NO. COA10-684

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF:

Z.H., T.H.,
Minor children.

Mecklenburg County
Nos. 08 JT 291, 293

Appeal by respondent-mother from order entered 11 March 2010 by Judge Lisa C. Bell in Mecklenburg County District Court. Heard in the Court of Appeals 4 November 2010.

Kathleen Arundell Widelski, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Pamela Newell, for Guardian ad Litem.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother appeals the trial court's order terminating her parental rights to the minor children, Z.H. ("Zack") and T.H. ("Tonya") (collectively "the children").[1] The respondent-fathers of the children have not appealed from the trial court's order terminating their parental rights to the minor children. We affirm.

I. BACKGROUND

[1]We use pseudonyms to protect the identities of the children and for ease of reading.

Mecklenburg County Department of Social Services, Division of Youth and Family Services ("YFS") became involved with respondent-mother in May 2006. At that time, respondent-mother was addicted to crack cocaine and was not providing proper supervision to the children. Respondent-mother enrolled in several in-patient programs in an attempt to improve; however, she was unsuccessful. Respondent-mother moved several times after YFS became involved and her case was subsequently transferred to Buncombe County in September 2006. In February 2008, Buncombe County prepared juvenile petitions to assume legal custody of the children, but respondent-mother moved to Hendersonville, North Carolina, before the petitions could be filed.

Respondent-mother returned to Mecklenburg County in March 2008. At the request of YFS, she agreed to complete substance abuse treatment. However, she failed to comply with the treatment and failed to enter a recommended in-patient treatment program. On 8 May 2008, YFS filed a juvenile petition alleging the children were neglected and dependent and obtained non-secure custody of the children.

On 14 August 2008, based on respondent-mother's stipulations, the children were adjudicated neglected and dependent. The disposition order was entered on 18 September 2008. Respondent-mother was ordered to comply with her Family Services Agreement ("the Agreement") in order to facilitate reunification. The components of the Agreement were, *inter alia*, that respondent-mother had to comply with substance abuse treatment, maintain

sobriety, obtain mental health and domestic violence assessments, and maintain stable housing and employment.

A review hearing was held on 14 November 2008. Respondent-mother did not appear at the hearing, and the trial court found respondent-mother had made no progress in addressing the issues that led to the children's placement in care. In particular, the trial court found that respondent-mother had not begun substance abuse treatment, obtained mental health or domestic violence assessments, or maintained stable housing and employment. The trial court also found that respondent-mother told her permanency planning social worker that she "did not need to complete substance abuse treatment" and that she "would be relocating to Asheville, North Carolina because she was homeless."

On 11 February 2009, respondent-mother informed YFS that she would not complete anything in the Agreement. On 2 April 2009, respondent-mother submitted to a urinalysis that tested positive for cocaine and marijuana, and admitted to recent use of prescription drugs that had not prescribed for her. Respondent-mother was again ordered to complete substance abuse treatment. However, since respondent-mother had two outstanding orders for arrest for charges of disorderly conduct and resisting a public officer, respondent-mother was detained and ordered to complete substance abuse treatment while incarcerated.

The trial court conducted a permanency planning hearing on 8 April 2009. The trial court found that respondent-mother made no progress in addressing the issues that led to the children's

placement in foster care, and that efforts to reunite respondent-mother and the children would be futile and inconsistent with the children's health, safety, and the need for a safe permanent home within a reasonable period of time. Accordingly, the permanent plan for the children was changed to adoption.

On 10 June 2009, YFS filed petitions to terminate respondent-mother's parental rights. The summons was issued on that same date. A pre-trial hearing was held on 9 July 2009, but respondent-mother had not been served. A subsequent summons was issued on 14 August 2009. The termination of parental rights hearing was continued from 16 September 2009 to 15 January 2010 because respondent-mother had not been served. The continuance order required YFS to complete service on respondent-mother including service by publication. Another summons was issued on 17 November 2009. YFS filed affidavits of service by publication on 25 November 2009 and 15 December 2009.

The termination of parental rights hearing was held on 15 January 2010. Respondent-mother did not appear at the hearing. On 11 March 2010, the trial court entered an order terminating respondent-mother's parental rights. Respondent-mother appeals.

II. PERSONAL JURISDICTION

Respondent-mother argues that YFS failed to exercise due diligence in attempting to locate and serve her with the summons prior to resorting to service by publication. Respondent-mother further contends the affidavit filed by YFS upon completion of its attempted service by publication failed to meet the requirements of

N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2009) ("Rule 4(j1)"). Respondent-mother argues the affidavit was defective because there was no attempt to identify the specific circumstances necessitating service by publication, or to identify what efforts constituted due diligence on the part of YFS in trying to locate respondent-mother. We disagree.

A summons should be issued upon the filing of a petition to terminate parental rights. N.C. Gen. Stat. § 7B-1106(a). Service of the summons should be in accordance with the procedures established by N.C. Gen. Stat. § 1A-1, Rule 4(j). *Id.* Rule 4(j1) provides in relevant part that:

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication . . . . Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4(j1).

Our Supreme Court has held that "[b]ecause the purpose of the summons is to obtain jurisdiction over the parties to an action . . ., summons-related defects implicate personal jurisdiction . . . ." *In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009). "Deficiencies regarding the manner in which a court obtains jurisdiction over a party, including those relating to a summons, are waivable and must be raised in a timely manner." *Id.* at 346,

677 S.E.2d at 837; *see also In re J.T. (I), J.T. (II), A.J.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) ("Objections to a court's exercise of personal (in personam) jurisdiction . . . must be raised by the parties themselves and can be waived in a number of ways.").

