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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-262

Filed: 5 July 2017

Surry County, No. 16JT17

IN THE MATTER OF: D.L.A.D.

Appeal by respondent-mother from an adjudication order terminating her parental rights entered 16 December 2016 by the Honorable David V. Byrd in Surry County District Court. Heard in the Court of Appeals 8 June 2017.

Jeffery M. Hill, petitioner-appellee father, pro se.

Richard Croutharmel for respondent-appellant mother.

BERGER, Judge.

Nancy Diane Davis (“Respondent-mother”) appeals from an order terminating her parental rights. She contends the trial court erred when it exercised authority over a Petition to Terminate Parental Rights because it lacked requisite subject matter jurisdiction. We agree.

Factual and Procedural Background

The record shows that D.L.A.D. was born to Respondent-mother on October 24, 2007 in Guilford County. For the first seven years of D.L.A.D.'s life, Respondent-mother believed that his biological father was an individual with whom she had an intermittent relationship. However, following a paternity test, Respondent-mother learned that Jeffrey Michael Hill ("Petitioner-father") was instead D.L.A.D.'s biological father.

Petitioner-father began making child support payments to Respondent-mother and obtained a temporary custody order implementing graduated visitation. Initially, the temporary custody order granted Petitioner-father supervised visitation with D.L.A.D. Over time, their visits became unsupervised and developed into a routine schedule allowing for visits every other weekend. Provisions of the temporary custody order required Respondent-mother and Petitioner-father to return to Surry County District Court on October 5, 2015 to review the order. The district court, at Respondent-mother's request, granted a continuance and ordered both parents to submit to drug tests. Petitioner-father complied, but Respondent-mother did not. Shortly thereafter, Respondent-mother failed to bring D.L.A.D. to scheduled visits with Petitioner-father. On October 2, 2015, in response to a second failed visit, Petitioner-father obtained an order of contempt, which required Respondent-mother to reschedule the failed visit and submit to a drug test.

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Respondent-mother's drug test results were positive for cocaine and Benzoylcegonine.

An *ex parte* custody order was entered on November 5, 2015 and, from that date forward, D.L.A.D. resided primarily with Petitioner-father in Davidson County. In January 2016, Respondent-mother began having supervised visits with D.L.A.D. Over the following months, Respondent-mother repeatedly offered to renounce her parental rights to D.L.A.D., had minimal contact with D.L.A.D., and did not provide monetary support or gifts to D.L.A.D.

On March 8, 2016, Petitioner-father filed a petition in Surry County District Court to terminate Respondent-mother's parental rights to D.L.A.D. Respondent-mother filed an answer on April 8, 2016 and a motion to dismiss on April 13, 2016. The trial court denied the motion to dismiss on June 15, 2016 and heard testimony on June 29, 2016 and August 30, 2016. On December 16, 2016, the trial court issued an Adjudication Order finding Respondent-mother had neglected D.L.A.D., and that D.L.A.D. was a neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101. The trial court also concluded that sufficient grounds existed to terminate Respondent-mother's parental rights to D.L.A.D. and that doing so was in the best interests of the child. The trial court's Adjudication Order had findings which included, among others: (1) D.L.A.D. resided, at that time, in Davidson County with Petitioner-father and had done so since November 5, 2015; and (2) the Surry County

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District Court “ha[d] jurisdiction to hear and determine this petition relating to the termination of parental rights to . . . [D.L.A.D.] pursuant to N.C.G.S. § 7B-1101.” Respondent-mother appeals from this order.

Standard of Review

“Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question. Subject matter jurisdiction cannot be conferred by consent or waiver and[] . . . may be raised for the first time on appeal.” *In re B.L.H.*, 239 N.C. App. 52, 57-58, 767 S.E.2d 905, 909 (2015) (citations and quotation marks omitted). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *In re K.U.-S.G., D.L.L.G., & P.T.D.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

Analysis

Respondent-mother argues on appeal that the Surry County District Court did not have subject matter jurisdiction to terminate her parental rights. Because Petitioner-father had custody of D.L.A.D. and the child resided with him in Davidson County at the time he filed a petition to terminate Respondent-mother’s parental rights in Surry County District Court, we agree that the trial court lacked subject matter jurisdiction and erred when it ordered Respondent-mother’s parental rights to be terminated. We, therefore, vacate the trial court’s adjudication order.

