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NO. COA07-1372-2

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

IN RE:
J.T. (I)
J.T. (II)
A.J.

Cumberland County
Nos. 04 JT 652-654

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina for consideration of the parties' assignments of error. Appeal by mother and father J.T. from order terminating their parental rights filed 24 August 2007 by Judge Edward A. Pone in Cumberland County District Court. Originally heard in the Court of Appeals 18 February 2008.

Elizabeth Kennedy-Gurnee, for petitioner-appellee Cumberland County Department of Social Services.

Beth A. Hall, attorney advocate, for appellee Guardian ad Litem.

Richard Croutharmel, for respondent-mother.

Peter Wood, for respondent-father J.T.

STEELMAN, Judge.

Where mother appeared at a prior hearing and participated in the termination proceeding through her requested court-appointed counsel, any alleged summons-related deficiencies were waived. The trial court properly concluded that grounds for termination of father and mother's parental rights existed where the findings of

fact tended to show that father willfully failed to pay a reasonable portion of the juveniles' cost of care for six months prior to the filing of the termination petition and mother willfully left the juveniles in foster care for more than 12 months without showing that reasonable progress had been made in correcting those conditions which led to the removal of the juveniles. Where the trial court's findings of fact also supported its conclusion that it was in the juveniles' best interest to terminate father and mother's parental rights, the trial court did not abuse its discretion by entering a termination order as to each parent.

I. Factual and Procedural Background

The underlying facts set forth in *In re J.T.*, 189 N.C. App. 206, 657 S.E.2d 692 (2008) are not repeated. The specific facts relevant to the assignments of error raised by respondents are discussed in the analysis of those assignments.

II. Sufficiency of Service of Process

In her first argument, mother contends the trial court erred in entering an order terminating her parental rights where DSS failed to properly serve the petition and summons in accordance with the provisions of Rule 4(j) of the Rules of Civil Procedure as is required by N.C. Gen. Stat. § 7B-1106. We disagree.

At the outset, we note mother failed to file a motion or raise any issue before the trial court as to the insufficiency of the service of process of the termination petition and summons. Accordingly, mother did not properly preserve this issue for appeal

and is precluded from raising it before this Court for the first time. *See* N.C.R. App. P. 10(b)(1) (2008) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *In re D.R.S.*, 181 N.C. App. 136, 140, 638 S.E.2d 626, 628 (2007) ("[R]espondent waived the issue of service of process by failing to object at the trial level.").

Even if we were to address mother's contention on the merits, her argument fails. It is undisputed that the termination petition and summons were sent to mother on 14 October 2006 by certified mail/return receipt requested at the residence of juveniles' maternal grandmother. The record contains an "Affidavit of Service by Certified Mail" signed by a DSS staff attorney, as well as the return receipt signed by juveniles' maternal grandmother. On appeal, mother contends that she was not living at that address at the time of delivery. Even assuming *arguendo* mother's contention is correct, the insufficiency of process and insufficiency of service of process "are defenses that implicate personal jurisdiction and thus can be waived by the parties." *In re J.T. (I)*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (citations omitted). "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of

summons.'" *Id.* at 4, 672 S.E.2d at 18 (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956)).

On 14 November 2006, approximately one month after the summons was received, mother contacted the clerk's office and "request[ed] court appointed counsel." Attorney William Brown (Brown) was assigned to represent her. A special juvenile session was scheduled for 24 April 2007. On that date, the trial court continued this matter until 23 July 2007. During the termination hearing, Brown indicated to the trial court that he had spoken with mother several times and stated "she doesn't want to be terminated. She has given me a direction in which way to go but she is not here[.]" Brown further stated that mother had been present for the April hearing. Additionally, Brown submitted a fifteen-page faxed document to the trial court, which contained correspondence from mother to DSS, including: (1) a letter from mother explaining her current living situation; (2) checklists from her position with Multi Community Diversified Service; (3) certificates of attendance from various Head Start programs; and (4) her American Red Cross CPR and Standard First Aid certifications.

Mother's attendance at the April hearing and her participation in the termination hearing through her court-appointed counsel, constituted a general appearance in this proceeding and "served to waive any such objections that might have been made." *Id.* at 4-5, 672 S.E.2d at 19 (citation omitted). This argument is without merit.

III. Termination of Parental Rights

A. Standard of Review

In the adjudicatory stage of a termination of parental rights proceeding,

> the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists. We review whether the trial court's findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law.

In re Anderson, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (internal citations omitted). Findings of fact unchallenged on appeal are deemed to be supported by competent evidence and are binding on this Court. *In re M.A.I.B.K.*, 184 N.C. App. 218, 222, 645 S.E.2d 881, 884 (2007). Once it is established that one or more of the grounds for termination exist, the trial court must proceed to the dispositional stage where the best interests of the child are considered. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602 (citation omitted).

