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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1053

Filed 1 October 2024

Guilford County, Nos. 19JT506–509, 21JT523–524

IN THE MATTER OF:

J.B., R.B., G.B., R.B., R.B., R.B.

Appeal by respondent-mother from an order terminating her parental rights, entered 3 July 2023 by Judge William B. Davis in Guilford County District Court.

Heard in the Court of Appeals 28 May 2024.

Peter Wood, for respondent-appellant mother.

Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Hedrick Gardner Kincheloe & Garofalo, LLP, by A. Grant Simpkins, for guardians ad litem.

FLOOD, Judge.

Respondent-Mother appeals from the trial court’s order terminating her parental rights in Jack, Ramona, Gary, Rachel, Raya, and Regina (collectively, “the children”).¹ Respondent-Mother’s counsel has filed a North Carolina Rules of Appellate Procedure Rule 3.1(e) no-merit brief with this Court in which he identifies

¹ Pseudonyms are used to protect the identities of the minor children pursuant to N.C.R. App. P. 42.

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two issues as arguably supporting appeal: whether the trial court prejudicially erred when it found grounds to terminate Respondent-Mother's parental rights, and whether the trial court abused its discretion in determining it was in the children's best interests to terminate Respondent-Mother's parental rights. Upon careful review, we find no merit in these arguments and therefore affirm the trial court's order. Counsel, however, further argues the trial court prejudicially erred in conducting the termination hearing where it did not have subject matter jurisdiction over Raya, and alleges merit in this issue. We conclude this argument was improperly included as part of counsel's Rule 3.1(e) brief, and upon our independent review, in light of our consideration of the entire Record, find no potentially meritorious subject matter jurisdiction argument as to any of the children. We therefore dismiss counsel's subject matter jurisdiction argument.

I. Factual and Procedural Background

On 30 December 2019, the Guilford County Department of Social Services ("DSS") filed petitions alleging the following: (1) Jack was neglected, dependent, and abused, and (2) Ramona, Gary, and Rachel were neglected and dependent. On 21 June 2021, the trial court adjudicated Jack to be abused, neglected, and dependent, and adjudicated Gary, Rachel, and Ramona to be neglected and dependent. On 30 June 2021, DSS filed petitions alleging the twins, Raya and Regina, to be neglected and dependent. On 20 August 2021, the trial court adjudicated Raya and Regina to be neglected and dependent.

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On 29 August 2022, DSS filed a petition to terminate Respondent-Mother's parental rights in the children. Following a hearing on 11 April 2023, the trial court found grounds to terminate Respondent-Mother's rights in the children, and found this termination to be in the best interests of the children. The trial court entered its termination of parental rights ("TPR") order on 3 July 2023. Respondent-Mother timely appealed and retained appellate counsel. Pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, counsel has filed a no-merit brief with this Court, and informed Respondent-Mother by letter that he "can find no issues to raise with the North Carolina Court of Appeals," and that "he has filed a 'no merit' brief with" this Court.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final order issued by a district court terminating Respondent-Mother's parental rights pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2023).

III. Analysis

Counsel has identified in his Rule 3.1(e) brief two issues that arguably support appeal, while conceding that they likely lack appellate merit: (1) whether the trial court prejudicially erred when it found grounds to terminate Respondent-Mother's parental rights, and (2) whether the trial court abused its discretion in determining it was in the children's best interests to terminate Respondent-Mother's parental rights. Counsel, however, has also raised in his Rule 3.1(e) brief an issue that he

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argues is actually meritorious: he contends the trial court prejudicially erred in conducting the termination hearing where it did not have subject matter jurisdiction over Raya.

We first consider the no-merit issues identified in counsel’s brief. Counsel for an appellant may file a no-merit brief with this Court where counsel “concludes that there is no issue of merit on which to base an argument for relief,” and “[i]n the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result.” N.C.R. App. P. 3.1(e). When a no-merit brief is filed pursuant to Rule 3.1(e), this Court will conduct an “independent review . . . of the issues identified therein” to see if they have potential merit. *In re K.M.S.*, 380 N.C. 56, 59, 867 S.E.2d 868, 870 (2022) (citation and internal quotation marks omitted); *see also In re Z.R.*, 378 N.C. 92, 98, 859 S.E.2d 180, 184 (2021) (“When a parent’s appellate counsel files a no-merit brief on his or her client’s behalf pursuant to N.C.R. App. P. 3.1(e), this Court reviews the issues that are identified in that brief to see if they have potential merit.” (citation omitted)). Such review is made “in light of our consideration of the entire record[.]” *In re L.E.M.*, 372 N.C. 396, 402–03, 831 S.E.2d 341, 345 (2019). Where this Court determines the proposed issues are lacking in merit, the correct disposition is to affirm the trial court’s TPR order. *See In re K.M.S.*, 380 N.C. at 59, 867 S.E.2d at 870 (“Having reviewed the two issues identified by counsel in the no-merit brief, we are satisfied the trial court’s order terminating respondent’s parental

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rights is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court’s [TPR] order[.]”).

