)), *cert. denied*, 364 N.C. 241, 699 S.E.2d 925 (2010). Although collateral attacks are not generally allowed under North Carolina law, an order that is void on its face because the trial court lacked subject matter jurisdiction may be collaterally attacked. *See id.* at 220, 689 S.E.2d at 474-75.

The consent judgment issue raised by respondent father does not, however, implicate the trial court's subject matter jurisdiction. Respondent father does not allege that the trial court lacked jurisdiction to hear the neglect proceeding, but rather that the trial court exceeded its statutory authority in entering the order adjudicating Doug and Luke neglected children based solely on respondent mother's consent in violation of N.C. Gen. Stat. § 7B-902.

In both *In re J.R.* and *In re Thrift*, however, this Court, which was addressing direct appeals by the non-consenting parent, held not that the order was void or that the trial court lacked jurisdiction, but rather that the violation of N.C. Gen. Stat. § 7B-902 resulted in the adjudication not being supported by sufficient evidence. *See In re J.R.*, 163 N.C. App. at 203,

592 S.E.2d at 747 ("As the trial court's adjudication of neglect therefore did not have a sufficient evidentiary basis, we reverse and remand this case for a new hearing."); *In re Thrift*, 137 N.C. App. at 564, 528 S.E.2d at 397 ("For the reasons stated herein, we hold that the trial court erred in finding the allegations of neglect contained in the petition had been proved by clear and convincing evidence.").

In other words, in this case, the trial court hearing the neglect proceeding had jurisdiction over the proceeding and could properly have adjudicated the children neglected. The trial court arguably erred, however, in concluding that respondent mother's consent to that adjudication eliminated any need for evidence beyond that consent to support the conclusion that the children were neglected. At most, the order was not supported by the evidence.

Although the order may have been "contrary to law," it was thus at most "voidable" and remains "binding until vacated or corrected." *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001) (holding that even though trial court lacked statutory authority to impose particular sentence, judgment by sentencing court was binding because trial court had jurisdiction over dispute and parties); see also *In re Webber*, 201 N.C. App. at 221, 689 S.E.2d at 475 (holding that petitioner

could not collaterally attack initial commitment order that violated statute despite fact that commitment period in initial order exceeded trial court's authority because trial court had jurisdiction to hear commitment proceeding).

While respondent father could have appealed the initial adjudication of neglect, he cannot now collaterally attack it since the order was merely voidable. That order, including its grant of custody to DSS, remains binding. The trial court, therefore, had jurisdiction to hear the TPR petition. Since respondent father makes no further argument regarding the termination of his parental rights, we also affirm the trial court's order with respect to respondent father.

Affirmed.

Judges STEELMAN and ROBERT N. HUNTER JR. concur.

Report per Rule 30(e).