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Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 1, 2022

IN RE JIMMY H. ET AL.

Appeal from the Circuit Court for Coffee County
No. 2020-CV-46728 Vanessa Jackson, Judge

No. M2021-01353-COA-R3-PT

Mother appeals from the termination of her parental rights on the ground that she was not properly served with the termination petition. Because the record raises substantial questions as to whether the Tennessee Department of Children’s Services exercised diligence in its attempt to locate and serve Mother with process, we vacate the termination of her parental rights and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and JEFFREY USMAN, JJ., joined.

Kyle L. Johnson, Murfreesboro, Tennessee, for the appellant, Crystal W.

Herbert H. Slatery, III, Attorney General and Reporter; Amber L. Barker, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children’s Services.

Jean M. Brock, McMinnville, Tennessee, Guardian ad Litem.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a case involving the termination of Respondent/Appellant Crystal W.’s¹ (“Mother”) parental rights to her two children. Here, the Tennessee Department of Children’s Services (“DCS”) filed a petition to declare the two children dependent and

¹ In cases involving termination of parental rights, it is this Court’s policy to remove the full names of children and other parties to protect their identities.

neglected, Jimmy L.H., born in 2013, and Mercedes G.H., born in 2015.² The petition was filed against Mother and the children's father, Respondent Floyd H. ("Father"). On April 18, 2019, the Coffee County Juvenile Court ("the juvenile court") placed the children with Father and ordered that Mother would have no contact with the children until she appeared before the court.

On May 2, 2019, however, DCS filed a motion for protective custody over the children and for an amendment to the dependency and neglect petition to add an allegation of severe abuse by Father. According to the motion, Father exposed the children to a firearm, drugs, and drug paraphernalia. Criminal charges were also imminent against Father. On the same day, the juvenile court entered an ex parte order granting DCS temporary custody of the children. A few days later, the juvenile court entered an order appointing counsel for Mother after she filled out a uniform affidavit of indigency.

A hearing on the dependency and neglect petition was held on August 12, 2019. Father was not present due to his incarceration. Mother was also not present and her appointed counsel "had no[] reason for her absence." In a September 17, 2019 order, the juvenile court found that the children were dependent and neglected, but reserved ruling on the issue of severe abuse. Mother's visitation and contact with the children was suspended "until such time as she appears in court and establishes such contact is in the best interest of the children." A second order declaring the children dependent and neglected was entered on May 2, 2020; the order specifically found that the children were victims of severe abuse by Father. Father eventually appealed the juvenile court's order to the Coffee County Circuit Court ("the trial court").

On June 1, 2020, DCS filed a petition to terminate the parental rights of both Mother and Father in the trial court. As to Mother, the petition alleged that she had no contact with the children, would not keep in contact with DCS, and continued to use illegal drugs. The petition further alleged that Mother's last known address was on Newt Vanattia Road in Hillsboro, Tennessee, but that "she has not had a permanent address in many months" and is homeless. So the petition alleged the following grounds against Mother: (1) abandonment by failure to visit and support; (2) abandonment by failure to establish a suitable home; (3) substantial noncompliance with permanency plans; (4) persistent conditions; and (5) failure to manifest a willingness or ability to assume custody or financial responsibility for the child.

On March 30, 2021, DCS filed an affidavit of diligent search concerning Mother, as well as a motion seeking permission to serve Mother by publication. The affidavit, a filled-out form, was executed by Amy Batts, a Family Service Worker ("FSW") with DCS, and dated December 4, 2020. FSW Batts noted that Mother's last known address was on Clyde

² The petition also sought to have an older child of Mother's declared dependent and neglected. He is not at issue in this appeal.

Vickers Road in Estill Springs, Tennessee. FSW Batts checked a box indicating that phone contact had been attempted and noted four phone numbers associated with Mother, as well as five numbers used by Mother to call DCS but which “would never work again.” FSW Batts further noted that there were no relatives of Mother to contact and that Father was only recently released from incarceration. According to the affidavit, in an October 2019 conversation Father claimed not to know Mother’s whereabouts.

The affidavit also stated that a “clear search” was performed on Mother by DCS on November 6, 2020. In addition to the Clyde Vickers Road address, the search revealed eighteen other addresses for Mother.³ FSW Batts further reported that she had searched for Mother on social media, but located no information as to Mother’s whereabouts. The Child Support office also had no information about Mother as of April 2020. The affidavit did note, however, that Mother was incarcerated on August 2, 2020 “for possession of meth,” but did not state the length of Mother’s stay in jail. The space for “[p]hysical attempts to locate” Mother was also marked on the form and stated that “FSW Batts tried to visit [Mother] at her most recent address but [Mother] stated she no longer lived there and would not provide FSW Batts with an address.” The portions of the form to indicate searches with the Department of Human Services, local utilities, and the post office, and attempts by process servers to locate Mother were left blank. Finally, FSW Batts stated that

Every time [Mother] would call FSW Batts, FSW Batts would ask for an address and would offer to drive out and meet her but [Mother] always refused to give an address. I do not have any other information to relay about the whereabouts of this person. Based upon the above information it is my belief that the last known verifiable address of this person was [] CLYDE VICKERS RD ESTILL SPRINGS, TN 37330 located in Coffee County in the state of Tennessee.