Upon our independent review of the Record per Rule 3.1(e), we find no merit in either of counsel’s two identified claims; we therefore affirm the trial court’s TPR order. *See In re K.M.S.*, 380 N.C. at 59, 867 S.E.2d at 870; *see also In re Z.R.*, 378 N.C. at 98, 859 S.E.2d at 184.

We next address counsel’s allegedly meritorious argument. Counsel argues in his brief—which he has titled a “No-Merit Brief . . . pursuant to N.C. R. App. P. 3.1(e)” and represented to Respondent-Mother as solely a Rule 3.1(e) no-merit brief—that the trial court prejudicially erred in conducting the termination hearing where it did not have subject matter jurisdiction over Raya. As set forth above, however, an appellate brief filed pursuant to Rule 3.1(e) permits appellate counsel only to “identify any issues in the record on appeal that *arguably support* the appeal[.]” and for such issues, appellate counsel “*must* state why those issues lack merit or would not alter the ultimate result.” N.C.R. App. P. 3.1(e) (emphasis added).

Here, counsel’s inclusion of the subject matter jurisdiction argument in his Rule 3.1(e) brief contravenes the scope of this appeal and the scope of our appellate review. While “issues challenging subject matter jurisdiction may be raised at any time, even for the first time on appeal[.]” *Gurganus v. Gurganus*, 252 N.C. App. 1, 4, 796 S.E.2d 811, 814 (2017) (citation omitted), the challenge must be properly raised. Counsel alleges merit as to this issue, but an appellate brief filed pursuant to Rule

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3.1(e) is to identify only those issues that “arguably support appeal”—*not* those where an appellant actually alleges merit. N.C. R. App. P. 3.1(e). Further, for any issue properly included in a Rule 3.1(e) brief, appellate counsel is *required* to explain why the issue lacks merit or would not alter the ultimate result. *See id.*

Here, counsel has included no such explanation as to the subject matter jurisdiction argument. Accordingly, as this argument was improperly included in counsel’s Rule 3.1(e) brief, and counsel failed to include any explanation as to the issue’s lack of merit, we decline to consider this argument on the merits, and the correct disposition is to dismiss. *See* N.C.R. App. P. 3.1(e); *see also* N.C.R. App. P. 28(b)(6) (“Issues not presented in a party’s brief . . . will be taken as abandoned.”); *Gyger v. Clement*, 263 N.C. App. 118, 126, 823 S.E.2d 400, 406 (2018) (“It is not the job of this Court to create an argument for an appellant.”).

We further decline to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to hear this argument, as our Rule 3.1(e) review reveals no potentially meritorious subject matter jurisdiction claim. *See In re L.E.M.*, 372 N.C. at 402–03, 831 S.E.2d at 345; *see also* N.C.R. App. P. 3.1(e); N.C.R. App. P. 2 (“To prevent manifest injustice to a party . . . [this Court] may . . . suspend or vary the requirements or provisions of these rules . . . upon its own initiative.”). Upon our review, it is apparent from the face of the Record that counsel has made his subject matter jurisdiction argument as to the wrong child. Counsel contends in his brief that the trial court lacked subject matter jurisdiction over Raya, and this contention is

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followed by a cite to the Record pages where one may find the neglect and dependency petition for Raya. Raya's petition, however, *does* contain a signature from the presiding Judge Angela C. Foster. The petition that does *not* contain a signature from the "person authorized to administer oaths" is *Regina's* neglect and dependency petition. Despite this omission, however, upon our Rule 3.1(e) review—in light of our consideration of the entire Record and any potentially meritorious subject matter jurisdiction claim it might reveal—we ascertain the omission of a signature was not fatal to the trial court's subject matter jurisdiction over Regina, and there is no arguably meritorious subject matter jurisdiction claim as to Raya, Regina, or the remaining four children. *See In re L.E.M.*, 372 N.C. at 402–03, 831 S.E.2d at 345; *see also* N.C.R. App. P. 3.1(e).