B. Grounds for Termination

1. Father J.T.

In his first argument, father contends the trial court erred by concluding that grounds existed to terminate his parental rights as to J.T. I and J.T. II pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). We disagree.

N.C. Gen. Stat. § 7B-1111(a)(3) provides that the trial court may terminate the parental rights upon a finding that:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2007). A specific finding that a parent has the ability to pay support is essential for termination based upon nonsupport. *In re Ballard*, 311 N.C. 708, 716–17, 319 S.E.2d 227, 233 (1984). "In determining what is a 'reasonable portion,' the parent's ability to pay is the controlling characteristic." *In re Bradley*, 57 N.C. App. 475, 478, 291 S.E.2d 800, 802 (1982) (citation omitted). Our Supreme Court has held that "[w]hat is within a parent's 'ability' to pay or what is within the 'means' of a parent to pay is a difficult standard which requires great flexibility in its application." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). "[N]onpayment would constitute a failure to pay a 'reasonable portion' if and only if respondent were able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. at 479, 291 S.E.2d 802.

The relevant six month period in this matter was from 6 April to 6 October 2006. During this time, father was incarcerated in the Cumberland County Detention Center awaiting trial on criminal charges for sexually abusing A.J. and was subsequently convicted of eight counts of various sexual offenses. The trial court made the

following finding of facts regarding father's ability to pay for his children's care:

> 57. That Respondent [father] provided monetary support to the Respondent mother through military [sic] until his military service was terminated following his incarceration.
>
> 58. That Respondent [father] has received $50.00 per month for in excess of 12 months prior to the filing of the petition to terminate parental rights.
>
> 59. That the Respondent [father] used this money for toiletries etcetera although for that time he was incarcerated in the Cumberland County Detention Center (pre-trial) where all of his basic necessities were provided by the State.
>
> . . . .
>
> 68. That while Respondent [father] is incarcerated he received $50.00 per month and he contributed nothing toward the cost of care for the minor children [J.T. I and J.T. II].
>
> 69. That the Cumberland County Jail/Detention Center provided all the essentials for the Respondent [father] during his incarceration.
>
> 70. That the Respondent [father] could have contributed some funds for the care of his children.

Father challenges findings of fact numbered 58, 59, 68, 69, and 70 as not being supported by the evidence. At the termination hearing, father testified that he had the opportunity to work while he was incarcerated, but that "it's hard to get a job" and that the jail would "only pay you . . . . forty cents to a dollar a day." Father was not employed by the jail during the six month period from 6 April to 6 October 2006. However, father testified that his

mother sent him "$50 a month"[1] and he spent it on "[p]ersonal, cosmetics and what not." Father did not send any of this money to DSS to supplement the cost of J.T. I and J.T. II's foster care. Father also concedes these facts in his appellate brief. However, father argues that "[t]here must be some evidence that an incarcerated parent has a realistic earning potential."

Father's argument has been rejected by this Court in *In re T.D.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). In *In re T.D.P.*, the respondent-father was incarcerated and worked as a prison cook for "very little money." *Id.* at 288, 595 S.E.2d at 737. The respondent-father's parental rights were terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *Id.* at 289, 595 S.E.2d at 737. On appeal, the respondent-father argued that because his earned wages as a prison cook ranged from only forty cents to one dollar per day, it was unreasonable to require him to pay a portion of the juvenile's foster care. *Id.* at 290, 595 S.E.2d at 737. This Court disagreed and held that although the respondent-father's prison wages were "meager," there was clear and convincing evidence that he had an ability to pay an amount greater than zero. *Id.* at 290, 595 S.E.2d at 738.

We also note that this Court has held that when a parent

> had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that

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[1]The money sent to father from his mother each month is the only source of income father had while he was incarcerated.

> he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.

In re Bradley, 57 N.C. App. at 479, 291 S.E.2d at 802–03; *but see In re Gardner*, 75 N.C. App. 137, 141, 330 S.E.2d 33, 36 (1985) ("The rule in *Bradley* was not a blanket statement that incarcerated parents can never assert an inability to provide support. Such a rule would be in conflict with the holding in *Ballard* that a finding that a parent has ability to pay support is essential to termination for nonsupport on this ground." (quotation and alteration omitted)).

The holdings of *In re T.D.P.* and *In re Bradley* are applicable to the instant case. Father had been incarcerated for over two years at the time of the termination hearing and had not obtained employment while he was in jail based on his assertion that it was hard to get a job and the pay was minimal. However, father was being financially supported by his family and acknowledged that he was receiving fifty dollars per month from his mother. Father did not send any of this money to DSS for his children's care. Because father was "able to pay some amount greater than zero[,]" *In re Bradley*, 57 N.C. App. at 479, 291 S.E.2d 802, but failed to pay any portion of J.T. I and J.T. II's cost of foster care, the trial court properly terminated his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). This argument is without merit.

