IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1165

Filed: 17 May 2016

Randolph County, No. 13 JT 148

IN THE MATTER OF: K.S.

Appeal by Respondent-Mother from order entered 12 August 2015 by Judge Don Creed, Jr., in District Court, Randolph County. Heard in the Court of Appeals 18 April 2016.

Melissa Starr Livesay for Petitioner-Appellee Randolph County Department of Social Services.

Robert W. Ewing for Respondent-Appellant Mother

Winston & Strawn, LLP, by Lisa F. Vaughn; and Duke Energy, by Garry S. Rice, for Guardian ad Litem.

McGEE, Chief Judge.

Randolph County Department of Social Services ("DSS") filed a juvenile petition on 29 July 2013, claiming K.S. was neglected and dependent. The petition alleged that Respondent-Mother ("Respondent"), who had sole custody of K.S., had been "arrested and taken to jail because she was extremely intoxicated and disruptive" on 28 July 2013, leaving K.S. without an appropriate alternative caretaker. DSS amended the petition on 31 July 2013 to add allegations that Respondent and K.S.'s father, while intoxicated, had engaged in "physical

altercation[s]" in close proximity to K.S., and that Respondent had a history of mental health and substance abuse issues.

The trial court adjudicated K.S. dependent by order entered 22 November 2013. The court kept K.S. in DSS custody and ordered Respondent to maintain stable housing and income and to engage with services addressing substance abuse, mental health, domestic violence, and parenting skills.

Prior to the initial permanency planning hearing, Respondent's counsel filed a motion to determine whether Respondent required representation by a guardian *ad litem* ("GAL"). Counsel cited the results of a psychological evaluation performed on 14 November 2013 by Dr. Chris Sheaffer, Ph.D. ("Dr. Sheaffer"), who found Respondent to have cognitive impairments. Dr. Sheaffer also noted Respondent's self-reported diagnosis "as 'bipolar schizophrenic'" for which she was not receiving treatment.

The trial court appointed attorney Jane Redding as Respondent's GAL ("GAL Redding") on 9 July 2014, and continued the permanency planning hearing to 23 July 2014. GAL Redding appeared at the 23 July 2014 permanency planning hearing and attended all subsequent court proceedings.

Following a permanency planning review hearing on 1 October 2014, the trial court ceased reunification efforts and, by order entered 6 November 2014, changed

K.S.'s permanent plan from reunification to adoption. K.S.'s father executed a relinquishment of parental rights on 7 October 2014.

DSS filed a "Motion to Terminate Parental Rights" ("TPR motion") on 16 December 2014, asserting grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) neglect, (2) lack of reasonable progress, and (6) dependency. Respondent, "along with [GAL Redding], by and through her attorney," filed a "Motion for Mediation" on 29 January 2015. In that motion, Respondent noted that DSS had "filed to terminate parental rights for . . . Respondent[,]" and proposed her cousin as a possible placement option for K.S.[1] Because of the pending mediation proceeding, the trial court continued the pretrial hearing on the TPR motion until 18 March 2015.

Respondent's counsel and GAL Redding represented Respondent at the mediation on 10 March 2015. The parties were unable to reach resolution but expressed a willingness to "have further discussion about issues." GAL Redding, in her capacity as "substitute-mother[,]" signed the "Mediation Outcome" that was filed with the trial court.

Respondent was represented by counsel and GAL Redding at the 18 March 2015 TPR pretrial hearing. At that hearing, Respondent's counsel objected to the manner in which DSS served the TPR motion. Specifically, Respondent's counsel

[1] Although DSS had previously conducted and denied a home study for Respondent's cousin, Respondent averred that the cousin was "willing and able to obtain and maintain a larger home to accommodate [K.S.]."

argued that DSS's placement of a copy of the TPR motion in her box at the Randolph County Courthouse did not comply with the service requirements of N.C. Gen. Stat. § 1A-1, Rule 5(b). Acknowledging that she was also handed a copy of the TPR motion by DSS counsel on 16 March 2015, two days before the hearing, Respondent's counsel claimed "that service was not achieved until that date." *See* N.C. Gen. Stat. § 1A-1, Rule 5(b)(1)(a) (allowing a motion subsequent to the original complaint to be served by hand-delivery to the party's attorney of record). The trial court concluded that, under "a strict reading of Rule 5[,]" DSS had not properly served Respondent with the TPR motion prior to hand-delivering a copy to Respondent's counsel on 16 March 2015. Therefore, the trial court continued the hearing on the TPR motion to 20 May 2015.