Accordingly, as counsel has improperly included in his Rule 3.1(e) brief this allegedly meritorious subject matter jurisdiction argument; counsel has presented no statement as to why this issue lacked merit or would not alter the ultimate result; a facial review of the Record reveals he has made this argument as to the wrong child; and our Rule 3.1(e) review, in light of our consideration of the whole Record, reveals there is no potentially meritorious subject matter jurisdiction claim as to any of the children, this argument is dismissed. *See* N.C.R. App. P. 3.1(e); *see also* N.C.R. App. P. 28(b)(6); *In re L.E.M.*, 372 N.C. at 402–03, 831 S.E.2d at 345; *Gyger*, 263 N.C. App. at 126, 823 S.E.2d at 406.

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We note that the dissent, in addressing the merits of counsel's subject matter jurisdiction argument, recognizes that subject matter jurisdiction may be raised at any time, but seems to accept the notion that it may be raised regardless of procedural propriety and without invoking Rule 2. *See* N.C.R. App. P. 3.1(e); *see also* N.C.R. App. P. 2. Further, in conducting its subject matter jurisdiction analysis, the dissent ignores the presumptions in favor of jurisdiction and regularity on the part of public officials in performance of their duties, and the burden on the contesting party in overcoming these presumptions. *See In re N.T.*, 368 N.C. 705, 707–08, 782 S.E.2d 502, 503–04 (2016) (providing that “although the question of subject matter jurisdiction may be raised at any time[,] where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction[,]” and that “generally, there is a presumption that a public official in performance of an official duty acts in accordance with the law and the authority conferred upon him. The burden is upon the contesting party to overcome this presumption” (citations and internal quotation marks omitted) (cleaned up)). As explained above, counsel has improperly raised his subject matter jurisdiction argument on appeal, and upon our Rule 3.1(e) review of the Record, we find no potentially meritorious subject matter jurisdiction claim as to any of the children. *See* N.C.R. App. P. 3.1(e); *see also* N.C.R. App. P. 28(b)(6); *In re L.E.M.*, 372 N.C. at 402–03, 831 S.E.2d at 345; *Gyger*, 263 N.C. App. at 126, 823 S.E.2d at 406.

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We also note that DSS has expressed concern in its brief that Respondent-Mother has not received her right to meaningful appellate review, as it is “unclear how [she] could know of her right to address the purported jurisdictional issue[.]” As our Supreme Court held in *In re L.E.M.*, however, while Rule 3.1(e) “requires that parents be advised by counsel of their opportunity to file a pro se brief, Rule 3.1[(e)] neither states nor implies that appellate review of the issues set out in the no-merit brief hinges on whether a pro se brief is actually filed by a parent.” 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019); *see also* N.C.R. App. P. 3.1(e) (“In the no-merit brief, . . . [c]ounsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of filing the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.”). As to this holding, the Supreme Court provided it “furthers the significant interest of ensuring that orders depriving parents of their fundamental right to parenthood are given meaningful appellate review.” *In re L.E.M.*, 372 N.C. at 402, 831 S.E.2d at 345.

Here, Respondent-Mother’s counsel, prior to filing the current no-merit brief and in accordance with the requirements of Rule 3.1(e), sent Respondent-Mother a letter informing her of his intent to file this brief, as well as apprising Respondent-Mother of her right to file a pro se brief with this Court. Evidence of this communication is attached to the no-merit brief. *See* N.C.R. App. P. 3.1(e). Further, while Respondent-Mother had the right to file a pro se brief supplemental to a Rule

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3.1(e) no-merit brief, no such right exists as to a Rule 28 brief involving issues of alleged merit, and the allegedly meritorious issue here was improperly included in counsel's no-merit brief. See N.C.R. App. P. 28 (governing "Briefs—Function and Content"); see also N.C.R. App. P. 3.1(e). As such, Respondent-Mother was not deprived of her right to meaningful appellate review. See *In re L.E.M.*, 372 N.C. at 402, 831 S.E.2d at 345.

IV. Conclusion

Upon our independent review of the two no-merit claims contained in counsel's Rule 3.1(e) brief—whether the trial court prejudicially erred in finding grounds to terminate Respondent-Mother's parental rights, and whether the trial court abused its discretion in making its best interests determination—we find no merit as to either claim, and accordingly affirm the trial court's order. Further, we conclude counsel improperly included in his Rule 3.1(e) brief the allegedly meritorious subject matter jurisdiction claim; find he made this argument as to the wrong child; and upon our Rule 3.1(e) review, in light of our consideration of the entire Record, discern no potentially meritorious subject matter jurisdiction argument as to any of the children. We accordingly dismiss this claim.

