REL: June 30, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2210093, 2210094, and 2210095

M.W.

v.

Calhoun County Department of Human Resources

Appeals from Calhoun Juvenile Court
(JU-20-513.02, JU-20-514.02, and JU-20-515.02)

EDWARDS, Judge.

On August 23, 2021, the Calhoun County Department of Human Resources ("DHR") filed petitions in the Calhoun Juvenile Court ("the juvenile court") seeking to terminate the parental rights of M.W. ("the

mother") to her children, A.F., T.F. and K.F.; those petitions were assigned case numbers JU-20-513.02, JU-20-514.02, and JU-20-515.02, respectively.[1] The juvenile court entered an order in each action on August 26, 2021, setting the petitions for a trial to be held on October 14, 2021. On September 1, 2021, DHR filed a motion in each action seeking to serve the mother by publication. DHR supported each of its motions with an affidavit stating that "[t]he mother's whereabouts are unknown and cannot be ascertained with reasonable and due diligence." The juvenile court granted those motions the following day.

On October 14, 2021, the mother submitted an affidavit of substantial hardship and requested the appointment of counsel to represent her. At the commencement of the trial, the juvenile court appointed the mother counsel, who accepted the appointment and

[1]The petitions also sought the termination of the parental rights of the fathers of the children. Specifically, the petition in case number JU-20-513.02 also sought to terminate the parental rights of the unknown father of A.F.; the petition in case number JU-20-514.02 also sought to terminate the parental rights of K.T.-F., the father of T.F.; and the petition in case number JU-20-515.02 also sought to terminate the parental rights of the unknown father of K.F.

immediately challenged service by publication. In his argument to the juvenile court, the mother's counsel contended that DHR had been aware, as indicated by information in a court report, that the mother had relocated from Calhoun County to Sylacauga; that DHR had attempted to serve the mother at her former Anniston address, despite its knowledge that she had relocated; and that DHR had not made any effort to ascertain the mother's address in Sylacauga before filing the motions to serve the mother by publication. DHR's counsel admitted that DHR had known that the mother intended to relocate to Sylacauga but stated that the mother's actual address was unknown to DHR; counsel for DHR also stated that the mother had neither provided her address to DHR nor contacted DHR for months. The juvenile court denied the oral motion challenging service of process and proceeded to try the termination-of-parental-right actions.

On October 15, 2021, the juvenile court entered a judgment in each action, terminating the parental rights of the mother and the children's respective fathers. See note 1, supra. The mother filed timely notices of

appeal. We dismiss the appeals with instructions to the juvenile court to vacate the judgments terminating the mother's parental rights.

On appeal, the mother's initial argument is that service by publication was not properly authorized by the juvenile court and that, therefore, she was not properly served with the termination-of-parental-rights petitions. DHR contends that the mother waived that argument by appearing and testifying at the trial. Although a party may waive the issue of improper service by filing an answer or other motion omitting any challenge to service of process or by participating in trial without raising an objection to service of process, see, e.g., Ex parte Dunbar, 281 So. 3d 444, 446-47 (Ala. Civ. App. 2019), and D.D. v. Calhoun Cnty. Dep't of Hum. Res., 81 So. 3d 377, 380-81 (Ala. Civ. App. 2011), the mother did not file an answer or motion that omitted her challenge to service of process, and her counsel, once he was appointed, immediately raised the issue of improper service via an oral motion before the mother testified

or otherwise participated in the trial.[2] Thus, the mother timely objected to service of process at the earliest opportunity for her to do so.

Moreover, the fact that the mother participated in the trial after her challenge to service of process was denied by the juvenile court does not vitiate that challenge. See Ala. Code 1975, § 6-8-101 ("A party may raise the defense[] of ... insufficiency of service of process and, losing thereon, proceed to litigate on the merits; and, losing on the merits, the party may appeal and, on appeal, attack the judgment both on the merits and on such ground[] ... as he urged below."). As explained in the Committee Comments on the 1973 Adoption to Rule 12, Ala. R. Civ. P., "a party can claim on appeal error in overruling his jurisdictional objections even though he went ahead and contested on the merits after

[2]DHR neither contends nor provides authority indicating that the mother's filing of an affidavit of substantial hardship in order to obtain counsel served to waive the mother's challenge to service of process, and we are not inclined to determine that it did so. We additionally note that the Committee Comments on the1973 Adoption of Rule 12, Ala. R. Civ. P., indicate that the rule abolished the practice of requiring a special appearance to challenge jurisdiction and specifically states that the filing of a general appearance does not "prevent[] a party from attacking the jurisdiction of the court or the service of process."

those objections we overruled." See Ex parte Slocumb Law Firm, LLC, 304 So. 3d 748, 753 (Ala. Civ. App. 2020) (quoting the committee comments and pointing out that a timely objection "attacking the propriety of service of process" is not waived by later participation in the ongoing court proceedings); see also Hubbard v. State ex rel. Hubbard, 625 So. 2d 815, 816 (Ala. Civ. App. 1993) (explaining that a husband's participation in litigation after raising the issue of the courts alleged lack of personal jurisdiction over him did not waive the defense). We conclude, therefore, that the issue of improper service of process was not waived and was preserved for our review.

