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NO. COA01-1134

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

IN THE MATTER OF
JOSEPH KITCHEN,
Minor Child

HENDERSON COUNTY DEPARTMENT
OF SOCIAL SERVICES,
Petitioner

Henderson County
No. 00 J 9

v.

CHRISTOPHER ALLEN MABE, Father,
and JANE LINDSEY, Guardian ad
litem for Joseph Kitchen,
Respondents

Appeal by petitioner Henderson County Department of Social Services from an order entered 24 May 2001 by Judge Laura J. Bridges in Henderson County District Court. Heard in the Court of Appeals 13 May 2002.

Henderson County Legal Department, by Charles Russell Burrell, for petitioner-appellant.

No brief filed by respondent-appellee Christopher Allen Mabe.

No brief filed by Guardian Ad Litem.

HUNTER, Judge.

The facts relevant to this appeal are as follows: Joseph Allen Kitchen ("the child") was born on 2 July 1999. Angeline Marks is the child's mother. Franklin Marks, Angeline's husband,

is the legal father of the child, although he has denied paternity. Christopher Allen Mabe is allegedly the biological father of the child, and a paternity test calculated the probability of paternity at 99.44%. On 11 September 2000, a petition to terminate parental rights was filed by the Henderson County Department of Social Services ("DSS") seeking to terminate the parental rights of Marks and Mabe. No proper service of the petition was made on Mabe. On 13 November 2000, Mabe answered the petition opposing termination of his parental rights, and counterclaimed seeking sole custody of the child. On 24 May 2001, the trial court dismissed the action *ex mero motu* as to Mabe because he was never served with the neglect petition.

DSS's sole argument on appeal is that the trial court erred in dismissing the case *ex mero motu* because the defense of lack of proper personal service was not raised in Mabe's answer, and thus the defense was waived. N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (1999). We agree.

"The defenses of insufficiency of process and insufficiency of service of process are waived if they are not raised in a motion or responsive pleading before the trial court." *City of Charlotte v. Noles*, 143 N.C. App. 181, 183, 544 S.E.2d 585, 586 (2001) (citing N.C. Gen. Stat. § 1A-1, Rule 12(h)(1) (1999)). In the case *sub judice*, Mabe answered the petition and raised a counterclaim, but did not raise as a defense insufficiency of process or lack of personal jurisdiction. Thus, "[d]efendant made a general appearance thereby consenting to personal jurisdiction by seeking

affirmative relief in his answer without contesting personal jurisdiction." *Judkins v. Judkins*, 113 N.C. App. 734, 737, 441 S.E.2d 139, 140, *disc. review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994). Accordingly, the trial court obtained personal jurisdiction over Mabe and it was error for the trial court to dismiss the action.

Reversed and remanded.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).