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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1003

Filed: 7 May 2019

Robeson County, No. 13 JT 352

IN THE MATTER OF: K.L.C.

Appeal by respondent-mother from order entered 22 June 2018 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 28 March 2019.

Jennifer A. Clay for petitioners-appellees.

Parent Defender Wendy Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant.

ZACHARY, Judge.

Respondent-mother appeals from an order terminating her parental rights to the minor child "Karl,"[1] who was born in February 2013. Because the petition filed in this cause fails to demonstrate Petitioners' standing to sue for the termination of Respondent-mother's parental rights under N.C. Gen. Stat. § 7B-1103(a)(7) (2017), we must vacate the termination order.

Background

[1] To protect the juvenile's identity, we adopt the pseudonym chosen by the parties.

Petitioners are Karl's paternal grandparents. Due to Respondent-mother's substance abuse, on 20 January 2015, the juvenile court adjudicated Karl as neglected and placed him in the legal and physical custody of his father. Karl came to live with Petitioners following his father's death on 27 July 2017.

On 26 September 2017, Petitioners filed a petition to terminate Respondent-mother's parental rights on the grounds of neglect, willful abandonment, and failure to provide substantial financial support or consistent care for Karl. Respondent-mother filed her written answer opposing termination on 20 December 2017.

The trial court held a hearing on the termination petition on 30 April 2018. In an "Order Terminating Parental Rights" entered 22 June 2018, the court adjudicated the existence of grounds to terminate Respondent-mother's parental rights for (1) willfully abandoning Karl pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), and (2) failing to provide him with substantial support or consistent care pursuant to N.C. Gen. Stat. § 7B-1111(a)(5).[2] The trial court further determined that terminating Respondent-mother's parental rights was in Karl's best interest. *See* N.C. Gen. Stat. § 7B-1110(a). Respondent-mother timely filed notice of appeal from the termination order.

Discussion

On appeal, Respondent-mother claims that the trial court erred by concluding that Petitioners had standing to file their termination petition under N.C. Gen. Stat.

[2] Subdivision (a)(5) only applies to "[t]he *father* of a juvenile born out of wedlock[.]" N.C. Gen. Stat. § 7B-1111(a)(5) (emphasis added).

§ 7B-1103(a)(7). As a result, she contends, the trial court lacked subject matter jurisdiction to hear the petition and enter the termination order. We agree.

It is well established that "standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re A.D.N.*, 231 N.C. App. 54, 59, 752 S.E.2d 201, 205 (2013) (citation, quotation marks, and brackets removed), *disc. review denied*, 367 N.C. 321, 755 S.E.2d 626 (2014). Whether the petitioner has standing is a legal issue, which we review *de novo* on appeal. *Id.* (citation omitted).

"Standing to file a petition or motion to terminate parental rights is conferred by N.C. Gen. Stat. § 7B-1103." *In re N.G.H.*, 237 N.C. App. 236, 237, 765 S.E.2d 550, 551 (2014). Section 7B-1104 of the Juvenile Code requires the pleading to include, *inter alia*, "[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [section] 7B-1103 to file a petition or motion" to terminate the respondent's parental rights. N.C. Gen. Stat. § 7B-1104(2). Of particular significance here, this Court has held that the petition must also "include any document or order through which the petitioner claims standing that will enable the court to determine whether it has subject matter jurisdiction." *In re N.G.H.*, 237 N.C. App. at 237, 765 S.E.2d at 551. "Where there is no proper petition, . . . the trial court has no jurisdiction to enter an order for

termination of parental rights." *In re Z.T.B.*, 170 N.C. App. 564, 568, 613 S.E.2d 298, 300 (2005).

Petitioners asserted standing in this matter pursuant to N.C. Gen. Stat. § 7B-1103(a)(7), which provides that a termination petition may be filed by "[a]ny person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes." N.C. Gen. Stat. § 7B-1103(a)(7). Their termination petition included the allegation that "Petitioners are authorized to file this Petition pursuant to 7B-1103(a)(7) in that they have filed a petition to adopt the minor child." However, Petitioners failed to attach a copy of the adoption petition.

In her written answer, Respondent-mother admitted "based on information and belief" that Petitioners had filed a petition to adopt Karl, but denied that they "filed a *valid* petition to adopt because . . . Petitioners lack standing to file [a] petition to adopt, pursuant to N.C.G.S. §48-2-301 and §48-3-201." (Emphasis added). Section 48-2-301 of our General Statutes allows a prospective adoptive parent to file a petition for adoption under Chapter 48 "only if [the] minor has been placed with the prospective adoptive parent pursuant to Part 2 of Article 3 of this Chapter unless the requirement of placement is waived by the court for cause." N.C. Gen. Stat. § 48-2-301(a). Section 48-3-201, in turn, limits the persons or entities authorized to "place" a child with a prospective adoptive family. *See* N.C. Gen. Stat. § 48-3-201(a); *see also* N.C. Gen. Stat. § 48-1-101(13) (defining "[p]lacement" as the "transfer of physical

custody of a minor to the selected prospective adoptive parent").

