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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-677

Filed: 15 December 2015

Alleghany County, No. 14 JA 26

IN THE MATTER OF: J.P.

Appeal by respondents from order entered 13 May 2015 by Judge Robert Crumpton in Alleghany County District Court. Heard in the Court of Appeals 23 November 2015.

James N. Freeman, Jr. for petitioner-appellee Alleghany County Department of Social Services.

Jeffrey William Gillette for respondent-appellant mother.

J. Thomas Diepenbrock for respondent-appellant father.

Parker Poe Adams & Bernstein LLP, by Ashley A. Edwards, and Womble Carlyle Sandridge & Rice, LLP, by Hunter S. Edwards, for guardian ad litem.

ZACHARY, Judge.

Respondents, the parents of the juvenile J.P., appeal from an order adjudicating the juvenile as neglected and dependent and ordering that custody remain with the Alleghany County Department of Social Services (“DSS”). After careful review, we affirm.

I. Factual and Procedural Background

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On 8 December 2014, DSS filed a petition alleging that J.P. was an abused, neglected, and dependent juvenile. DSS had received a report that respondent-mother had shaken J.P. An investigation revealed that respondent-mother shook J.P. when she became angry, and DSS personnel witnessed respondent-mother “getting angry to the point that she [became] unaware of her surroundings and what she is doing.” DSS further alleged that its staff had been working continuously with respondent-mother since June of 2014 due to issues including unstable housing, insufficient income to meet her financial needs, unsanitary living conditions, testing positive for marijuana, and other concerns. The facts underlying the allegation of dependency and ultimately the filing of the petition were that respondent-mother informed DSS that she would be unable to care for J.P. Respondent-mother had made arrangements for the juvenile’s care on 5 December 2014, but neglected to tell the provider when she would return to get J.P., failed to provide adequate clothing and food for the juvenile, and informed DSS she had no plan of care for J.P. DSS obtained non-secure custody of the juvenile.

An adjudicatory hearing was held on 3 March 2015. On 13 May 2015, the trial court entered an order adjudicating J.P. a neglected and dependent juvenile. The court determined that the juvenile should remain in DSS custody and granted respondents visitation.

Respondents appeal.

II. Subject Matter Jurisdiction

Respondent-mother argues that the trial court lacked subject matter jurisdiction because the petition failed to allege sufficient facts to support jurisdiction. See N.C. Gen. Stat. § 7B-402(a) (2013) (“The petition shall contain . . . allegations of facts sufficient to invoke jurisdiction over the juvenile.”). We disagree.

“Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). “Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal.” *In re H.L.A.D.*, 184 N.C. App. 381, 385, 646 S.E.2d 425, 429 (2007), *aff’d per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008). The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal. *In re K.U.–S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

Pursuant to N.C. Gen. Stat. § 50A-201(a)(1), a state has jurisdiction to make an initial custody determination if it “is the home state of the child on the date of the commencement of the proceeding. . . .” N.C. Gen. Stat. § 50A-201(a)(1) (2013). A child’s “[h]ome state” is defined as “the state in which a child lived with a parent. . . for at least six consecutive months immediately before the commencement of a child-custody proceeding.” N.C. Gen. Stat. § 50A-102(7) (2013).

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Here, the trial court found that it had subject matter jurisdiction, but did not state the basis for its finding. We note that this Court has recognized that making specific findings of fact related to a trial court's jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) "would be the better practice;" however, the statute "states only that certain circumstances must exist, not that the court specifically make findings to that effect." *In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007). Therefore, so long as the trial court asserts its jurisdiction and there is evidence sufficient to satisfy the statutory requirements, the trial court has properly exercised subject matter jurisdiction. *Id.* at 397, 642 S.E.2d at 473-74.

We conclude that the record supports the trial court's exercise of jurisdiction, and further that there was no evidence presented that would substantiate a contention to the contrary. The petition was filed on 8 December 2014. The initial order for nonsecure custody indicated that DSS had been "involved with the family consecutively since 6/2/2014." [R. p. 4] Furthermore, the evidence demonstrates that the juvenile was born in December 2013, DSS received its first report for abuse and neglect concerning the juvenile in January 2014, and there was no evidence that the infant juvenile had ever lived outside of the State of North Carolina prior to the filing of the petition. Accordingly, we hold that the trial court possessed subject matter jurisdiction.

This argument is without merit.

III. Award of Custody

Respondent-father's sole argument on appeal is that the trial court erred by awarding custody of the juvenile to DSS. We disagree.

Respondent-father asserts that because DSS is a non-parent, the trial court erred by using the best interest standard to determine custody, and instead must find whether respondent-father was an unfit parent or acted in a manner inconsistent with his constitutionally protected status. Respondent-father's argument is misplaced. "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status."). *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005); *see also In re B.G.*, 197 N.C. App. 570, 571–74, 677 S.E.2d 549, 551–52 (2009) (applying the constitutional analysis in a juvenile petition case). The test set forth in *David N.* applies, however, only where the trial court seeks to award *permanent* custody of a juvenile to a third party. *See In re D.M.*, 211 N.C. App. 382, 385, 712 S.E. 2d 355, 357 (2011) (the trial court "could not award permanent custody to the maternal grandmother in the absence of findings of fact and conclusions of law that respondent-father had acted inconsistently with his constitutional rights as a parent."). In the matter before the Court, the trial court

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had previously given custody of the juvenile to DSS and merely continued custody in the adjudication and disposition order at issue. This order in no way changed or altered the custody of the juvenile. Accordingly, because the trial court did not make a final custody determination, respondent-father's argument is without merit.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).