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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-582

Filed 5 March 2024

Polk County, No. 21-JT-27

IN RE: B.L.J.

Appeal by respondent-mother from order entered 16 March 2023 by Judge Kimberly Justice in Polk County District Court. Heard in the Court of Appeals 14 February 2024.

Phillip R. Feagan and Lora T. Baker for petitioner-appellee Polk County Department of Social Services.

Angela Farag Craddock for guardian ad litem.¹

Emily Sutton Dezio for respondent-appellant mother.

PER CURIAM.

Respondent-mother appeals the district court's order terminating her parental rights to her minor child B.L.J. ("Bella Leigh") born in September 2018.^{2,3} After careful review, we affirm the district court's order.

¹ Angela Farag Craddock substituted for S. Wesley Tripp III on appeal.

² A pseudonym is used to protect the juvenile's identity and for ease of reading.

³ Respondent-father is not a party to this appeal.

I. Background

The Polk County Department of Social Services (DSS) filed a juvenile petition alleging Bella Leigh was a neglected and dependent juvenile on 14 October 2021. At a medical appointment on 25 May 2021, respondent-mother disclosed that Bella Leigh had been suffering seizures twice a month for six months. Thereafter, respondent-mother failed to take Bella Leigh to medical appointments scheduled on 16 June, 24 August, and 29 September 2021, even when DSS offered to provide transportation.

A hearing on DSS's juvenile petition was conducted on 9 November 2021. By order entered 24 November 2021, the district court concluded that Bella Leigh was a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(9). Though the court granted DSS legal custody of the minor child, respondent-mother retained physical custody. The court ordered a permanent plan of reunification with respondent-mother along with a concurrent plan of custody/guardianship with a court-approved caretaker.

DSS filed a second juvenile petition alleging Bella Leigh to be a neglected and dependent juvenile on 23 December 2021. Respondent-mother had been the victim of domestic violence committed by a caretaker in the home on 20 December 2021, and Bella Leigh had witnessed the incident. Respondent-mother did not follow through with plans to seek a 50B domestic violence protective order or vacate the home. When a social worker visited the residence, the home was heated by an open oven; trash

had to be moved from the entranceway to gain access to the residence; and insects were in the kitchen and the room where respondent-mother and Bella Leigh slept. Respondent-mother also said that she had stopped taking the medication prescribed for her schizophrenia. Respondent-mother had no family or friends to help care for the minor child. DSS obtained a nonsecure custody order and placed Bella Leigh in foster care.

A hearing on DSS's second juvenile petition was conducted on 8 February 2022. The district court noted that respondent-mother acknowledged needing more help before she could care for the juvenile in her home and that her parental rights to two other juveniles had been terminated. The court concluded that Bella Leigh was a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9) and that it was contrary to her welfare to remain in respondent-mother's home. By order entered 4 March 2022, the primary permanent plan remained reunification but the secondary plan was changed to adoption. The court granted respondent-mother one hour of supervised visitation each week.

The court conducted a ninety-day review hearing on 10 May 2022 and a permanency planning hearing on 11 October 2022. Respondent-mother was present for both. Following the permanency planning hearing, the district court changed the primary permanent plan to adoption with a concurrent plan of reunification. Respondent-mother had refused multiple drug screens requested by DSS between March and May 2022, but on 27 September 2022, she tested positive for

methamphetamine, amphetamine, and hydrocodone. However, the evidence did not indicate respondent-mother was taking her medication for schizophrenia as prescribed. The court noted that respondent-mother “ha[d] moved from place to place, totaling seven different addresses within the last six months. She has also had five different phone numbers, making it difficult to stay in contact with her.” DSS had sought to update the family services agreement with respondent-mother, “but it ha[d] been difficult to reach her.” The court ordered DSS to file a motion to terminate respondent-mother’s parental rights and scheduled a permanency planning review hearing for 10 January 2023.