At the beginning of the hearing on 30 April 2018, counsel for Respondent-mother informed the trial court that she had previously moved to dismiss the termination petition for lack of standing, based on Petitioners' failure to file a "proper petition for adoption." Specifically, counsel alleged that Petitioners "had not obtained a special waiver in order to proceed with that petition for adoption" at the time it was filed. *See* N.C. Gen. Stat. § 48-2-301 (allowing the court to waive "for cause" the requirement that the child have been placed with the prospective adoptive parent before the prospective parent may petition for adoption). Respondent-mother's counsel further advised the trial court:

> We're satisfied that the waiver [for cause] has been obtained. We're not necessarily in agreement that that corrects the issue of standing at the time that this [termination] petition was filed. I have not been able to find any case law . . . for or against retroactively approving standing at the time that the [termination] petition was filed if standing didn't exist at that time.

Counsel for Petitioners advised the court that, after filing their termination petition, Petitioners "filed an amended petition for adoption including the waiver" and had, therefore, "retroactively fixed the problem[.]"

The trial court orally denied Respondent-mother's motion to dismiss the termination petition for lack of standing, finding that the omission in Petitioners' adoption petition "has been corrected and they have filed the necessary waiver, it is

timely, [and] everybody's been put on notice[.]" The court included the following findings and conclusions in its termination order:

> CONCLUSIONS OF LAW
>
> 1. The Court has jurisdiction over the parties and subject matter of this action.
>
> 2. That [Respondent-mother] has been properly served.
>
> . . . .
>
> DISPOSITION
>
> After considering the factual evidence, the needs of the juvenile, the Court finds by clear, cogent, and convincing evidence the following facts:
>
> . . . .
>
> 2. All parties were notified of this proceeding, which is properly before this Court.
>
> . . . .
>
> 5. That [Petitioners] who are the biological paternal grandparents wish to adopt the minor child.

The trial court made no additional written findings of fact or conclusions of law with regard to Petitioners' standing under N.C. Gen. Stat. § 7B-1103(a)(7).

After careful review, we conclude that the instant case is governed by our decisions in *In re T.B.*, 177 N.C. App. 790, 629 S.E.2d 895 (2006), and *In re N.G.H.*, 237 N.C. App. 236, 765 S.E.2d 550 (2014). In *In re T.B.*, the petitioner ("DSS") claimed standing to file a petition to terminate parental rights under N.C. Gen. Stat.

§ 7B-1103(a)(3) as a "county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction." 177 N.C. App. at 792, 629 S.E.2d at 897 (quoting N.C. Gen. Stat. § 7B-1103(a)(3)).[3] As we explained, in order "to have standing to file for termination of parental rights, DSS must *prove* that it has legal custody of the child at the time the petition is filed." *Id.* (emphasis added). Because our trial courts are courts of record, we held that "where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction *only if the record includes a copy of an order*, in effect when the petition is filed, that awards DSS custody of the child." *Id.* at 793, 629 S.E.2d at 897 (emphasis added). Applying these principles, we concluded that

> because the petition was not accompanied by a copy of the custody order then in effect, . . . the petition failed to confer subject matter jurisdiction on the trial court. This omission <u>need not have been fatal</u> if [the] petitioner had simply amended the petition by attaching the proper custody order or otherwise ensured the custody order was made a part of the record before the trial court. Thus, it was the failure by DSS <u>either</u> to attach the custody order to the petition <u>or</u> to remedy this omission that ultimately deprived the court of subject matter jurisdiction.

Id. at 793, 629 S.E.2d at 898.

The petitioners in *In re N.G.H.*, like Petitioners here, asserted standing under N.C. Gen. Stat. § 7B-1103(a)(7), "because they have filed a petition to adopt the child."

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[3] *See also* N.C. Gen. Stat. § 7B-1104(5) (requiring that, whenever custody of the juvenile has been awarded by a court, "a copy of the custody order shall be attached to the petition" for termination of parental rights).

