NO. COA01-315

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

IN THE MATTER OF:

CASH WALLACE PAWLEY, JR.,
a minor child

Buncombe County
No. 99 J 141

Appeal by respondent from judgment entered 5 January 2001 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 9 January 2002.

The Moore Law Firm, by Jennifer W. Moore, for petitioners-appellees.

Patla, Straus, Robinson & Moore, P.A., by Mark C. Martin, for respondent-appellant.

WALKER, Judge.

On 9 February 1994, Cash Wallace Pawley, Jr. (the child) was born of the marriage of Tracy Krauss (petitioner) and Cash Wallace Pawley, Sr. (respondent). Petitioner and respondent divorced and petitioner has since married the other named petitioner, Aaron C. Krauss. Pursuant to the divorce, petitioner gained custody and respondent gained visitation rights.

On 12 November 1997, upon returning the child at the end of a visitation, petitioner and respondent were involved in an "altercation." As a result, respondent filed a warrant for assault

against the petitioner which resulted in her being jailed overnight. Upon her release, she immediately filed a warrant for assault against the respondent and a complaint seeking domestic violence protective orders. Several days after the altercation, respondent returned home from work and was informed by his landlord that "two large, unidentified males had been looking for the Respondent earlier that day for the purpose of 'killing him.'" Based on this information and the outstanding warrants, respondent left this State and went to live with his brother in Florida. The warrants were never served on the respondent while he was in Florida.

In March of 1998, petitioner filed a custody action against respondent seeking custody and child support. On 12 June 1998, respondent received a notice through the mail from the trial court, notifying him that a custody hearing had been held on 8 June 1998. Enclosed was a copy of the trial court's order, dated 8 June 1998, suspending his visitation rights until the warrants against him were addressed. He continued to send child support payments to petitioner until September 1998 when he notified the petitioner and the clerk of court that he was unable to work and make payments because of an injury.

In late January or early February 1999, respondent claimed he mailed a birthday card along with cash to his son at petitioner's address. He included a note telling petitioner that he would be sending her a payment in the near future. The return address on the birthday card was the following: 1342 E. Vine St., #408,

Kissimmee, Florida. Kissimmee, Florida is located in Lake County. On 13 February 1999, respondent sent petitioner two money orders in the amounts of $80.55 and $700.00. The address on both money orders was the same Kissimmee, Florida address as had been given on the birthday card. Petitioner does not deny the receipt of the money orders.

Furthermore, respondent asserted in his affidavit that his parents, the paternal grandparents of the child, were in regular contact with the child and the petitioner throughout 1998, 1999, and 2000 by telephone and visits at the petitioner's home. Petitioner never questioned respondent's parents regarding the respondent's whereabouts nor did she inform them of the petition to terminate respondent's parental rights.

On 18 May 1999, petitioner filed a petition to terminate respondent's parental rights. Petitioner attempted service by certified mail, return receipt requested, at 7512 Dr. Phillips Blvd., Orlando, Florida; however, it was returned unserved. Orlando is located in Orange County. Petitioner alleges she searched the telephone directory for Orange County and could not find a listing for the respondent. Personal service was then attempted by the Orange County Sheriff's Department but they could not locate the respondent in Orange County. Petitioner then proceeded with service by publication pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j1)(1999).

Pursuant to a hearing, the trial court terminated respondent's parental rights on 14 October 1999. The trial court found that the

respondent "was properly served by publication but failed to respond or appear in court."

Respondent returned to Buncombe County in the spring of 2000 under the belief that his visitation rights had only been temporarily suspended until the outstanding warrants were addressed. He was served with the warrants and was ordered to appear in court on 25 October 2000. These charges were subsequently dismissed pursuant to a plea agreement. After the hearing, respondent filed a motion in the cause seeking a resumption of his visitation rights. Petitioner then informed him that his parental rights had been terminated and her present husband had adopted the child.

On 14 November 2000, respondent filed a motion to set aside the order terminating his parental rights pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. At a hearing on the motion on 8 December 2000, the trial court heard arguments from counsel but did not receive evidence other than the verified motion and affidavit of the respondent. Based on the information in the file, the trial court made the following findings in part:

> 4. The Petitioners published the notice in the Orlando Sentinel, Orlando, Florida, a newspaper having circulation in Orange County, Florida; Petitioner's counsel filed an affidavit stating that the Respondent's last known address was 7512 Dr. Phillips Blvd., Orlando, FL, which is located in Orange County, Florida.
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> 5. At the time the petitioners served the Respondent, they were not actually aware of no other address for Respondent despite researching telephone records other than the Orange County, Florida address.

