NO. 12-16-00297-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF E.C.Q.L.,	***§***	***APPEAL FROM THE 354TH***
	§	***JUDICIAL DISTRICT COURT***
A CHILD	***§***	***RAINS COUNTY, TEXAS***

MEMORANDUM OPINION

Z.Q. appeals the denial of his petition for a bill of review. In four issues, he challenges the trial court's judgment. We reverse and remand.

BACKGROUND

Z.Q. and S.L. were married in 2007 and lived in California. Z.Q. testified that in 2009, S.L. traveled to Texas to visit her mother and take care of some criminal matters. According to records admitted at trial, S.L. gave birth to E.C.Q.L. in Texas in September 2010. According to Z.Q., he did not know that S.L. was pregnant. Patricia Skelton, a Department of Family and Protective Services (the Department) conservatorship worker, stated that the baby tested positive for drugs at birth. Initially, the Department filed an original petition for termination of S.L.'s parental rights, naming another person as E.C.Q.L.'s alleged father. The Department was appointed temporary managing conservator of the child. The caseworker's records show that S.L. announced during a court hearing on March 14, 2011, that she was married to Z.Q. and that he was the father of the child. Z.Q. testified that S.L. told him in early 2011, that she had given birth to E.C.Q.L. At that time, he said, S.L. told him that E.C.Q.L. was in the "temporary" custody of the government until her criminal cases were resolved.

On March 31, 2011, the Department filed a first amended original petition for protection of E.C.Q.L., for conservatorship, and for termination of Z.Q.'s parental rights. From the records admitted at trial, it appears that Z.Q. was appointed counsel. According to Skelton, S.L.

provided the Department with a Fresno, California business address, and a telephone number for Z.Q. In records admitted at the hearing, Julie Tolson, the Department caseworker, noted that she attempted to contact Z.Q. at the telephone number provided by S.L. She did not receive an answer, but left a message for him. The next day, the CASA volunteer told Tolson that she also attempted to contact Z.Q. She called the telephone number and a woman answered. However, she said, there was a "language barrier" and she did not get much information from the woman who answered the telephone. Moreover, the CASA volunteer was not sure if the woman would be able to give Z.Q. a message to return the telephone call.

According to Tolson's affidavit, she stated that Z.Q. was unknown to her and that he was a "transient person." She said that she sent a notice regarding the child to Z.Q. at the Fresno business address by certified mail, return receipt requested. The "green card" was signed by a person whose signature did not appear to be Z.Q.'s. Tolson also stated that inquiries to the Diligent Search Unit, Google.com, the Department of Public Safety databases, and the food stamp division of the Department of Human Services yielded no results. Thus, the Department effectuated substituted service by publication on Z.Q. in the RAINS COUNTY LEADER newspaper located in Emory, Texas on April 26, 2011.

At the conclusion of the trial on the merits, the trial court found, by clear and convincing evidence, that Z.Q. had engaged in one or more of the acts or omissions necessary to support termination of his parental rights under subsections (C) and (N) of Texas Family Code Section 161.001(b)(1). The trial court also found that termination of the parent-child relationship between Z.Q. and E.C.Q.L. was in the child's best interest. Based on these findings, the trial court ordered that the parent-child relationship between Z.Q. and E.C.Q.L. be terminated. The order of termination was filed on July 11, 2011.[1]

On January 25, 2016, Z.Q. filed a petition for bill of review, contending that he was not personally served by citation and was unaware that a court proceeding relating to his parental rights was pending. In his supplemental petition, Z.Q. further argued that service by publication denied him due process of law. After a hearing, the trial court denied Z.Q.'s petition for bill of

[1] The trial court found, by clear and convincing evidence, that the mother of the child, S.L., had engaged in one or more of the acts or omissions necessary to support termination of her parental rights under subsections (D), (E), (O), and (R) of Texas Family Code Section 161.001(b)(1). The trial court also found that termination of the parent-child relationship between S.L. and E.C.Q.L. was in the child's best interest. Based on these findings, the trial court ordered that the parent-child relationship between S.L. and E.C.Q.L. be terminated. The mother is not a party to this appeal.

review. The trial court filed findings of fact and conclusions of law, finding that Z.Q. was validly served by citation by publication and that his bill of review was not timely filed under section 161.211(b) of the Texas Family Code. This appeal followed.