On 2 December 2022, DSS filed a Motion in the Cause for Termination of Parental Rights to Bella Leigh against respondent-mother alleging the following grounds: neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2021); willfully leaving the minor child in foster care for more than twelve months without showing progress in correcting those conditions which led to the child’s removal, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); willfully failing to pay a reasonable portion of the cost of care for the minor child for the six months preceding the filing of the motion, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3); and incapacity to provide proper care and supervision such that the minor child was dependent and there existed a reasonable probability that such incapacity would continue for the foreseeable future, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

The hearing on the motion to terminate parental rights was continued on 10 January and on 14 February 2023—in response to respondent-mother’s motions—and heard on 28 February 2023. Respondent-mother was not present at the hearing, and the district court denied her counsel’s motion to continue. The district court adjudicated grounds to support terminating respondent-mother’s parental rights in Bella Leigh pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), and (6). The court further concluded that terminating respondent-mother’s parental rights was in Bella Leigh’s best interest. The court entered its order terminating respondent-mother’s parental rights to Bella Leigh on 16 March 2023. Respondent-mother appeals.

II. Appeal

On appeal, respondent-mother argues that the district court (1) lacked subject matter jurisdiction to terminate her parental rights, (2) failed to provide respondent-mother with a fundamentally fair procedure, and (3) abused its discretion by denying respondent-mother’s counsel’s motion to continue.

A. Jurisdiction

Respondent-mother argues that the district court lacked subject matter jurisdiction to terminate her parental rights where DSS failed to issue a summons for respondent-mother to appear at the hearing to terminate her parental rights. She contends that where the notice was not properly served due to an incorrect mailing address, a new summons was required for the court to obtain subject matter jurisdiction. We disagree.

“Absent subject matter jurisdiction a court has no power to act and any resulting judgment is void.” *In re N.P.*, 376 N.C. 729, 731, 855 S.E.2d 203, 206 (2021) (citing *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787 (2006)). “Thus[,] the [district] court’s subject-matter jurisdiction may be challenged at any stage of the proceedings, even for the first time on appeal.” *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)). “We review the issue of subject matter jurisdiction de novo[.]” *In re M.C.*, 244 N.C. App. 410, 413, 781 S.E.2d 70, 73 (2015).

“In matters arising under the Juvenile Code, the court’s subject matter jurisdiction is established by statute.” *In re N.P.*, 376 N.C. at 732, 855 S.E.2d at 206 (citing *In re K.J.L.*, 363 N.C. 343, 345, 677 S.E.2d 835, 837 (2009)). Within Article 11 of our Juvenile Code, our General Assembly has conferred the “exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights” upon the district court. N.C. Gen. Stat. § 7B-1101 (2021).

Where a district court is already exercising jurisdiction over a juvenile and parent during an abuse, neglect, or dependency proceeding, a movant may initiate a proceeding to terminate parental rights by motion. N.C. Gen. Stat. § 7B-1102(a) (2021). “[B]ecause the court has already acquired subject matter jurisdiction over the juvenile and parents because of the ongoing proceedings, a new summons is not necessary; rather, mere notice of the hearing is sufficient.” *In re S.F.*, 190 N.C. App.

779, 783, 660 S.E.2d 924, 927 (2008); *see also* N.C. Gen. Stat. § 7B-1102(b) (identifying the rule of service applicable for notice of the termination proceeding).

DSS filed juvenile petitions alleging Bella Leigh to be a neglected and dependent juvenile on 14 October and 23 December 2021. The court adjudicated Bella Leigh a neglected juvenile on 24 November 2021 and a dependent juvenile on 4 March 2022. Continuing to exercise its jurisdiction, the court conducted a review hearing on 10 May 2022 and a permanency planning hearing on 11 October 2022 and calendared a permanency planning hearing to be conducted on 28 February 2023. DSS filed its Motion in the Cause for Termination of Parental Rights to Bella Leigh as well as issued notice of the termination proceedings on 2 December 2022. As the district court was exercising jurisdiction during the neglect and dependency proceeding when DSS filed its motion for termination of respondent-mother's parental rights to Bella Leigh, a summons was not required to establish the court's subject matter jurisdiction. Notice of the termination proceeding was sufficient. *See* N.C. Gen. Stat. § 7B-1102(a); *In re S.F.*, 190 N.C. App. at 783, 660 S.E.2d at 927. On this point, respondent-mother's argument is overruled.

Respondent-mother also contends that the district court's order terminating her parental rights should be reversed because DSS mailed the notice of the proceeding to an out-of-date address, having been made aware that respondent-mother no longer resided there.

