

No. COA06-488

28th JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:
K.N.,
Juvenile.

From Buncombe County
05 J 413

BRIEF OF GUARDIAN AD LITEM/APPELLEE FOR JUVENILE

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STATEMENT OF THE CASE

A juvenile petition alleging KN was an abused and neglected juvenile was filed, and summons was issued, December 28, 2004. R. pp. 2, 13. KN was immediately placed in the nonsecure custody of the Buncombe County Department of Social Services (BCDSS, Department). R. p. 11. By consent and on stipulated facts KN was adjudicated abused and her step brother (who is not a party to the Termination of Parental Rights hearing or this appeal, his guardianship having been given to his paternal grandmother) were adjudicated neglected on February 23, 2005. R. pp. 75-82, 100.

After a series of review and permanency planning hearings, the permanency plan for KN was changed to adoption and BCDSS was relieved of further reunification efforts on August 19, 2005. R. pp. 95-100. The termination of parental rights petition was filed October 18, 2005. R. p. 35. A summons for Appellant Mother was issued that same day, but no return shows successful service. R. p. 44. A second summons was issued October 27, 2005. R. p. 51. An affidavit of service shows delivery of this summons by certified mail; the receipt was signed by Hershel action was taken at the pre-termination of parental rights hearing that day. R. p. 107. Having been set for hearing (R. p. 117), the case was continued to May 22, 2006, by order dated March 10, 2006, because of family emergency of the presiding judge.

R. p. 125. The trial was held May 26, the TPR order was entered June 23, and notice of appeal was served July 26, 2006, as noted in Appellant's brief.

STATEMENT OF THE FACTS

The Facts: On June 11, 2001, KN and two siblings were taken into custody by the Madison County DSS following an incident where the Madison County Sheriff's office found the two children in a vehicle in a ditch beside Bee Tree Road. Their grandmother and Danny S., who had been driving, were intoxicated. KN and the siblings were placed with KN's mother, Respondent Appellant. On July 8, AN, a sibling of KN, was killed when the family car rolled over him in the driveway. At the time, Appellant Mother was in the bathtub inside the trailer; the grandmother was also in the trailer. Placement of the surviving children In the meantime, during May, BCDSS was advised that KN was caring for her sibling with no adult supervision as Appellant Mother was smoking crack, taking opiates and prescription drugs. The Mother agreed to obtain a substance abuse assessment. She failed to so do from May through November 1, 2004.

On October 29, a new report (involving physically striking KN's sibling, continued drug abuse, and improper medication of the step sibling) was received. By the middle of November, Appellant twice picked up the children at daycare and drove them somewhere while smelling of alcohol

and exhibiting slurred speech. When the social workers went to investigate, both smelled alcohol on her person. R. p. 77.

Appellant Mother finally participated in a drug assessment on November 1, 2004, but she did not pursue treatment as recommended. The situation progressed to a crisis on December 24, 2004, when a physical fight between KN's Mother and stepfather occurred at 4:00 am. Both were intoxicated. The altercation was witnessed by a social worker and a police officer. The social worker was struck by a medication bottle thrown by Appellant Mother, who was then taken to jail. The children were placed with the stepfather's mother.

When she advised BCDSS on December 28, 2004, that she could not care for them, the Department filed the abuse and neglect petition and took custody. R. p. 78. After the Adjudication Appellant and the stepfather were ordered to engage in substance abuse treatment, participate in family therapy programs with Families Together and submit to random drug screens. Additionally, Appellant was ordered to complete an abusers recovery program at Women at Risk. R. pp. 81-2. The parents were allowed supervised visits. R. p. 88.

A permanency planning and review hearing was held March 21, 2005. Respondent Mother initially participated in substance abuse treatment with

Lighthouse Recovery. R. p. 85. By the June 13, 2005, hearing (where Virginia Thompson was appointed to represent Respondent in the underlying case), both parents had discontinued substance abuse treatment “due to transportation issues.” They also stopped participating in the other programs ordered at Disposition. R. pp. 92, 95. At the August 19, 2005 hearing, the trial court found that the parents had returned to the Lighthouse Recovery program, but only one session per week rather than the recommended two or three. They refused to participate in NA as requested. They cancelled visits with KN at the last minute at least three times. R. p. 97. The court concluded that the children were unlikely to return home within six months. The plan for KN was changed to adoption with a concurrent plan of guardianship. R. p. 99.

