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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1317

Filed: 1 August 2017

Chatham County, Nos. 14 JT 4–5

IN THE MATTER OF: P.D. and C.A.

Appeal by respondent-father from orders entered 22 September 2016 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 13 July 2017.

*Holcomb and Stephenson, LLP, by Angenette Stephenson, for petitioner-appellee Chatham County Department of Social Services.*

*David A. Perez for respondent-appellant father.*

*Redding Jones, PLLC, by Ty Kimmell McTier and David G. Redding, for guardian ad litem.*

ELMORE, Judge.

Respondent-father appeals from orders terminating his parental rights to his minor children P.D. (Philip) and C.A. (Charles).<sup>1</sup> Because we hold the trial court exceeded its authority by exercising its jurisdiction to terminate a nonresident's

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<sup>1</sup> Pseudonyms are used to protect the minors' identities.

parental rights absent proper service on the respondent-parent as required under N.C. Gen. Stat. § 7B-1101, we vacate its orders.

***I. Background***

In January 2014, the Chatham County Department of Social Services (DSS) filed petitions alleging the children were abused and neglected while in the care of the children's mother and their stepfather. The children were subsequently adjudicated abused and neglected, but they were not removed from the home, and the case was scheduled to be closed on 11 December 2014. However, on 26 November 2014, DSS obtained nonsecure custody of the children after it received a new report alleging drug abuse by the children's mother and stepfather. DSS amended its petition that same day to include the new allegations. After a hearing, the trial court entered an order on 24 February 2015 adjudicating the children neglected and dependent. The court found that respondent-father was not involved in the children's lives.

After a 23 April 2015 permanency planning hearing, the court entered an order on 14 May 2015, in which it found that respondent-father was residing in Georgia and was not interested in working with DSS toward reunification with his children. The court set the permanent plan for the children as a concurrent plan of reunification and adoption, and directed DSS to file petitions or motions to terminate parental rights to the children.

On 24 July 2015, DSS filed petitions to terminate respondent-father's parental rights to Philip and Charles. That same day, the court issued summonses naming, *inter alia*, respondent-father's attorney as respondent. The summonses did not name respondent-father. After a termination of parental rights (TPR) hearing, the trial court entered orders terminating respondent-father's parental rights to Philip and Charles.<sup>2</sup> The court neither found that it had jurisdiction to make a child-custody determination nor that process was served on respondent-father, as statutorily required before a court may exercise its jurisdiction to terminate the parental rights of a nonresident parent. *See* N.C. Gen. Stat. § 1101. Respondent-father appeals the termination orders.

## ***II. Analysis***

Even when not raised by the parties, we must examine whether the district court had jurisdiction to terminate respondent-father's parental rights. “Whether a court has jurisdiction is a question of law reviewable de novo on appeal.” *In re T.E.N.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 798 S.E.2d 792, 794 (2017) (quoting *In re J.D.*, 234 N.C. App. 342, 344, 759 S.E.2d 375, 377 (2014)).

“[T]he General Assembly has granted subject matter jurisdiction to the trial court to hear and determine TPR petitions within a prescribed set of circumstances.” *In re J.T.*, 363 N.C. 1, 4, 672 S.E.2d 17, 19 (2009) (citing N.C. Gen. Stat. § 7B-1101

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<sup>2</sup> The children's mother relinquished her parental rights in November 2015.

(2007)). “When subject matter jurisdiction is a statutory creation, the General Assembly can, within the bounds of the Constitution, set whatever limits it wishes on the possession or exercise of that jurisdiction . . . .” *In re M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012); *see also In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (“ ‘Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.’ ” (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457–58, 290 S.E.2d 653, 661 (1982))). “When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to . . . vacate any order entered without authority.” *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

“[H]aving jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the court.” *In re M.I.W.*, 365 N.C. at 379, 722 S.E.2d at 473. Contrarily, “[e]xercising jurisdiction, in the context of the Juvenile Code, requires putting the court’s jurisdiction into action by holding hearings, entering substantive orders or decrees, or making substantive decisions on the issues before it.” *Id.* (addressing “distinctions in the Juvenile Code between exercising and having jurisdiction” and interpreting a juvenile statute prohibiting the court from

exercising jurisdiction as follows: “By choosing to prohibit exercising jurisdiction, rather than stating that the trial court is divested of jurisdiction, the General Assembly has signaled that the subject matter jurisdiction of the trial court is not removed.”); *see also Jerson v. Jerson*, 68 N.C. App. 738, 740, 315 S.E.2d 522, 523 (1984) (“[E]ven when the district court *has jurisdiction . . .*, it *has no authority to exercise its jurisdiction* without making findings of fact which support the conclusion that such exercise is required in the interest of the child . . . .” (emphasis added)). “[A] trial court’s general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action.” *In re T.P.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, slip op. at 7 (Jul. 5, 2017) (No. 17-119) (quoting *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003)).