Where a movant initiates a termination of parental rights proceeding by motion in accordance with N.C. Gen. Stat. § 7B-1102(a) and issues notice of the proceeding, notice directed to the parents of the juvenile must be served in accordance with N.C. Gen. Stat. 1A-1, Rule 5(b). N.C. Gen. Stat. §§ 7B-1102(b); 7B-1106.1(a)(1) (2021). Under Rule 5(b), notice upon a party's attorney of record is notice to the party. N.C. Gen. Stat. § 1A-1, Rule 5(b)(1) (2021); *Griffith v. Griffith*, 38 N.C. App. 25, 29, 247 S.E.2d 30, 33 (1978); *see, e.g., id.* ("Since notice was properly served on the [party]'s attorney of record, the [party] cannot now complain of inadequate notice absent a showing of extraordinary circumstances"); *In re M.C.*, No. COA10-651, 2010 WL 5135604 (N.C. Ct. App. Dec. 7, 2010) (unpublished) (holding the respondent-father was correctly served with notice of a termination of parental rights hearing pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 5, and 7B-1102 where his attorney was served by first-class mail). Moreover, a failure to provide notice "cannot affect the district court's subject matter jurisdiction 'because the court has already acquired subject matter jurisdiction . . . because of the ongoing proceedings.'" *In re C.S.B.*, 194 N.C. App. 195, 198, 669 S.E.2d 15, 17 (2008) (quoting *In re S.F.*, 190 N.C. App. 779, 783, 660 S.E.2d 924, 927 (2008)).

Here, DSS initiated the termination of parental rights proceeding against respondent-mother by motion in accordance with N.C. Gen. Stat. § 7B-1102. Respondent-mother does not contest that her attorney of record was served with notice of the proceeding by the United States Postal Service, as reflected by the

certificate of service attached to the notice, in accordance with Rule 5(b). Respondent-mother's challenge against the termination of parental rights order based on inadequate notice is overruled.

B. Fundamentally fair procedure

Respondent-mother argues that she was denied a fundamentally fair procedure where the district court failed to conduct an independent review hearing to determine “[w]hether all summons, service of process, and notice requirements have been met” in accordance with N.C. Gen. Stat. § 7B-1108.1, when she did not attend any hearing after the motion for termination of parental rights was filed and prior orders indicated she had moved eight times. Asserting that “[n]otice and a meaningful opportunity to be heard are fundamental requirements for due process under the U.S. and North Carolina Constitutions,” respondent-mother contends that where she was not served with notice of the termination of parental rights hearing, the district court “was required to balance [her] constitutionally protected right to custody of Bella Leigh with the [S]tate’s interest in protecting her.” Respondent-mother contends that when she failed to attend any of the termination hearings, the court should have ordered that notice of the termination proceeding be served in accordance with N.C. Gen. Stat. § 1A-1, Rule 4.

“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” *Santosky v. Kramer*, 455 U.S. 745, 753–54, 71 L. Ed. 2d 599, 606 (1982). “[T]he existence of such procedures being an

inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship." *In re K.M.W.*, 376 N.C. 195, 208, 851 S.E.2d 849, 859 (2020) (citing N.C. Gen. Stat. § 7B-100(4) (2021)). In a termination of parental rights proceeding, our General Assembly requires that a district court conduct a pretrial hearing in accordance with N.C. Gen. Stat. § 7B-1108.1 and consider, in part, "[w]hether all summons, service of process, and notice requirements have been met." N.C. Gen. Stat. § 1108.1(a)(3) (2021).

As discussed, pursuant to section 7B-1102(b), the motion for termination of parental rights and "the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b)[.]" N.C. Gen. Stat. § 7B-1102(b). Pursuant to Rule 5(b), service of notice "shall be made upon the party's attorney of record and, if ordered by the court, also upon the party." N.C. Gen. Stat. § 1A-1, Rule 5(b). Service upon a party's attorney of record may be accomplished "[b]y mailing a copy to the attorney's mailing address of record with the court." *Id.* § 1A-1, Rule 5(b)(1)b.

Respondent-mother does not dispute that DSS's notice of the termination proceeding was mailed to respondent-mother's counsel and Bella Leigh's guardian ad litem attorney advocate on 2 December 2022, as reflected by the notice and attached certificate of service. Respondent-mother's counsel and the guardian ad litem program volunteer, case supervisor, and attorney advocate appeared before the district court for the termination hearing on 28 February 2023.

