

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-624

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:  
D.P.H.

Burke County  
No. 05 J 62

Appeal by respondent-father from order entered 23 February 2010, *nunc pro tunc* 10 December 2009, by Judge Gary Dellinger in Burke County District Court. Heard in the Court of Appeals 3 November 2010.

*Russell R. Becker, for petitioners-appellees.*

*Michael E. Casterline, for respondent-appellant father.*

JACKSON, Judge.

Respondent-father appeals from an order terminating his parental rights to D.P.H., the minor child. Because respondent-father has failed to preserve his sole issue for appellate review, we dismiss.

Petitioners are the aunt and uncle of D.P.H. D.P.H. was placed with petitioners by the child's mother on 26 July 2004, and has resided with petitioners since that time. On 29 August 2005, petitioners were granted custody of the juvenile and named guardians.

On 25 February 2009, petitioners filed a petition to terminate respondent-father's parental rights. Petitioners alleged: (1) that

the child was born out of wedlock, and that respondent-father had failed to establish paternity, legitimate the child, or provide substantial financial support or consistent care with respect to the child and the mother, pursuant to North Carolina General Statutes, section 7B-1111(a)(5); and (2) respondent-father willfully had abandoned the child for at least six consecutive months immediately preceding the filing of the petition, pursuant to North Carolina General Statutes, section 7B-1111(a)(7). Petitioners further stated their intent to file a petition for adoption upon termination of respondent-father's parental rights.

On 10 December 2009, the trial court conducted a hearing on the petition to terminate respondent-father's parental rights. The trial court concluded that grounds to terminate respondent-father's parental rights existed pursuant to North Carolina General Statutes, sections 7B-1111(a)(5) and (a)(7). The court further concluded that it was in the juvenile's best interest that respondent-father's parental rights be terminated. Accordingly, on 23 February 2010, *nunc pro tunc* 10 December 2009, the trial court terminated respondent-father's parental rights. Respondent-father appeals.

Respondent-father's sole argument on appeal is that the petition did not allege specific facts sufficient to support termination of his parental rights. See N.C. Gen. Stat. § 7B-1104(6) (2009) (A petition to terminate parental rights must set forth "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights

exist.”). However, we decline to review respondent-father’s argument because he has failed to preserve this question for appeal.

An allegation that a petition to terminate parental rights does not sufficiently state the facts required pursuant to North Carolina General Statutes, section 7B-1104(6) constitutes a contention that the petition fails to state a claim for relief pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 (1992). “The Rules of Civil Procedure apply to proceedings for termination of parental rights[,] and a Rule 12(b)(6) motion may not be made for the first time on appeal.” *In re H.L.A.D.*, 184 N.C. App. 381, 392, 646 S.E.2d 425, 434 (2007) (internal citations and quotation marks omitted), *aff’d*, 362 N.C. 170, 655 S.E.2d 712 (2008) (per curiam). Respondent-father never moved to dismiss this action for failure to state a claim for relief pursuant to Rule 12(b)(6). Consequently, respondent-father has not properly preserved this issue for appeal. Accordingly, we dismiss respondent-father’s appeal.

Dismissed.

Judge HUNTER, Robert C. concurring by separate opinion.

Judge ELMORE concurs.

Report per Rule 30(e).

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HUNTER, Robert C., Judge, concurring

I agree with the majority's conclusion that "[r]espondent-father never moved to dismiss this action for failure to state a claim for relief pursuant to Rule 12(b)(6)[,]" of the Rules of Civil Procedure, and, therefore, any argument made by respondent pertaining to Rule 12(b)(6) should not be addressed by this Court. Still, respondent argues that the trial court lacked subject matter jurisdiction because petitioner failed to state specific facts in the petition sufficient to support termination as required by N.C. Gen. Stat. § 7B-1104(6) (2009). It is my position that this argument should be addressed and the trial court's order affirmed.

It is well established that "subject matter jurisdiction may be raised at any time by the parties or by the court . . . ." *In re J.D.S.*, 170 N.C. App. 244, 248, 612 S.E.2d 350, 353, cert. denied, 360 N.C. 64, 360 N.C. 176, 623 S.E.2d 584 (2005). "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547

S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001).

In support of his argument that the trial court lacked subject matter jurisdiction, respondent cites *In re McKinney*, 158 N.C. App. 441, 581 S.E.2d 793 (2003). There, this Court stated that "in the absence of a proper petition, the trial court has no jurisdiction to enter an order for termination of parental rights." *Id.* at 446, 581 S.E.2d at 796. *McKinney* is inapposite to the case at bar. In holding that the trial court lacked subject matter jurisdiction and vacating the trial court's order, the Court in *McKinney* noted the following deficiencies in the petitioner's motion in the cause:

The title, or caption, of petitioner's motion does not state that it is a petition for termination of parental rights. Nor does the motion reference any of the statutory provisions governing termination of parental rights. Petitioner's motion does not seek a termination of parental rights hearing, or request that the court issue an order of termination of parental rights. Indeed, the motion fails to request any relief, judgment, or order from the trial court. Nor does the petitioner's use of the word "pray" establish what relief is sought, as petitioner does not "pray" for any desired relief.

*Id.* at 446, 581 S.E.2d at 796-97. Here, the only alleged deficiency in the petition for termination of respondent's parental rights is that the petition did not specifically set out facts to support petitioner's allegation that respondent's rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) and (a)(7) (2009). I would hold that any such deficiency, if in fact it is a deficiency, would not deprive the trial court of

subject matter jurisdiction. As the majority states, respondent could have filed a motion pursuant to Rule 12(b)(6) requesting dismissal for failure to state a claim upon which relief could be granted; however, he chose not to do so, therefore any argument regarding insufficiency of the petition on that ground has been waived. Based on the foregoing, I would affirm the trial court's order since respondent's argument regarding subject matter jurisdiction is without merit.