DUE PROCESS

In his third issue, Z.Q. argues that strict enforcement of Texas Family Code section 161.211(b) violated his rights to due process under both the Texas Constitution and the United States Constitution because he was never properly served.

Standard of Review

Involuntary termination of parental rights embodies fundamental constitutional rights. ***Vela v. Marywood***, 17 S.W.3d 750, 759 (Tex. App.–Austin 2000), *pet. denied per curiam*, 53 S.W.3d 684 (Tex. 2001); ***In re J.J.***, 911 S.W.2d 437, 439 (Tex. App.–Texarkana 1995, writ denied). Because a termination action "permanently sunders" the bonds between a parent and child, we carefully scrutinize termination proceedings, and strictly construe involuntary termination statutes in the parent's favor. ***In re E.R.***, 385 S.W.3d 552, 563 (Tex. 2012); ***Wiley v. Spratlan***, 543 S.W.2d 349, 352 (Tex. 1976); ***In re Shaw***, 966 S.W.2d 174, 179 (Tex. App.–El Paso 1998, no pet.).

Applicable Law

Personal jurisdiction, a vital component of a valid judgment is dependent "upon citation issued and served in a manner provided for by law." ***In re E.R.***, 385 S.W.3d at 563 (quoting ***Wilson v. Dunn***, 800 S.W.2d 833, 836 (Tex. 1990)). If service is invalid, it is "of no effect" and cannot establish the trial court's jurisdiction over a party. ***Id.*** (quoting ***Uvalde Country Club v. Martin Linen Supply Co.***, 690 S.W.2d 884, 885 (Tex. 1985) per curiam)). Citation may be served by publication as in other civil cases to persons entitled to service of citation who cannot be notified by personal service or registered or certified mail and to persons whose names are unknown. TEX. FAM. CODE ANN. § 102.010(a) (West 2014). The validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed. ***Id.*** § 161.211(b) (West 2014).

Rule 109 of the Texas Rules of Civil Procedure provides that in order to issue citation by publication, a party to a suit shall make an oath (1) that the residence of the defendant is

unknown to the affiant; or (2) that such defendant is a transient person, and that after due diligence, such party and the affiant have been unable to locate the whereabouts of such defendant; or (3) that such defendant is absent from or is a nonresident of the State, and the party applying for citation has attempted to obtain personal service of nonresident notice as provided in Rule 108, but has been unable to do so. *See* TEX. R. CIV. P. 109. However, when a defendant's identity is known, service by publication is generally inadequate. *See* ***In re E.R.***, 385 S.W.3d at 560. Moreover, service by publication should be a last resort, not an "expedient replacement" for personal service. ***Id.*** at 561.

Further, a trial court must inquire into the sufficiency of the diligence exercised in attempting to ascertain the residence or whereabouts of the defendant or to obtain service of nonresident notice before granting any judgment on such service. *See* TEX. R. CIV. P. 109. If personal service can be effected by the exercise of reasonable diligence, "substituted service is not to be resorted to." ***In re E.R.***, 385 S.W.3d at 564. A diligent search must include inquiries that someone who really wants to find the defendant would make, and diligence is measured not by the quantity of the search but by its quality. ***Id.*** at 565.