Prior to commencing the adjudication hearing on 28 February 2023, the district court conducted a pretrial hearing addressing the factors listed under N.C. Gen. Stat. § 7B-1108.1(a), including whether Rule 5 notice to respondent-mother had been satisfied. As respondent-mother acknowledges in her brief to this Court, the district court heard the unchallenged assertion that “[t]his is a motion in the cause only requiring Rule 5 notice and notice was given . . . to [respondent-mother’s counsel].” In its order terminating respondent-mother’s parental rights, the court found that having “considered all pre-adjudication issues[,] . . . [a]ll service of process and notice requirements have been met[.]” We overrule respondent-mother’s argument that she was denied a fundamentally fair procedure because the district court failed to conduct a review hearing in accordance with N.C. Gen. Stat. § 7B-1108.1 and determine whether all notice requirements had been met.

To the extent respondent-mother claims her constitutional due process rights were violated, we note that respondent-mother was represented by counsel at the termination hearing and no due process argument was raised. *Cf. In re J.E.*, 377 N.C. 285, 290, 856 S.E.2d 818, 822 (2021) (“A parent’s absence from termination proceedings does not itself amount to a violation of due process.”). Constitutional arguments “not raised at a termination hearing may not be raised for the first time on appeal.” *In re A.L.L.*, 254 N.C. App. 252, 264 n.7, 802 S.E.2d 598, 607 n.7 (2017) (citing *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011)). Therefore, we dismiss this contention.

Where respondent-mother contends that the address listed for her on DSS's notice of the termination proceeding was incorrect and the district court should have ordered notice to be served in accordance with N.C. Gen. Stat. § 1A-1, Rule 4, we note that notice of the termination proceeding was correctly served on respondent-mother's counsel, pursuant to N.C. Gen. Stat. § 1A-1, Rule 5(b), who appeared before the district court during the termination hearing and raised no objection based on the service of the motion and notice of the proceeding upon respondent-mother. Therefore, respondent-mother waived her right to challenge the notice of the termination proceeding and is not entitled to relief on this ground. *See, e.g., In re T.D.W.*, 203 N.C. App. 539, 546, 692 S.E.2d 177, 181 (2010) (holding the respondent-mother "waived the right to complain about the lack of proper notice on appeal" where trial counsel appeared at the hearing to terminate the respondent-mother's parental rights and did not "lodge a notice-based objection during the course of that hearing"); *In re S.E.F.*, No. COA06-611, 2007 WL 655776, at *2 (N.C. Ct. App. March 6, 2007) (unpublished) (Where service of the motion for termination of parental rights and notice was accomplished by mailing both to the respondent's attorney and her guardian ad litem in accordance with Rule 5(b), "this was sufficient service regardless of the defect in the address of respondent.").

C. Motion to continue

Respondent-mother contends that the district court erred in denying her counsel's motion to continue the termination hearing where there was a question as to whether respondent-mother had notice of the hearing. We disagree.

Our Juvenile Code provides that “[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice[.]” N.C. Gen. Stat. § 7B-1109(d) (2021). “[C]ontinuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.” *In re L.A.J.*, 381 N.C. 147, 150, 871 S.E.2d 697, 699 (2022) (quoting *In re J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (cleaned up)). “Ordinarily, a motion to continue is addressed to the discretion of the [district] court, and absent a gross abuse of that discretion, the [district] court’s ruling is not subject to review.” *In re J.E.*, 377 N.C. at 290, 856 S.E.2d at 822 (quoting *In re A.L.S.*, 374 N.C. 515, 516–17, 843 S.E.2d 89 (2020)). “An abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *In re L.A.J.*, 381 N.C. at 149, 871 S.E.2d at 699 (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451 (2015) (cleaned up)). “Moreover, [r]egardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when defendant shows both that the denial was erroneous, and that

he suffered prejudice as a result of the error.’” *In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (quoting *State v. Walls*, 342 N.C. 1, 24–25, 463 S.E.2d 738, 748 (1995)).