"Our supreme court has recognized that

> "'[o]ne of the requisites of personal jurisdiction over a defendant is "perfected service of process giving notice to the defendant of the suit being brought." "When the service of process on the defendant is contested as being improper or invalid, the burden of proof is on the plaintiff to prove that service of process was performed correctly and legally." A judgment rendered against a defendant in the absence of personal jurisdiction over that defendant is void.'"

R.M. v. Elmore Cnty. Dep't of Hum. Res., 75 So. 3d 1195, 1199 (Ala. Civ. App. 2011) (quoting Horizons 2000, Inc. v. Smith, 620 So. 2d 606, 607 (Ala.1993) (internal citations omitted in R.M.)).

Furthermore,

> "[j]ust as strict compliance is required regarding the civil rules of service of process, see Johnson v. Hall, 10 So. 3d 1031, 1037 (Ala. Civ. App. 2008), so must we also require strict compliance with the statute regarding service of process applicable to termination-of-parental-rights proceedings. Those proceedings strike at the very heart of the family unit. See Ex parte Beasley, 564 So. 2d 950, 952 (Ala. 1990). In a termination-of-parental-rights case, the state is seeking to irreversibly extinguish a fundamental liberty interest more precious than any property right, the right to associate with one's child. Santosky v. Kramer, 455 U.S. 745, 758-59, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Unlike a judgment divesting a parent of custody, a judgment terminating parental rights is immediate, permanent, and irrevocable. See C.B. v. State Dep't of Human Res., 782 So. 2d 781, 785 (Ala. Civ. App.1998) ('termination of parental rights is an extreme action that cannot be undone; it is permanent'). Out of respect for those fundamental rights, due process must be observed. Santosky, supra."

L.K. v. Lee Cnty. Dep't of Hum. Res., 64 So. 3d 1112, 1115 (Ala. Civ. App. 2010), superseded in part by statute, as recognized by J.B. v. Cullman Cnty. Dep't of Hum. Res., 225 So. 3d 66, 69 n.3 (Ala. Civ. App. 2016).

Service of process in termination-of-parental-rights cases is governed by Ala. Code 1975, § 12-15-318(c), which provides:

> "Service of process by publication may not be ordered by the juvenile court unless at least one of the following conditions is met:
>
> > "(1) The child who is the subject of the proceedings was abandoned in the state, or
> >
> > "(2) The state or private department or agency having custody of the child has established, by evidence presented to the juvenile court, that the absent parent or parents are avoiding service of process or their whereabouts are unknown and cannot be ascertained with reasonable diligence."

We have previously held that, to be entitled to serve a defendant parent in a termination-of-parental-rights action by publication, DHR must do more than state in a conclusory manner in its affidavit in support of the motion seeking service by publication that the whereabouts of that defendant parent are unknown and are unable to be ascertained. D.M.T.J.W.D. v. Lee Cnty. Dep't of Hum. Res., 109 So. 3d 1133, 1143 (Ala. Civ. App. 2012), superseded in part by statute, as recognized in J.B. v. Cullman Cnty. Dep't of Hum. Res., 225 So. 3d at 69 n.3. Instead, as required by the statute, DHR must present evidence indicating that a

parent's "whereabouts are unknown and cannot be ascertained with reasonable diligence." § 12-15-318(c)(2).

As mentioned above, the affidavit in support of DHR's motions for service by publication merely stated in a conclusory manner that the mother's whereabouts were unknown and could not be ascertained. No facts supporting that conclusion were provided in the affidavit. Furthermore, DHR's counsel's statements at the commencement of trial were not evidence, see L.F. v. Cullman Cnty. Dep't of Hum. Res., 175 So. 3d 183, 184-85 (Ala. Civ. App. 2015) (explaining that counsel's statements during argument before the court are not evidence), and Ex parte Russell, 911 So. 2d 719, 725 (Ala. Civ. App. 2005) ("The unsworn statements, factual assertions, and arguments of counsel are not evidence."), much less evidence supporting the earlier granted motions. See D.M.T.J.W.D., 109 So. 3d at 1143 (indicating that testimony at trial relating to steps taken to locate a defendant mother could not be used to support the juvenile court's order permitting service by publication because that evidence had not been before the juvenile court when it authorized service by publication). Thus, at the time the juvenile court

denied the mother's motion to dismiss on the basis of improper service, the record contained no evidence indicating that DHR had made any efforts to locate the mother or her address for service of process.

Because the record lacks evidence supporting the conclusion that the mother's whereabouts were unknown to DHR and that her whereabouts could not be ascertained by reasonable diligence, DHR did not properly serve the mother with the termination-of-parental-rights petitions in these actions. As a result, the juvenile court lacked personal jurisdiction over the mother, rendering the juvenile court's judgment in each action void. D.M.T.J.W.D., 109 So. 3d at 1144. A void judgment will not support an appeal. K.T. v. B.C., 232 So. 3d 897, 900 (Ala. Civ. App. 2017). Accordingly, the mother's appeals are dismissed, albeit with instructions to the juvenile court to vacate the judgments terminating the mother's parental rights.

2210093 -- APPEAL DISMISSED WITH INSTRUCTIONS.

2210094 -- APPEAL DISMISSED WITH INSTRUCTIONS.

2210095 -- APPEAL DISMISSED WITH INSTRUCTIONS.

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.