A termination of parental rights petition for the present case was filed October 18, 2005. R. p. 35. Additional facts, specifically related to the procedural issues raised by Respondent Mother, will be related in the Arguments.

The Child: The Guardian ad Litem described the child at the center of this case: K continues to do very well in her therapeutic foster home and has developed a very close bond with her foster mom, Karleene. She follows direction much better, is more mannerly, and her social skills with children

her age have improved. She still enjoys school, loves to learn, and is doing very well in school. Therapy with Teresa Anderson continues one hour a week, mainly working on attachment issues. Other than the attachment issues, there are no major problems at this time; but, K still has a lot of anger against her biological mom and she is still “searching for a forever mom.” DSS Exhibit 1, See Appendix.

The Court found on March 20, 2006, that “The minor child continues to ask about a 'forever family' where she will be able to live and grow up. A family has come forward that is interested in the possibility of adopting the minor child and they are in the process of becoming a licensed foster home.” R. p. 127. No objection or exception is found in the record supporting any of the issues raised by Appellant Mother. She should not now be permitted to raise these issues for the first time. “In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make.” Rule 10(b), North Carolina Rules of Appellate Procedure.

This Court stated in *In re Hennie*, 22 N.C. App. 690, 691, 207 S.E.2d 367, 368 (1971), an abuse and neglect case, “No objection or exceptions were entered by the respondent during the hearing. The purported

assignments of error are not proper and ought not be considered by this court."

I. APPELLANT MOTHER WAS NOT DEPRIVED OF HER RIGHT TO COUNSEL AS SHE FAILED TO PARTICIPATE AND REQUEST COUNSEL PRIOR TO THE TERMINATION HEARING AND DID NOT APPEAR AT THE HEARING WHERE HER ATTENDANCE WOULD HAVE REQUIRED THE TRIAL COURT TO INQUIRE ABOUT HER DESIRE FOR REPRESENTATION AND APPOINT COUNSEL IF REQUESTED.

Appellant Mother never took any of the steps that could have resulted in appointment of counsel for her. As required by N.C.G.S. §7B-1106(b)(3), the summons advised her, "Parents are entitled to have counsel appointed by the court if they cannot afford one, provided that they request such counsel at or before the time of the hearing on this matter. Parents may contact the clerk of Superior court immediately to request counsel." R. p. 51. Nothing in the Record indicates she contacted the Clerk regarding appointment of counsel. Nor did she appear at the trial where the court would have inquired about her desire for counsel. T. p. 2, 21-2; R. p. 137, See discussion of N.C.G.S., §7B-1109(b) *infra*. But even more significantly, since September 12, 2005, she had not appeared at review and permanency planning hearings or maintained contact with her attorney in the underlying case. R. pp. 111, 126; R. p. 137. Had she done so, she would have been advised of her right to counsel in the TPR case and could have indicated her desires for such

representation. Sometimes the horse just refuses to be led to water. N.C.G.S., §7B-1101.1 provides, “The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right.” (Emphasis supplied) This provision is unchanged from language in N.C.G.S. §7B-1101, and is essentially the same as former N.C.G.S. §7B-602(a). These statutes apparently respond to an observation by the United States Supreme Court that providing appointment of counsel in Termination of Parental Rights cases, while not constitutionally required in every case, is “enlightened and wise.” *Lassiter v. Department of Social Services*, 452 U.S. 18, 68 L. Ed. 2d 640, 101 S.Ct. 2153 (1981), *reh’g denied*, 69 L. Ed. 2d 1023, 102 S.Ct. 889.

In addition to the foregoing statutory provisions, N.C.G.S. §7B-1109, provides a procedure for assuring compliance with this policy even as late as the commencement of the trial. At that time: (b) The Court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them(counsel shall be appointed to represent them in accordance with rules

adopted by the Office of Indigent Defense Services. The General Assembly has determined that failure to request counsel earlier than the day of trial is not a waiver of the statutory right. *See In re Little*, 127 N.C. App. 191, 487 S.E.2d 823 (1997). But if a parent fails to appear for trial, time has finally run out and the right to appointment of counsel is waived.