AFFIRMED in part, and DISMISSED in part.

Judge GRIFFIN concurs.

Judge THOMPSON dissents in separate opinion.

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Report per Rule 30(e).

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THOMPSON, Judge, dissenting.

Subject matter jurisdiction can be raised at any stage in litigation, by any party. Because the trial court did not have subject matter jurisdiction over the juvenile proceedings as to the minor children Raya and Regina, I respectfully dissent.

It is paramount that, “[s]ubject matter jurisdiction refers to the power of the court to deal with the kind of action in question.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). “A court *must* have subject matter jurisdiction in order to decide a case.” *State v. Sellers*, 248 N.C. App. 293, 300, 789 S.E.2d 459, 465 (2016) (emphasis added). “[A] court’s lack of subject matter jurisdiction *is not waivable and can be raised at any time.*” *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009) (emphases added). Consequently, “the issue of subject matter jurisdiction *may be raised for the first time on appeal.*” *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007) (emphasis added).

“Abuse, neglect, and dependency actions are statutory in nature and are governed by Chapter 7B of the North Carolina General Statutes (the Juvenile Code).” *In re T.R.P.*, 360 N.C. 588, 591, 636 S.E.2d 787, 790 (2006). “The Juvenile Code sets out specific requirements for a valid juvenile petition” including, *inter alia*, N.C. Gen. Stat. § 7B-403(a) (2023). *Id.* N.C. Gen Stat. § 7B-403(a) requires that, “a report should be filed as a petition, the petition shall be drawn by the director, *verified* before an official authorized to administer oaths, and filed by the clerk, recording the date of

filing.” N.C. Gen. Stat. § 7B-403(a) (emphasis added). Finally, pursuant to Rule 11(b) of the North Carolina Rules of Civil Procedure, “[i]n any case in which verification of a pleading shall be required by these rules or *by statute* . . . [the pleading] shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification” and “such verification shall be by affidavit.” N.C. Gen. Stat. § 1A-1, Rule 11(b).

In *In re T.R.P.*, our Supreme Court concluded that North Carolina courts lack subject matter jurisdiction over abuse, neglect, and dependency proceedings “when the juvenile petition that initiated the case was not verified as mandated by [N.C. Gen. Stat.] § 7B-403(a).” 360 N.C. 588, 588, 636 S.E. 2d 787, 789 (2006). In reaching this determination, the Court reasoned that N.C. Gen. Stat. § 7B-403(a)’s “unambiguous statutory language mandates [their] holding” because “[w]hen the General Assembly recodified and amended the Juvenile Code in 1998, *it chose not to modify the mandatory language relating to verification of the juvenile petition.*” *Id.* at 594, 636 S.E.2d at 792 (emphasis added).

In the present case, as defendant notes, “the trial court in the underlying case did not have competent jurisdiction to award custody to [DSS]” because “when DSS filed the neglect and dependency petition . . . the petition for [Raya and Regina] had not been verified.” After careful review of the underlying juvenile petitions, I agree with defendant that DSS failed to properly verify the juvenile petition for the minor children, Raya and Regina, which was *required* pursuant to N.C. Gen. Stat. § 7B-403,

Rule 11 of the North Carolina Rules of Civil Procedure, and our Supreme Court's holding in *In re T.R.P.* Indeed, the "verification" section of the juvenile petitions lacks a notary's seal, the date the notary's commission expires, and the county where the juvenile petition was notarized; these omissions constitute a failure to comply with Rule 11.

Because DSS failed to properly verify Raya and Regina's juvenile petitions, the trial court lacked subject matter jurisdiction over the proceeding. Again, "[s]ubject matter jurisdiction refers to the power of the court to deal with the kind of action in question[.]" *Harris*, 84 N.C. App. at 667, 353 S.E.2d at 675, and "[the trial] court *must* have subject matter jurisdiction in order to decide [this] case." *Sellers*, 248 N.C. App. at 300, 789 S.E.2d at 465 (emphasis added). As our Supreme Court held in *T.R.P.*, absent a properly verified petition, the trial court did not have subject matter to address the adjudication of the minor children Raya and Regina; for this reason, I respectfully dissent.