Respondent filed a motion to dismiss the TPR motion on 18 May 2015, "pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure . . . for failure to state a claim upon which relief may be granted[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). Her motion argued, *inter alia*,[2] that DSS "failed to properly serve the Motion to Terminate Parental Rights on the parties." Respondent also filed a response to the TPR motion as an alternative to her Rule 12(b)(6) motion.

[2] Respondent also claimed the TPR motion did not comply with the requirements of N.C. Gen. Stat. § 7B-1104, because (1) "Movant fails to state the minor child's full name as it appears on the birth certificate . . .;" (2) "Movant fails to state the minor child's parents including addresses;" and (3) "Movant fails to include custody orders which grant [DSS] custody of the minor child."

The trial court held a hearing on Respondent's Rule 12(b)(6) motion on 20 May 2015. Counsel and GAL Redding represented Respondent at that hearing. In support of her claim of improper service, Respondent's counsel argued as follows:

> COUNSEL: Your Honor, in the [Rule 12(b)(6)] motion, I indicated that it was not -- I was not served. And Ms. Redding . . . – GAL for the parent was not properly served. The March 18th court date, in court, we were handed a copy of the motion to terminate parental rights. That copy was every other page. And it -- the certificate of service I'm not sure is in the file on that.
>
> *. . . I did receive a copy on March – the Monday of that week. I can't remember the exact date. I think it was the 16th – it would have been the 16th or 17th, which did have a full copy of the motion to terminate parental rights that was given to me. I had to sign for that in order to receive discovery at DSS.*
>
> I'm not sure as to what – what Ms. Redding has obtained. And my client, I'm not sure which version she has received as well.
>
> [GAL] REDDING: Your Honor, for the court's information, I did receive a copy of the petition in court on March 18th. In going through my file, I have several copies of the petition, which were filed prior to the March 18th court date that are complete. . . .
>
> [COUNSEL]: And Your Honor, I understand for DSS that Ms. Redding and I have been served by fax on March 20th, that there's a certificate of service that it indicated to the court. I do not have a copy of that in my file. And that may be at my error, but I just wanted to be completely candid with the court if I'm presenting a motion to dismiss based on service.

(Emphasis added).

DSS responded that it had served the TPR motion upon Respondent in accordance with N.C. Gen. Stat. § 7B-1102(b) (2015), "which specifies quite clearly that service shall be in accordance with Rule 5(b)" of the North Carolina Rules of Civil Procedure. Counsel for DSS advised the trial court as follows:

> Rule 5 provides . . . that service shall be on the parties' attorney of record. . . . And delivery, the acceptable methods of serving on a party are delivery to the attorney, delivery to the attorney's office, or providing it by fax or by placing it in the mail.
>
> I believe counsel has acknowledged that she received a copy, which was a complete copy, on March the 16th. She signed for it. There's a certificate of service in the file.
>
> I submit to the court that we actually exceeded what we're required to do because we are not required to serve the actual party unless specifically ordered to do so by the court. However, there is a certificate of service from March the 20th of 2015 that is in the file in which we served by Rule 5(b) Subsection 2(b), which is we served her by mailing a copy to the party at the party's last known address, which was the address in Pennsylvania that was listed on the certificate of service.
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> At that time, we also provided a fax to Ms. Redding and a fax to [counsel]. And that's reflected in the certificate of service. I believe the parties have acknowledged that they have full and complete copies that include every page of this [TPR] motion.