In an appeal from a bench trial, the trial court's findings of fact have the same weight as a jury verdict. ***Fulgham v. Fischer***, 349 S.W.3d 153, 157 (Tex. App.–Dallas 2011, no pet.). Findings may be overturned only if they are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. ***Ortiz v. Jones***, 917 S.W.2d 770, 772 (Tex. 1996). When the appellate record contains a reporter's record as it does in this case, findings of fact are not conclusive and are binding only if supported by the evidence. ***Fulgham***, 349 S.W.3d at 157. We review a trial court's conclusions of law de novo. ***Quick v. Plastic Sol. of Tex., Inc.***, 270 S.W.3d 173, 181 (Tex. App.–El Paso 2008, no pet.). Erroneous conclusions of law are not binding on the appellate court, but if the controlling findings of fact will support a correct legal theory, are supported by the evidence, and are sufficient to support the judgment, the adoption of erroneous legal conclusions will not mandate reversal. ***Id.***

Analysis

Z.Q. argues that strict enforcement of section 161.211(b) violated his rights to due process under both the Texas Constitution and the United States Constitution because he was never served with citation. The Department contends that service by publication is allowable under the Family Code, and that citation by publication in this case was constitutional.

Diligent Search

We must first determine whether citation by publication deprived Z.Q. of due process by evaluating the quality of the "diligent search" required by statute. *See* ***In re E.R.***, 385 S.W.3d at 565; TEX. R. CIV. P. 109. The trial court's findings of fact stated that the Department sent notice of the pending case to Z.Q. at the address provided by S.L. Further, the trial court found that the Department and the CASA volunteer left messages at the telephone number provided by S.L. The trial court found that the address and telephone number had "adequate connection" to Z.Q. to provide him notice of the pending case. Finally, the trial court found that the Department made "reasonable attempts" to locate Z.Q. prior to obtaining citation by publication.

The evidence shows that Tolson, the Department caseworker, attempted to call Z.Q. at the telephone number provided by S.L. She did not receive an answer, but left a message for him. The CASA volunteer also attempted to contact Z.Q. by calling the same telephone number. However, she admitted to Tolson that there was a "language barrier" with the woman who answered the telephone. The CASA volunteer was not sure if the woman would be able to give Z.Q. a message to return the telephone call. While the telephone number may have had an "adequate connection" to Z.Q., the two efforts by Tolson and the CASA volunteer to reach the father could not give the trial court assurance that Z.Q. would have received the messages as a result of the admitted language barriers.

Tolson also stated in her affidavit that she sent a notice regarding the child to Z.Q. at the Fresno business address by certified mail, return receipt requested. The "green card" was signed by a person whose signature did not appear to be Z.Q.'s. Again, while the address may have been connected to Z.Q., the difference in signatures should have caused the Department to make more inquiries. Indeed, at the hearing, Z.Q. denied ever receiving mail at that address and stated that the address was not his "actual" address.

Moreover, Tolson stated in her affidavit that inquiries to the Diligent Search Unit of the Texas Department of Family and Protective Services, Google.com, the Department of Public Safety databases, and the food stamp division of the Department of Human Services yielded no results. However, most, if not all, of these services would have located Z.Q. only if he resided in Texas. Moreover, Tolson stated in her affidavit that Z.Q. was "unknown" to her and a "transient" person. There was no evidence that Z.Q. was a "transient person," or that he was "unknown."

Thus, the Department's search that included making two telephone calls, none of which were likely to have resulted in contacting Z.Q., sending one notice letter to a business address that may not have been Z.Q.'s address, and checking a few websites is not the type of diligent inquiry required before the Department may dispense with actual service. *See* ***In re E.R.***, 385 S.W.3d at 565-66. Here, it was both possible and practicable to more adequately warn Z.Q. of the impending termination of his parental rights. *See* ***id.*** at 566. The Department could have effectuated personal service to Z.Q. in California pursuant to Rule 108 of the Texas Rules of Civil Procedure.[2] Or, the Department could have obtained a translator and attempted another telephone call to Z.Q. that would have been more likely to have resulted in a message to Z.Q. or communication with him.