This statute specifies two conditions in order to require appointment of counsel: (1) the parent must appear in court, and (2) the parent must not waive counsel in response to the court's inquiry. "If the parent is present in court, waiver can only result from an examination by the trial court and a finding of knowing and voluntary waiver." *In re Little*, 127 N.C. App. 191, 487 S.E.2d 823 (1997) (emphasis supplied).

Appellant Mother did not bother to show up for the hearing. The trial court was no longer required to, indeed it could not, determine and fulfill her desires for representation. Virginia Thompson, under the impression she had been appointed counsel for appellant mother, asked to withdraw when this case was called because Appellant had not contacted her for several months. R. p. 137, T. p. 2. If she had been appointed for this case, of course, she was conforming to her ethical obligations. A lawyer is required to make a motion to withdraw when the client has disappeared and the lawyer is ignorant of the client's objectives for the litigation. RPC 223. Such a motion

is appropriate only after the lawyer has used reasonable diligence to locate the client but is unsuccessful. *Id.*

If Attorney's motion to withdraw is denied, Attorney may participate in the proceedings to the limited extent that such participation is consistent with the known objectives of the missing client and the court's order of appointment. However, Attorney may not advocate for any particular position or outcome in the proceeding and Attorney does not have a duty to file an appeal.

North Carolina State Bar, 2003 Formal Ethics Opinion 16; July 16, 2004.

Had the trial court not released her, she would not have been able to make any meaningful contribution to the proceeding as she was without instructions from her client. The trial court's release of Ms Thompson had no effect on the proceedings, and therefore was in no way prejudicial to Appellant Mother. Any injury to her litigation interests resulted entirely from her failure to maintain contact with her attorney and from her failure to attend court in a timely manner.

Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

Lassiter, supra, at 33, 68 L.Ed.2d at 653.

II. APPELLANT WAS PROVIDED ADEQUATE NOTICE OF THE HEARING.

Appellant Mother argues she did not receive proper notice of the Termination hearing, but she supports her position with no legal authority whatsoever. This argument should be disregarded for failure to comply with N.C.R. App. P. 28(b)(6).

We first note that respondent has failed to support this argument with any citations to legal authority, in violation of Rule 28(b)(6) of our Rules of Appellate Procedure. N.C.R. App. P. 28 (b)(6) ("The body of the argument [of an appellant's brief] shall contain citations of the authorities upon which the appellant relies." (emphasis added)). Violations of the Rules of Appellate Procedure subject an appeal to dismissal. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360 (2005).

In re CEL, 171 N.C. App. 468, --- S.E.2d --- (2005). But if this Court were to consider this issue, it is without merit.

The Trial Court specifically found that Appellant knew of the hearing: "The trial was set for 9:30 a.m. on May 26, 2006, and the respondent mother was aware of the court date and the time court began. The respondent mother appeared at approximately 10:20 a.m., a few moments after this trial was over." R. p. 137. And in court, the judge addressed Appellant Mother directly, "I do see Ms. Sorenson was noticed, actually she was served by certified mail on the TPR matter November 1st, 2005 and was actually given

a notice of hearing that the matter, that is the TPR matter was going to be on the trial term May 22nd of '06. That's what the TPR file contains." T. p. 25 (See also R. pp. 105-6r 130A). When Appellant Mother appeared after conclusion of the trial, counsel was appointed for her and they both returned to the courtroom later in the day. At no time did she claim she did not know of the hearing, nor did she raise any objection based on lack of notice. T. pp. 21, 23-5. Any ingenuous person who had not been notified would have excused her tardiness by stating she had not known of the hearing.

Construing a different section of the Juvenile Code (N.C.G.S. §7B-907), this court has held:

A party who is entitled to notice of a hearing waives such notice where they attend the hearing and participate in it without objecting to improper notice. [Citations omitted]. Here, respondents and their attorneys were present at the hearing, they participated in the proceedings, and no one objected to improper notice. Thus, respondents waived any objection they might have had to improper notice.

In re JS, 165 N.C. App. 509, 598 S.E.2d 658 (2004). If Appellant Mother really did not have notice of the hearing, her failure to raise the issue in the trial court after failing to appear on time is inexplicable. Additionally, Appellant points to nothing in the record showing notice was not adequate because the original notice was directed to her. R. p. 117. Appellant asks this Court to assume this notice was not sent as directed. Appellate Courts,

however, should not assume error when none appears on the record. *State v. Blakeney*, 352 N.C. 287, 304, 531 S.E.2d 799, 812 (2000).