237 N.C. App. at 237, 765 S.E.2d at 551. We held that their failure to attach a copy of the adoption petition to their termination petition—or to incorporate the adoption petition into the record by other means—deprived the trial court of jurisdiction. *Id.* at 238, 765 S.E.2d at 552. Nor was standing established by the petitioners' testimony that they had "contemporaneously" filed an adoption action along with their termination petition. *Id.* (brackets omitted). We noted that "no testimony established that any adoption petition was filed pursuant to Chapter 48 or that [the p]etitioners had standing to file an adoption petition under Chapter 48." *Id.*

In their brief to this Court, Petitioners point to the allegation in their termination petition that they "are authorized to file this Petition pursuant to 7B-1103(a)(7) in that they have filed a petition to adopt the minor child." They further contend that "there was testimony that the petition to adopt Karl had been filed prior to the filing of the petition to terminate [Respondent-mother's] parental rights." Petitioners also claim they were permitted to amend their adoption petition under N.C. Gen. Stat. § 1A-1, Rule 15, and that the amendment related back to the petition's original filing date. *See* N.C. Gen. Stat. § 1A-1, Rule 15(c).

We find these arguments unavailing. Though the termination petition alleged Petitioners' filing of a petition to adopt Karl, it failed to allege that they filed a petition for adoption under Chapter 48 of the General Statutes, as required by N.C. Gen. Stat. § 7B-1103(a)(7). *See In re N.G.H.*, 237 N.C. App. at 237, 765 S.E.2d at 551. Nor did

the termination petition allege Petitioners' eligibility to petition for adoption under Chapter 48 or facts demonstrating such eligibility. *See id.*; *see also* N.C. Gen. Stat. §§ 48-2-301, -3-201. Moreover, what Petitioners cast as "testimony" about this issue was, in fact, an unsworn representation by counsel, which does not constitute evidence. *See State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). In her written answer to the termination petition, Respondent-mother affirmatively denied that Petitioners had standing to file an adoption petition under the relevant statutes in Chapter 48. Inasmuch as the basis for Petitioners' standing under N.C. Gen. Stat. § 7B-1103(a)(7) was reasonably in question, their failure to attach a copy of the adoption petition to the termination petition is fatal.

We need not resolve whether Petitioners' purported amendment of their adoption petition was sufficient to retroactively vest them with standing by operation of N.C. Gen. Stat. § 1A-1, Rule 15(c). It is undisputed that Petitioners failed to make the adoption petition—or the amendment—part of the trial court record. Because the document essential to Petitioners' standing under N.C. Gen. Stat. § 7B-1103(a)(7) was not included in the record, the cases in which this Court has deemed non-prejudicial a petitioner's failure to attach the document to the termination petition are inapposite to the case at bar. *See In re H.L.A.D.*, 184 N.C. App. 381, 391-92, 646 S.E.2d 425, 433 (2007) (finding no prejudice where "the custody order was made part of the record before the trial court" and "[v]arious trial court orders in the record on

appeal and referenced in the [termination] order . . . note that [the] respondent was present at pre-termination hearings in which custody was granted to [the] petitioners"), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); *In re W.L.M.*, 181 N.C. App. 518, 526, 640 S.E.2d 439, 444 (2007) ("The record before the trial court contained a custody order awarding DSS custody of the children, and thereby DSS showed that it had standing to file for termination of [the] respondent's parental rights."); *see also In re B.D.*, 174 N.C. App. 234, 242, 620 S.E.2d 913, 918 (2005) (concluding that the respondents were "unable to demonstrate any prejudice arising from [the] petitioner's failure to attach the custody order to the [termination] petition" where (1) the petition alleged that " 'custody of [Brian] was given by prior orders' of the trial court, and it referenced the court file wherein those orders were entered"; and (2) the "respondent-father admitted [in his answer] that Brian was 'in the legal custody of the Buncombe County Department of Social Services' "), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006).

As in *In re T.B.* and *In re N.G.H.*, the petition for termination of parental rights filed in this cause failed to include the "document or order through which the petitioner claims standing that will enable the court to determine whether it has subject matter jurisdiction." *In re N.G.H.*, 237 N.C. App. at 237, 765 S.E.2d at 551. Because Petitioners failed thereafter to make the relevant document a part of the trial court record, "the trial court never obtained subject matter jurisdiction." *In re*

T.B., 177 N.C. App. at 793, 629 S.E.2d at 898. Therefore, "the order terminating Respondent-mother's parental rights must be vacated without prejudice to Petitioners' right to file a new petition alleging facts that would show they have standing to bring that action." *In re N.G.H.*, 237 N.C. App. at 239, 765 S.E.2d at 552. In light of our holding, we do not reach Respondent-mother's remaining issues on appeal.

We emphasize that we have not reviewed, nor do we decide, the merits of the petition to terminate Respondent-mother's parental rights.

VACATED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).