Such deficiencies can generally be cured, as the court, even without a summons, "may properly obtain personal jurisdiction over a party who consents or makes a general appearance[.]" *In re K.J.L.*, 363 N.C. at 346, 677 S.E.2d at 837. "[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.'" *In re J.T. (I), J.T. (II), A.J.*, 363 N.C. at 4, 672 S.E.2d at 18 (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956)).

> The North Carolina rule for determining what constitutes a general appearance has been well defined. The defendant's appearance must be for a purpose in the cause, not one merely collateral to it. The party must have asked or received some relief in the case or participated in some step taken in it. Essentially, the test of whether the defendant has made a general appearance is whether she became an actor in the cause.

Bethea v. McDonald, 70 N.C. App. 566, 569, 320 S.E.2d 690, 692 (1984) (citing *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980)). *See Bullard v. Bader*, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) (defendant made a general appearance before entry of judgment by submitting financial documents for consideration at his child support hearing); *Bumgardner v. Bumgardner*, 113 N.C. App. 314, 319, 438 S.E.2d 471,

474 (1994) (defendant made a general appearance before entry of judgment by appearing in court with his attorney and participating in the hearing for absolute divorce without objection); *Humphrey v. Sinnott*, 84 N.C. App. 263, 265, 352 S.E.2d 443, 445 (1987) (defendant made a general appearance by moving for change of venue before asserting lack of jurisdiction defenses); *Williams*, 46 N.C. App. at 788, 266 S.E.2d at 27 (defendant made a general appearance before entry of judgment by his attorney's participation in an in-camera conference with judge and plaintiff's attorney on custody issue without objection); *Swenson v. Thibaut*, 39 N.C. App. 77, 89-90, 250 S.E.2d 279, 287-88 (1978) (defendants made a general appearance by moving to disqualify plaintiff's attorney before filing lack of jurisdiction defenses). *See also Seals v. Upper Trinity Regional Water Dist.*, 145 S.W.3d 291, 297 (Tex. App. - Fort Worth 2004) ("A party who examines witnesses or offers testimony has made a general appearance.").

In the instant case, respondent-mother's attorney appeared at the termination of parental rights hearing and fully participated in the hearing. He cross-examined the witness and entered objections on the record. We note that in response to the trial court's inquiry regarding whether a responsive pleading had been filed, respondent-mother's attorney stated:

> Well, Your Honor, I think I did not wish to submit my client to jurisdictional [sic] and we have those publications issues, I don't, I don't think that there has been a responsive pleading - ah, filed in this case.

We conclude this response was not a challenge to the court's jurisdiction and further note that the response occurred after respondent-mother's attorney had participated in the hearing.

By entering objections on the record, respondent-mother's attorney requested relief from the court. Furthermore, when the attorney cross-examined a witness, respondent-mother became an actor in the cause. "[I]t has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service." *Williams*, 46 N.C. App. at 789, 266 S.E.2d at 27. Since respondent-mother's attorney appeared and participated in the termination hearing without objecting to the court's jurisdiction, respondent-mother made a general appearance. Therefore, respondent-mother waived any defenses she may have had implicating the trial court's exercise of personal jurisdiction over her. Respondent-mother's proposed issues on appeal are overruled.

III. MOTION FOR CONTINUANCE

Respondent-mother next argues the trial court abused its discretion by denying her motion for a continuance. We disagree.

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803. "A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (citations omitted). A trial court abuses its discretion in denying a motion to continue if its ruling is "manifestly unsupported by reason." *In re Safriet*, 112 N.C. App. 747, 751, 436 S.E.2d 898, 901 (1993) (internal quotation and citation omitted).

In the instant case, respondent-mother's attorney requested a continuance, stating that respondent-mother was believed to be in a treatment facility for substance abuse and asked that he move to continue the case on her behalf. After hearing from the parties and reviewing the record and history of the case, the trial court found: (1) the children had been in custody since May 2008; (2) that respondent-mother maintained "very random contact" with YFS; (3) that respondent-mother previously enrolled in substance abuse treatment programs, and based on her behavior was discharged from at least one facility; (4) that based on respondent-mother's history and the history of the case, the extent of respondent-mother's substance abuse issues and respondent-mother's lack of compliance with contact with YFS, a continuance was not in the best interests of the children; and (5) the court had no assurance that

respondent-mother would be present at a later date if the matter was continued.

These facts do not show that the request for a continuance was "reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery." N.C. Gen. Stat. § 7B-803. Furthermore, these facts do not show "extraordinary circumstances . . . necessary for the proper administration of justice or in the best interests of the juvenile." *Id.* Therefore, the trial court's decision to deny respondent-mother's motion for a continuance was not "manifestly unsupported by reason," and the trial court did not abuse its discretion in denying her motion. *See In re Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901. Respondent-mother's proposed issues on appeal are overruled.

IV. CONCLUSION

Proposed issues on appeal not addressed in respondent-mother's brief are abandoned. N.C.R. App. P. 28(b)(6) (2009). The trial court's order terminating respondent-mother's parental rights is affirmed.

Affirmed.

Judges GEER and THIGPEN concur.

Report per Rule 30(e).