Finally, we should note that in addition to the formal notice procedure, the social worker also testified Appellant had actual knowledge of the proceedings.

Q. And currently, do you know the whereabouts of the Respondent Mother?

A. The last time I heard from Felicia was in March of 2006.

Q. Okay. And what was the nature of that contact?

A. She called and actually had left me a message, a voice mail, wanting to know when Court was scheduled, when the initial TPR was scheduled.

Q. Did you tell her?

A. I called her back and spoke to her brother and left a message letting her know when it was scheduled for.

As a final note on this argument, Appellant makes much of the court file reflecting an old address for her. The implication, with no citation to authority as noted above, is that it is the responsibility of the court, the clerk or the other parties to assure that a parent's address remains current. While due process certainly provides parents rights in Termination of Parental Rights cases, see *Lassiter*, supra, it certainly does not protect them against total

III. APPELLANT MOTHER, HAVING FAILED TO OBJECT TO SERVICE OF PROCESS AND THE RETURN OF SERVICE AT THE TRIAL LEVEL, WAIVED ANY OBJECTION SHE MIGHT HAVE HAD.

A. Failure Of Service Of Process Raises An Issue Of Jurisdiction Over The Person, Not Of Subject Matter Jurisdiction.

Discussing the standard of review for her third argument, Appellant Mother, in a single sentence, asserts that matters of subject matter jurisdiction are reviewed de novo and “may be raised at any time.” Brief p. 14. Inadequacies of service of process, however, involve the issue of personal jurisdiction, not subject matter jurisdiction, and require objection at trial. *In re Howell*, 161 N.C. App. 650, --- S.E.2d --- (16 Dec 2003).

At trial, Appellant Mother never objected to service of process or the return of service, nor did she move to dismiss the petition for failure to obtain jurisdiction over her. N.C.G.S., §1A-1, Rule 12(h). And N.C.G.S. §1-75.7 provides that a party who participates in a proceeding without raising the issue of personal service first, submits to the court's jurisdiction:

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance; Raising the issue at trial level is especially important because, “it is the service of the summons, rather than the return of the officer that confers jurisdiction.”

Matter of Arends, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1980). If objection is made at the trial level, the court can inquire about how the

summons was served and the result of the inquiry can be included in the record; at the appellate level the court can only speculate as to what occurred. Appellant Mother never objected to failure of service at the trial level. (R. p. 137; T, pp. 2, 21-5). Appellant's third argument fails because she did not object at the appropriate time.

B. Even Had Appellant Raised The Issue Process At The Trial Level, Without Failure Of Service, This Court Must Assume Proper Service

[A] defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning identity, role or authority of the person who signed for delivery of the summons.

Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 493, 586 S.E.2d 791 (2003). This court then continued at pp. 493-4: “Conspicuously absent from defendant's affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit.” Here, Appellant Mother has provided no affidavit or other evidence showing failure of service. In essence Appellant Mother argues in the present case that the presumption that the person who signed the certified mail receipt was her agent has been rebutted by the trial court asking her for a current address.

However, neither the transcript nor record indicates that Hershel Jenkins was not known to her, that she did not receive the summons, or even

that she did not reside at the address to which process was mailed at that time. Rather, Appellant would have this Court conclude, based solely on the fact that at the time of trial she resided elsewhere, that she was not properly served. *Granville* requires more. The conclusion does not follow from the premise.

CONCLUSION

Appellant mother was not deprived of her right to appointed counsel; her total inaction amounted to a waiver of that right. Her argument, unsupported by legal citation, that she involves a question of personal jurisdiction. Thus, Appellee argues that the trial court's order should be affirmed.

This the --- day of -----.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing APPELLEE BRIEF upon all parties to this cause by hand delivery, in the case of counsel for the Buncombe County Department of Social Services, by personal delivery of a copy to the Courthouse Office of the Buncombe County Department of Social Services, or by depositing a copy hereof in a post paid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney or attorneys for said parties as listed below.

This the --- day of November, 2006.

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