Nonetheless, the trial court found that Z.Q. was validly served by substituted service, i.e., citation by publication. The evidence shows that the Department effectuated substituted service by publication on Z.Q. in the RAINS COUNTY LEADER newspaper located in Emory, Texas on April 26, 2011. Notice by a publication in Rains County, Texas, as substituted service by citation for a father who was known to reside in California, is "a poor" and "hopeless substitute for actual service of notice." *See* ***id.*** at 561 (quoting ***City of New York v. N.Y., New Haven & Hartford R.R. Co.***, 344 U.S. 293, 296, 73 S. Ct. 299, 97 L. Ed. 333 (1953)).

From this evidence, we find, therefore, that the trial court's findings of fact were not supported by the evidence, and that citation by publication was constitutionally inadequate. *See* ***id.*** at 566; ***Fulgham***, 349 S.W.3d at 157.

Section 161.211(b) of Texas Family Code

We must next determine the effect of the failure to provide adequate notice on section 161.211(b) of the Texas Family Code. The validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after sixth months from the date the order was signed. TEX. FAM. CODE ANN. § 161.211(b). The trial court concluded that Z.Q.'s petition for bill of review was filed fifty-four months after the date of the order of termination and, therefore, was not timely under section 161.211(b). However, a complete failure of service deprives a litigant of due process and a trial court of personal jurisdiction; the resulting judgment is void and may be challenged at any time. *See* ***In re E.R.***,

[2] Rule 108 provides that where the defendant is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant. *See* TEX. R. CIV. P. 108.

385 S.W.3d at 566. The Texas Supreme Court has held that family code provisions which expedite termination proceedings must yield to due process. *See* ***id.*** at 567. "[F]inality cannot trump a parent's constitutional right to be heard." ***Id.***

Therefore, section 161.211(b)'s time limits cannot foreclose an attack by a parent who was deprived of constitutionally adequate notice. *See* ***id.*** We conclude that section 161.211(b) does not bar Z.Q.'s claim because service by publication was inadequate and deprived him of due process. Accordingly, we sustain Z.Q.'s third issue. Because Z.Q.'s third issue is dispositive, we will not address Z.Q.'s first, second, and fourth issues. *See* TEX. R. APP. P. 47.1.

Unreasonable Delay

However, this resolution does not end our inquiry. If, after learning that a judgment has terminated his parental rights, a parent "unreasonably stands mute," and granting relief from the judgment would impair another party's substantial reliance interest, the trial court has discretion to deny relief. *See* ***In re E.R.***, 385 S.W.3d at 569. In other words, when a child's welfare hangs in the balance, the reliance interest created by a termination order need not yield when a parent learns of the order yet unreasonably fails to act. *See* ***id.*** at 568.

Here, Z.Q.'s original petition for a bill of review contained some facts regarding when he hired an attorney to locate his son, when he learned that his parental rights had been terminated, and what he did after learning of the order. Pleadings, however, are not evidence. ***San Miguel v. City of Windcrest***, 40 S.W.3d 104, 111 (Tex. App.–San Antonio 2000, no pet.). At the hearing on the petition, Z.Q. testified that he may have hired his attorney in 2015. He provided no other information about when he learned of the termination order or what actions he took in response. On remand, the trial court is ordered to determine if Z.Q. unreasonably delayed seeking relief after learning of the termination order against him, and if granting relief would impair another party's substantial reliance on the order. *See* ***In re E.R.***, 385 S.W.3d at 569-70.

CONCLUSION

Having sustained Z.Q.'s third issue, we ***reverse*** the trial court's order denying his Petition for Bill of Review and ***remand*** this cause to the trial court for further proceedings consistent with this opinion.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 28, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 28, 2017

NO. 12-16-00297-CV

IN THE INTEREST OF E.C.Q.L.,A CHILD

Appeal from the 354th District Court
of Rains County, Texas (Tr.Ct.No. 9968)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the judgment be **reversed** and the cause **remanded** to the trial court **for further proceedings** in accordance with the opinion of this court; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.