North Carolina General Statute § 7B-1101 provides for jurisdiction over termination of parental rights proceedings and grants district courts with

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 or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101 (2016). “[G]enerally ‘residence’ indicates the person’s actual place of abode, . . . permanent or temporary, and ‘domicile’ indicates the person’s permanent home to which, when absent, he intends to return. Residence is a prerequisite to establishing a domicile [I]t is simpler to establish a change of residence than a change of domicile.” *In re Leonard*, 77 N.C. App. 439, 440-41, 335 S.E.2d 73, 74 (1985) (citation omitted).

In *In re J.M.*, ___ N.C. App. ___, 797 S.E.2d 305 (2016), this Court vacated an order terminating parental rights for lack of subject matter jurisdiction. There, a Durham County District Court named the petitioners as the juvenile’s guardians and physical custodians in a 2013 custody order. *Id.* at ___, 797 S.E.2d at 306. As a result, the juvenile moved to and was residing in Wake County for the following two years when the petitioners filed a petition in Durham County to terminate the juvenile’s mother’s parental rights. *Id.* at ___, 797 S.E.2d at 306. Accordingly, this Court held that the Durham County District Court had no jurisdictional power to terminate the mother’s parental rights because “no evidence [showed] that [the

child] was found in Durham County or was in the custody of a child-placing agency in Durham County at the time the petition was filed.” *Id.* at ___, 797 S.E.2d at 306-07.

Here, the Surry County District Court lacked jurisdiction needed to enter an order terminating Respondent-mother’s parental rights. For Surry County to obtain jurisdiction pursuant to N.C. Gen. Stat. § 7B-1101, D.L.A.D. must have been “found in” Surry County, “resid[ing] in” Surry County, or “in the legal or actual custody of [Surry] [C]ounty department of social services or [a] licensed child-placing agency” at the time Petitioner-father filed the petition to terminate Respondent-mother’s parental rights.

It is uncontested that D.L.A.D. was never in the custody of Surry County Department of Social Services or a Surry County child-placing agency. It is also uncontested that as a result of a November 5, 2015 temporary custody order, D.L.A.D. was residing primarily with Petitioner-father in Davidson County when he filed the petition to terminate Respondent-mother’s parental rights. Further, there is no evidence in the record from which we can determine that D.L.A.D. was found in Surry County the day the Petition was filed. *See In re J.L.K.*, 165 N.C. App. 311, 320, 598 S.E.2d 387, 393 (2004) (holding that the trial court properly exercised its jurisdiction when granting a petition to terminate parental rights, despite the child having resided in Wake County since birth, because the trial court made a finding

of fact in its termination of parental rights order that the minor child was physically present in Johnston County at the time the petition was filed).

Even though Surry County maintained jurisdiction over D.L.A.D.'s pending custody proceeding, he was not "residing in," "found in," or "in the legal or actual custody of" Surry County Department of Social Services or a child-placing agency as defined in N.C. Gen. Stat. § 7B-1101. *See In re Humphrey*, 156 N.C. App. 533, 537, 577 S.E.2d 421, 425 (2003) (holding that although the original child custody action was filed in Wake County and a temporary custody order was entered in Wake County, a New Hanover District Court properly exercised jurisdiction when granting a petition terminating parental rights because the child resided with the petitioner in New Hanover County when the petition was filed and the order terminating parental rights was issued). Accordingly, the Surry County District Court lacked the jurisdictional authority to terminate Respondent-mother's parental rights.

Conclusion

The trial court did not have subject matter jurisdiction to terminate Respondent-mother's parental rights because Petitioner-father failed to file his petition in accordance with N.C. Gen. Stat § 7B-1101. The Surry County District Court's order is, therefore, vacated.

VACATED.

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Judges DILLON and ZACHARY concur.

Report per Rule 30(e).