As a general matter, N.C. Gen. Stat. § 7B-1101 grants a district court with subject-matter jurisdiction to terminate the parental rights of a nonresident parent. But it expressly limits a court’s authority to exercise that jurisdiction:

The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. *Provided, that before exercising jurisdiction . . .*, the court *shall find that it has jurisdiction* to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 *and that process was served* on the nonresident parent pursuant to G.S. 7B-1106. . . .

N.C. Gen. Stat. § 7B-1101 (2015) (emphasis added).

Thus, in order for the district court here to exercise its jurisdiction to terminate respondent-father's parental rights, a nonresident parent, it should have first found (1) it had jurisdiction to make a child-custody determination under the relevant provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and (2) respondent-father was properly served pursuant to N.C. Gen. Stat. § 7B-1106. In this case, the court made neither finding.

This Court has held that a court need not find facts specifically addressing its subject-matter jurisdiction under those provisions of the UCCJEA cited above before exercising that jurisdiction. *See, e.g., In re J.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 780 S.E.2d 228, 235 (2015); *In re E.X.J.*, 191 N.C. App. 34, 40, 662 S.E.2d 24, 27 (2008), *aff'd*, 363 N.C. 9, 672 S.E.2d 19 (2009). In this context, our jurisdictional review centers on whether the “circumstances . . . exist[ed]” under the UCCJEA to support the court's exercise of its jurisdiction. *In re E.X.J.*, 191 N.C. App. at 40, 662 S.E.2d at 28 (citing *In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *disc. rev. denied in part*, 361 N.C. 568, 651 S.E.2d 562, *aff'd per curiam in part*, 362 N.C. 84, 653 S.E.2d 143 (2007)).

However, the jurisdictional provision applicable here also required the court to find that respondent-father was properly served with process under N.C. Gen. Stat. § 7B-1106 (2015) (requiring, *inter alia*, termination summons to list a parent as a respondent) before exercising jurisdiction. In this case, the court never found that

respondent-father was properly served with process, and the record reveals that service was deficient, since the termination summons failed to list respondent-father as respondent. Because this finding was a condition precedent to the court exercising its statutory grant of subject-matter jurisdiction, and because the record reveals that process was not properly served on respondent-father, the court here exceeded its jurisdictional authority by terminating respondent-father's parental rights.

Typically, summons-related deficiencies implicate personal jurisdiction, not subject-matter jurisdiction. *See In re J.T.*, 363 N.C. at 4, 672 S.E.2d at 19 (holding that summons-related deficiency in TPR action implicated personal jurisdiction and thus could be waived by the parties); *see also In re K.J.L.*, 363 N.C. 343, 347, 677 S.E.2d 835, 838 (2009) (holding that summons-related deficiency in neglect and dependency action had no bearing on court's subject-matter jurisdiction). Here, however, rather than merely implicating personal jurisdiction, this summons-related deficiency deprived the court of its statutory authority to exercise its jurisdiction to terminate a nonresident's parental rights.

In *In re J.T.*, our Supreme Court addressed the issue of whether the failure to name a child as respondent in a termination summons or to serve a summons upon the child pursuant to N.C. Gen. Stat. § 7B-1106(a) precluded the court from exercising its subject-matter jurisdiction over a TPR action. 363 N.C. at 2, 672 S.E.2d at 17. The *In re J.T.* Court answered that “[i]t is inconsequential to the trial court's subject

matter jurisdiction that no summons named any of the three juveniles as respondent and that no summons was ever served on the juveniles or their GAL” and concluded that these summons-related deficiencies “are examples of insufficiency of process and insufficiency of service of process, respectively, both of which are defenses that implicate personal jurisdiction and thus can be waived by the parties.” *Id.* at 4, 672 S.E.2d at 19. However, no parent in that case was a nonresident and thus those summons-related deficiencies had no bearing on the court’s authority to exercise its N.C. Gen. Stat. § 7B-1101 jurisdiction. Indeed, the *In re J.T.* Court noted that the jurisdictional requirements of N.C. Gen. Stat. § 7B-1101 were satisfied in that case. *Id.* at 4–5, 672 S.E.2d at 19.