> 6. The Respondents [sic] had no contact with the Petitioner immediately prior to their service of the motion for termination of parental rights.
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> 8. The Petitioner Aaron Christopher Krauss petitioned the Court to adopt the minor child, which adoption was approved by a Decree of Adoption by the Clerk of Superior Court, Buncombe County, North Carolina, on 30 May, 2000.
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> 9. On 13 February 1999, Respondent sent the Petitioner Tracy Krauss two (2) money orders in the amount of $780.85, which money order reflected the address 1342 E. Vine St., #408, Kissimmee, FL 34744.
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> 10. Petitioners do not deny receipt of the money orders, but do deny that they were aware of any other address other than the Orange County, Florida address, for Respondent at the time of the filing of the Petition for Termination of Respondent's Parental Rights, in May, 1999.

Based on the findings, the trial court concluded the following in part:

> 3. The Respondent failed to meet his burden of proof that the Petitioners did not exercise due diligence in their efforts to locate an address for service of process before serving him by publication pursuant to N.C. Gen. Stat. § 1-75.10.
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> 4. The Respondent is barred by the doctrine of laches because nineteen (19) months have elapsed since the Petition for termination of parental rights was filed, during which time Respondent has not attempted to contact the Petitioners regarding said Petition and the Petitioners have obtained an order terminating Respondent's Parental Rights and the minor child has been legally adopted by Petitioner Aaron Christopher Krauss.

The trial court denied the motion to set aside the order terminating the respondent's parental rights.

Rule 60(b)(4) of the North Carolina Rules of Civil Procedure allows for the trial court to set aside a judgment or order when that judgment or order is void. N.C. Gen. Stat. § 1A-1, Rule 60(b). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980)(*citing Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143, *rehearing denied*, 285 N.C. 597, ___ S.E.2d ___ (1974)). Thus, if service of process on the respondent were defective, the order terminating respondent's parental rights in the child is void and should be set aside pursuant to Rule 60(b).

On 17 May 1999, petitioner filed a petition for termination of the parental rights of respondent. Thus, service of process was controlled by N.C. Gen. Stat. § 7A-289.27, which has since been repealed and replaced with N.C. Gen. Stat. § 7B-1106. Both statutes require that "[s]ervice of summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j)." N.C. Gen. Stat. §§ 7A-289.27(a), 7B-1106(a).

Rule 4(j) provides the procedures for service of process on an individual. Rule 4(j1) provides "[a] party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication." N.C. Gen. Stat. § 1A-1, Rule 4(j1). Our Courts have held that "'[s]tatutes authorizing substituted service of process, service of publication, or other

particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity.'" *Hunter v. Hunter*, 69 N.C. App. 659, 662, 317 S.E.2d 910, 911 (1984) (*quoting Hassell v. Wilson*, 301 N.C. 307, 314, 272 S.E.2d 77, 82 (1980)).

If due diligence is not used to determine the address of the respondent before using service by publication, the service of process is defective and the order of termination of respondent's parental rights is void. *In re Adoption of Clark*, 327 N.C. 61, 66-67, 393 S.E.2d 791, 794, *rehearing denied*, 327 N.C. 488, 397 S.E.2d 214 (1990). Due diligence requires "that [petitioner] use all resources reasonably available to her in attempting to locate [respondent]." *Fountain*, 44 N.C. App. at 587, 261 S.E.2d at 516.

Here, three months prior to the petitioner filing the petition for termination of parental rights and the attempted service of process, the respondent sent money orders to the petitioner for child support. The address on both money orders clearly showed respondent's address to be in Kissimmee, Florida. Petitioner does not deny receiving the money orders with the new address on them. Thus, petitioner is charged with notice that respondent was then residing in Kissimmee, Florida, which is in Lake County. Although she attempted service at an Orlando address and searched the Orange County telephone directory, there was no search made or attempt of service at the address last provided by the respondent on the money orders. Furthermore, petitioner never questioned respondent's parents regarding his location.

Thus, we conclude petitioner failed to use due diligence in attempting to serve the respondent either by personal service or by certified mail before proceeding with service by publication. Because there was a lack of due diligence, the attempted service was defective and the order terminating respondent's parental rights is void.

Because the order is void, the trial court also erred in concluding that the respondent is barred by the doctrine of laches. Without proper service, the respondent had no notice of the termination order until he was so informed at the 25 October 2000 court proceeding. Respondent then timely filed his motion to set aside the order.

Thus, the trial court erred in denying the respondent's Rule 60(b) motion to set aside the order terminating respondent's parental rights.

Reversed.

Judges MCGEE and BIGGS concur.

Report per Rule 30(e).