An argument similar to respondent-mother’s was addressed by our Supreme Court in *In re J.E.*, 377 N.C. 285, 856 S.E.2d 818, although in *In re J.E.*, the respondent-father argued that the denial of his motion to continue violated his constitutional due process rights, which the Court reviewed de novo. *Id.* at 290, 856 S.E.2d at 822. The respondent-father

emphasize[d] his participation in the juvenile proceedings up to the termination hearing and argue[d], “[c]onsidering the fact that [he] had consistently participated in the proceedings prior to the termination hearing and the likelihood that he did not know the hearing was taking place, he had a critical need for procedural protection and his attorney’s motion to continue should have been granted.”

377 N.C. at 290, 856 S.E.2d at 822. Reviewing the transcript of the termination proceeding, the Court observed that “[t]here [wa]s no mention of the need to continue due to a lack of notice or in order to ensure due process. . . . [U]pon inquiry from the [district] court[,] [the] respondent[-father]’s counsel confirmed that his only objection to proceeding with the termination hearing was [the] respondent[-father]’s absence.” *Id.* at 290, 856 S.E.2d at 822. The termination of parental rights hearing was conducted five months after the termination petition was filed, after two prior continuances due to the parents’ absences, and when counsel for the respondent-father was present. *Id.* at 291, 856 S.E.2d at 823. The Court overruled the argument

that the district court erred by denying a further continuance of the termination proceedings beyond the ninety-day period where the respondent-father contended on appeal it was “likely” he did not know the hearing date and offered no explanation of his lack of contact with his counsel and DSS despite knowing the termination hearing was pending. *Id.* at 292, 856 S.E.2d at 823.

Here, the district court changed the primary permanent plan to adoption and ordered DSS to file a motion for the termination of respondent-mother’s parental rights to Bella Leigh in its 25 October 2022 permanency planning review order. Respondent-mother was in attendance for the permanency planning review hearing which was conducted on 11 October 2022 and does not contend she was unaware of the district court’s directive for DSS to file the motion. DSS filed the Motion in the Cause for Termination of Parental Rights on 2 December 2022. Ultimately, the matter was heard on 28 February 2023, eighty-eight days after the motion was filed and after two continuances requested by respondent-mother. The court report prepared by DSS in anticipation of the termination of parental rights hearing provides that respondent-mother was in contact with DSS on 26 January 2023.

Respondent-mother’s counsel appeared before the district court at the 28 February 2023 hearing and offered no argument in favor of finding an extraordinary circumstance to warrant hearing the motion to terminate respondent-mother’s parental rights more than ninety days after the filing of the motion. *See* N.C. Gen. Stat. § 7B-1109(d). Respondent-mother’s counsel stated that he had not had any

contact with respondent-mother since 14 February 2023, the day the case was last continued. Before this Court, respondent-mother contends that she “found out after the fact” that her parental rights had been terminated. But respondent-mother does not indicate why she did not contact her counsel or DSS about the pending termination proceeding. Respondent-mother fails to show the district court erred by denying her counsel’s motion to continue. *See* N.C. Gen. Stat. § 7B-1109(d); *In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91; *see generally In re J.E.*, 377 N.C. 285, 856 S.E.2d 818.

Respondent-mother contends that prejudice resulted from the denial of the motion to continue where “[s]he did not meaningfully participate in the hearing.” However, she was represented by counsel, and respondent-mother gives no indication the proceeding would have been influenced by her participation. Respondent-mother does not show prejudice from the denial of the motion to continue. *See In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91.

Respondent-mother fails to show the district court abused its discretion by denying her counsel’s motion to continue the termination of parental rights hearing. *See In re J.E.*, 377 N.C. at 290, 856 S.E.2d at 822. Accordingly, we overrule respondent-mother’s argument.

III. Conclusion

We uphold the district court’s exercise of subject matter jurisdiction to terminate respondent-mother’s parental rights and overrule her arguments that she

IN RE: B.L.J.

Opinion of the Court

was denied a fundamentally fair procedure and that the district court abused its discretion by denying her counsel's motion to continue. Accordingly, we affirm the district court's 16 March 2023 order terminating respondent-mother's parental rights to Bella Leigh.

AFFIRMED.

Panel consisting of:

Judges ZACHARY, CARPENTER, and THOMPSON.

Report per Rule 30(e).