In *In re K.J.L.*, our Supreme Court addressed the issue of whether a court lacked subject-matter jurisdiction over a neglect and dependency action, and a related TPR action, where the neglect and dependency summons was not properly issued. 363 N.C. at 344, 677 S.E.2d at 836. The *In re K.J.L.* Court answered that “the failure to issue a summons in the neglect and dependency action did not affect the trial court’s subject matter jurisdiction, and the parents’ appearance at the neglect and dependency hearing without objection to jurisdiction waived any defenses implicating personal jurisdiction.” *Id.* at 347, 667 S.E.2d at 838. The Court explained that “the summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons



does not deprive the court of subject matter jurisdiction.” *Id.* at 346, 667 S.E.2d at 837. Again, however, in that case, no parent was a nonresident, and thus those summons-related deficiencies had no bearing on the court’s exercise of its N.C. Gen. Stat. § 7B-1101 jurisdiction.

However, unlike in *In re J.T.* and *In re K.J.L.*, where a summons-related deficiency had no bearing on the court’s authority to exercise its jurisdiction, the statutory grant of subject-matter jurisdiction at issue here expressly limited the district court from exercising its jurisdiction absent a finding that process was properly served, which required the issuance of a proper summons. Thus, this summons-related deficiency implicated more than personal jurisdiction. *See In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (“ ‘Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner . . . an act of the Court beyond these limits is in excess of its jurisdiction.’ ” (quoting *Eudy*, 288 N.C. at 75, 215 S.E.2d at 785)).

Because the court never found that respondent-father, a nonresident, had been properly served under N.C. Gen. Stat. § 7B-1106, and because the record reveals that service of process was actually deficient, the jurisdictional requirements of N.C. Gen. Stat. § 7B-1101 were unsatisfied. Accordingly, we hold the court acted beyond its jurisdiction by terminating respondent-father’s parental rights and thus vacate its

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orders. In light of our disposition, we decline to address respondent-father's remaining arguments.

VACATED.

Judge TYSON concurs.

Judge BERGER concurs by separate opinion.

Report per Rule 30(e).

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BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion. The trial court did not have jurisdiction to terminate respondent's parental rights because (1) the nonresident father was never served with the petitions, and (2) the trial court failed to make necessary findings pursuant to statute. I write separately to emphasize that neither summons named the father as a respondent, which would be another jurisdictional requirement that was not met.

As the majority states, the trial court's jurisdiction over a termination of parental rights proceeding is governed by Section 7B-1101, which provides:

The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.

N.C. Gen Stat. § 7B-1101 (2015) (emphasis added).<sup>3</sup> Thus, the North Carolina General Assembly has expressly provided that the procedural requirements of

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<sup>3</sup> The legislative history provides:

[B]efore a court may exercise jurisdiction regarding the parental rights of a nonresident parent, the court must find:

- That it has jurisdiction to make a child-custody determination under

Section 7B-1106 affects subject matter jurisdiction in those cases concerning *nonresident* parents.

N.C. Gen. Stat. § 7B-1106 provides, in relevant part,

(a) [U]pon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the juvenile. However, a summons does not need to be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency or to any parent who has consented to the adoption of the juvenile by the petitioner.

N.C. Gen. Stat. § 7B-1106(a)(1) (2015).

Here, petitions were filed by CCDSS to terminate Respondent's parental rights to Charles and Phillip. The summonses issued for these petitions did not name Respondent as the father of the minor children. Instead, his counsel was named on the summonses.

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the initial child-custody jurisdiction provisions or the jurisdiction to modify determination provisions, without regard to the temporary emergency jurisdiction provisions.

- That proper process was served on the nonresident parent.

H.B. 866, 2007 Gen. Assem., Reg. Sess. (N.C. 2007).

As the majority cites, generally “summons-related defects implicate personal jurisdiction and not subject matter jurisdiction” for termination of parental rights proceedings, *In re K.J.L.*, 363 N.C. 343, 348, 677 S.E.2d 835, 838 (2009); however, Section 7B-1101 mandates a summons must be issued to a nonresident parent before a trial court may acquire subject matter jurisdiction. *See* N.C. Gen. Stat. § 7B-1101.

Because Respondent was neither properly issued a summons for either petition nor was he properly served with process, the trial court failed to acquire subject matter jurisdiction over the termination of parental rights proceedings. The failure to properly issue and serve Respondent with summonses and petitions involved more than simply the failure to follow procedure, it deprived him of the opportunity to file a written answer to the allegations against him and the statutory and due process rights guaranteed to nonresident parents.