See N.C. Gen. Stat. 1A-1, Rule 5(b)(1)(a)-(b), (2)(b) (2015).

The trial court denied Respondent's motion to dismiss in open court. The court proceeded with the adjudicatory stage of the termination hearing on 20 May and 10 June 2015, and held the dispositional stage of the hearing on 22 July 2015.

The trial court entered its order terminating Respondent's parental rights as to K.S. on 12 August 2015. The order included the following regarding DSS's service of the TPR motion upon Respondent:

> [A]ll due process and service requirements were met. Respondent . . . was properly noticed and served with the summons and Motion via NCGS §1A-1-Rule 5(b)(1)(a), in that copies were personally delivered to her Attorney of Record and Rule 17 Guardian ad Litem, and via NCGS §1A-1 Rule 5(b)(2)(b), in that copies were mailed to her last known address.

The trial court concluded that DSS had shown each of the three grounds for termination alleged in the TPR motion by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6). The court further determined that termination of Respondent's parental rights was in K.S.'s best interest. *See* N.C. Gen. Stat. § 7B-1110(a) (2015). Respondent appeals.

Respondent now claims the trial court lacked personal jurisdiction over "the action," because GAL Redding was not served with a copy of the TPR motion and notice of hearing "by the Sheriff's Office or by certified mail in accordance with Rule 4 of the North Carolina Rules of Civil Procedure, rather than the means as set out in Rule 5, as was done in this case." Respondent acknowledges that a TPR motion filed

in an ongoing juvenile dependency proceeding may generally be served by the methods prescribed in Rule 5. Under N.C. Gen. Stat. § 7B-1102(b), however, service must comply with Rule 4 if "[t]he person or agency to be served was not served originally with summons." N.C. Gen. Stat. § 7B-1102(b)(1)a. (2015). Because GAL Redding was not served with summons when DSS filed the original juvenile petition in July 2013, Respondent argues that DSS was statutorily mandated to serve GAL Redding in the manner prescribed by Rule 4. Absent valid service, Respondent contends, the trial court "lacked personal jurisdiction in this action. Therefore, the termination order . . . should be vacated and the case should be dismissed."

Assuming *arguendo* that N.C. Gen. Stat. § 1106.1[3] required personal service on GAL Redding in this matter, Respondent has waived her argument that service pursuant to Rule 4 was required. Objections to a court's jurisdiction over the person are waived by a general appearance of the objecting party. *See In re K.J.L.*, 363 N.C. 343, 346-47, 677 S.E.2d 835, 837 (2009). As our Supreme Court explained in *K.J.L.*: "Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by filing an answer or appearing at a hearing without objecting to personal jurisdiction." *Id.* at 346, 677 S.E.2d at 837. Accordingly, the *K.J.L.* Court held that "the parents' appearance at

[3] N.C. Gen. Stat. § 7B-1106.1 sets forth the persons and agencies that must be provided notice of a motion to terminate a respondent's parental rights in an ongoing abuse, neglect or dependency action.

the neglect and dependency hearing without objection to jurisdiction waived any defenses implicating personal jurisdiction." *Id.* at 347, 677 S.E.2d at 838; *see also Id.* at 348, 677 S.E.2d at 838 ("because K.J.L.'s GAL appeared at the TPR hearing without objecting to the court's jurisdiction, any defenses based on the failure to issue a summons to K.J.L. or to serve the summons on the GAL were waived, and the trial court's exercise of jurisdiction was proper").

In the case before us, the trial court obtained jurisdiction over the subject matter and over the person of Respondent on 29 July 2013 when DSS filed the juvenile petition and a sheriff's deputy served Respondent with the petition and summons pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(a), (j)(1)(a) (2013). *See In re J.T. (I), J.T. (II), A.J.*, 363 N.C. 1, 4-5, 672 S.E.2d 17, 18-19 (2009). The trial court appointed GAL Redding to represent Respondent on 9 July 2014 – after K.S. was adjudicated dependent, two weeks before the 23 July 2014 permanency planning hearing, and more than five months before DSS filed the TPR motion on 16 December 2014. Because GAL Redding's appointment occurred "as part of the original . . . dependency action, Ms. [Redding]'s appointment pursuant to N.C. Gen. Stat. § 7B-602(c) was still in effect" when DSS initiated termination proceedings by motion pursuant to N.C. Gen. Stat. § 7B-1102(a). *In re A.S.Y.*, 208 N.C. App. 530, 534, 703 S.E.2d 797, 799-800 (2010).