<u>2. Mother</u>

In her second argument, mother contends that the trial court erred by concluding that grounds existed to terminate her parental

rights to all three juveniles pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We disagree.

N.C. Gen. Stat. § 7B-1111(a)(2) provides that the trial court may terminate the parental rights upon finding that:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .

N.C. Gen. Stat. § 7B-1111(a)(2) (2007). In the instant case, it is undisputed that the juveniles had been in DSS's custody since 21 October 2004, approximately two years prior to the filing of the termination petition. Mother argues that she made reasonable progress under the circumstances in correcting those conditions which led to the removal of the juveniles. Mother contends that the following findings of fact are not supported by the evidence:

> 41. That the Respondent mother completed the parenting classes however she failed to consistently demonstrate an ability to provide proper care and supervision for the minor children despite having the opportunity to do so.
>
> . . . .
>
> 43. That the Respondent mother indicated to the social worker and therapist that she wished to give up on being reunified with [A.J.]
>
> . . . .
>
> 48. . . . the Respondent mother failed to comply and failed to make progress in therapy and otherwise toward her case plan goals and the orders of the court.
>
> . . . .

> 50. That prior to the Respondent mother's departure from the jurisdiction, she had discontinued her individual personal and joint counseling as ordered by the court.
>
> 51. That [A.J.] was very excited at the opportunity for reunification and joint counseling with the Respondent mother only to have her hopes dashed when the Respondent mother ceased to comply with the court's order and the case plans.

A review of the testimony of Patricia Robinson (Robinson), the DSS social worker assigned to mother's case, establishes that mother did finish parenting classes, but could not stabilize housing because she always shared a residence with multiple roommates, both male and female; mother did attend some personal and family counseling appointments, but did not complete them; mother did not attend or participate in therapy with A.J.; that in April or May of 2006, mother requested that her parental rights be terminated as to A.J.; and mother informed Robinson that she was not in counseling and could not afford it after moving to Kansas in August 2006. The challenged findings of fact are supported by clear and convincing evidence.

In addition, the trial court's unchallenged findings of fact pertinent to this issue show that J.T. I and J.T. II were returned to mother in November 2006. Less than two months later, DSS regained physical custody of these juveniles. Robinson had made an unannounced home visit and found the juveniles unattended, not wearing diapers, and with feces and extensive rashes on their bodies. J.T. I also had bite marks on his back and legs. We hold the trial court's findings of fact support its conclusion of law

that mother had willfully left the juveniles in foster care for more than 12 months without showing that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of the juveniles pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). This argument is without merit.

Since we hold that one ground for termination existed as to each parent, we need not address their remaining arguments regarding the other grounds for termination. *In re Yocum*, 158 N.C. App. 198, 203, 580 S.E.2d 399, 403 (2003).

C. Best Interests

Father and mother each argue the trial court abused its discretion by concluding it was in the juveniles' best interests to terminate their parental rights. We disagree.

N.C. Gen. Stat. § 7B-1110 sets forth the factors to be considered in determining the juvenile's best interests: (1) the age of the juvenile; (2) the likelihood of adoption; (3) whether the termination of parental rights will aid in the accomplishment of the permanent plan; (4) the bond between the juvenile and the parent; (5) the relationship between the juvenile and a proposed adoptive parent or other permanent placement; and (6) any other relevant consideration. N.C. Gen. Stat. § 7B-1110(a) (2007).

The trial court's unchallenged dispositional findings of fact establish that it considered these factors. The trial court found that A.J. was eight years old, J.T. II was almost four years old, and J.T. I was almost three years old at the time of the proceeding; J.T. I and J.T. II had been in foster care with Mrs.

Baez for over two years, that she was a potential adoptive placement for the boys, and that they were bonded to her; J.T. I and J.T. II had spent the better part of their young lives with Mrs. Baez; father is currently serving a sentence in excess of twenty years and that J.T. I and J.T. II will be beyond the age of majority by the time father is released; father has been absent from J.T. I and J.T. II's lives for over two and a half years; father has never visited with the minor child J.T. I; A.J. had made significant progress in therapeutic foster care; mother on more than one occasion expressed her inability to care for A.J. and had to be encouraged by the court to continue working toward reunification with her; and that the termination of mother and father's parental rights will aid in the accomplishment of the permanent plan for the juveniles. These findings of fact support the trial court's best interests determination. The trial court did not abuse its discretion by terminating mother and father's parental rights.

AFFIRMED.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).