"Broadly stated, any 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.*, 363 N.C. at 4, 672 S.E.2d at 18 (citation and quotation marks omitted). GAL Redding made general appearances in this cause both before and after the TPR motion was filed. She appeared on behalf of Respondent at the 23 July 2014 permanency planning hearing, and all subsequent review hearings, without objection. After the TPR motion was filed, GAL Redding filed a "Motion for Mediation" on 29 January 2015, and represented Respondent at the mediation on 10 March 2015. Accordingly, because GAL Redding voluntarily appeared before the trial court on multiple occasions without contesting issues of personal jurisdiction, GAL Redding has waived any objection to the trial court's jurisdiction.[4] *See In re K.J.L.*, 363 N.C. at 347, 677 S.E.2d at 838.

In addition, as noted in the brief of K.S's GAL, Respondent never presented the trial court with her current argument that service upon GAL Redding was required to comply with Rule 4. Respondent first objected to the method of service

[4] In light of our holding, we need not determine whether DSS was obliged by N.C. Gen. Stat. § 7B-1102(b)(1) to serve GAL Redding with the TPR motion pursuant to Rule 4, or whether GAL Redding was required to be served with the TPR motion at all. We note that Rule 17 of the North Carolina Rules of Civil Procedure does not contemplate the appointment of a GAL *in medias res* as authorized by N.C. Gen. Stat. § 7B-602(c). *Cf.* N.C. Gen. Stat. § 1A-1, Rule 17(c)(4) (2015) (For an incompetent defendant who does not require service by publication, the GAL "must be appointed . . . prior to or at the time of the commencement of the action[.]").

of the TPR motion at the 18 March 2015 pretrial hearing. As indicated in the trial court's findings of fact from its pretrial conference order:

> 3. Counsel for the Respondent-Mother for the first time today made an oral motion challenging the sufficiency of service of process of the Termination of Parental Rights Motion.
>
> 4. Counsel for the Respondent-Mother objects that the Motion in this Matter was not served consistent with Rule 5(b), which requires service via delivery to the attorney, delivery to the attorney's office, service by mail, or service by fax.

Because Respondent has not contested these findings of fact, they are binding on appeal. *In re T.H.*, 232 N.C. App. 16, 26, 753 S.E.2d 207, 214 (2014) ("'Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.'") (citation omitted). Further, Respondent did not indicate she was objecting to the manner of service based upon Rule 4 in her motion to dismiss filed 18 May 2015, and did not argue Rule 4 as a basis for that motion at the 20 March 2015 hearing on that motion. Therefore, Respondent's sole basis for her motion based upon improper service of the TPR motion was a purported failure to comply with Rule 5(b).

The trial court granted Respondent's initial motion on that basis, and continued the matter in order to grant Respondent thirty days in which to respond to the motion to terminate her parental rights as required by N.C. Gen. Stat. § 7B-1106.1(a). Though Respondent can preserve her right to contest personal jurisdiction

by a specific objection, a specific objection based on lack of proper service pursuant to Rule 5 does not serve as an objection preserving an argument that in actuality service pursuant to Rule 4 was required. "Objections to a court's exercise of personal (in personam) jurisdiction, on the other hand, must be raised by the parties themselves and can be waived in a number of ways." *In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 18 (2009) (citation omitted). Because Respondent failed to object to the trial court's exercise of personal jurisdiction on the basis that GAL Redding should have been served the TPR motion pursuant to Rule 4, Respondent has waived any such objection. Because any objection to the trial court's exercise of personal jurisdiction has been waived, Respondent's argument is overruled.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).