The motion accompanying the affidavit reiterated that Mother’s last known address was on Clyde Vickers Road and stated that Mother “was not located at this address by process servers attempting to serve her with process in this matter.” The motion further argued that DCS had utilized all its resources to locate Mother and should be allowed to serve Mother by publication. The trial court granted DCS’s request by order of April 1, 2021, finding that all reasonable efforts to locate Mother had been unsuccessful. As such, the trial court granted DCS permission to serve Mother by publication. DCS later filed proof that it had served Mother by publication in Coffee County.

The appeal of the dependency and neglect case and the termination trial were heard together on September 17, 2021. Father and his counsel were present. Mother was not present and no counsel had ever been appointed to represent her in the termination matter. At trial, much of the testimony concerned Father, as the testimony from DCS generally

³ One of the addresses was for Newt Vanattia Road, while two were P.O. Boxes.

showed that Mother was not involved in the case or the children. Indeed, FSW Batts confirmed in her testimony that Mother refused to provide DCS with an address throughout the case and did not communicate with DCS in the year preceding the September 2021 trial.

The trial court promptly entered an order resolving both the dependency and neglect appeal and the termination on October 13, 2021. First, the trial court found that the children were dependent and neglected and the victims of Father's severe abuse. As to the termination petition, the trial court found clear and convincing evidence to terminate the parental rights as to both parents on every ground alleged in the petition. The trial court further found that termination was in the best interest of both children.

Father appealed the termination of his parental rights. Following review by this Court, the case was remanded to the trial court for the entry of an order complying with Rule 58 of the Tennessee Rules of Civil Procedure. A certificate of service was appended to the termination order on March 31, 2022. The certificate of service indicated that Mother had been mailed a copy of the order at her last known address on "Newt Venetia Road" in Hillsboro, Tennessee.⁴ Father, DCS, and the guardian ad litem later filed appellate briefs. On June 2, 2022, the Clerk of this Court entered an administrative order noting that Mother had not filed a brief and giving her additional time to do so. Mother did not respond. By order of June 14, 2022, we ruled that the appeal was to be submitted for a decision without the involvement of Mother.

On July 5, 2022, Mother filed a pro se, hand-written letter with this Court explaining that she had been incarcerated and had not been notified of the proceedings.⁵ Mother also asked that she be appointed a lawyer. DCS filed a response arguing that Mother should not be given additional time to file a brief. On July 11, 2022, we entered an order vacating the June 14, 2022 order and remanding the matter to the trial court for the appointment of counsel for Mother. The appeal was stayed for sixty days to accomplish this objective. Mother filed a second pro se, handwritten letter on July 18, 2022, seeking clarification of the remand order. On August 1, 2022, appointed counsel for Mother filed a notice of appearance with this Court. The next day, we entered an order setting a new briefing schedule.

In the meantime, however, Father unfortunately passed away on July 29, 2022. His counsel filed a motion to withdraw his appeal on August 4, 2022. As a result, this Court entered an order on August 19, 2022, dismissing Father's appeal as moot. The appeal as to Mother would proceed. In due course, all remaining parties filed briefs, and this matter was

⁴ We assume that this was an attempt to serve Mother at the address that was listed in the termination petition: Newt Vanattia Road. Of course, the affidavit of diligent search stated that Mother's last known address was different than the address listed in the petition. It is unclear why the order was served at an even older address than the one listed in the later affidavit and motion for publication.

⁵ Mother's letter did not state when her incarceration began.

submitted to the Court without oral argument.

II. ISSUES PRESENTED

Mother raises a single issue in this case concerning whether service by publication was authorized by the relevant statutes. DCS argues that service by publication was authorized and that clear and convincing evidence supports the termination of Mother's parental rights.⁶

III. ANALYSIS

The central issue in this case concerns whether Mother was properly served with the petition seeking to terminate her parental rights. This question must be answered before we reach the question of whether termination of parental rights was proper because personal jurisdiction is one of the prerequisites to “[t]he lawful authority of a court to adjudicate a controversy[.]” *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015) (citing *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994); *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Brown v. Brown*, 155 Tenn. 530, 296 S.W. 356, 358 (Tenn. 1927)). “[P]ersonal jurisdiction recognizes and protects an individual liberty interest that flows from the Due Process Clause and requires that maintenance of the suit not offend traditional notions of fair play and substantial justice.” *Id.* at 270 (citing *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945))) (internal quotation marks omitted).

Courts obtain “personal jurisdiction over a party defendant by service of process.” *Id.* at 271 (citing *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012); *Johnson v. McKinney*, 32 Tenn. App. 484, 222 S.W.2d 879, 883 (Tenn. Ct. App. 1948) (“The general rule is that notice by service of process *or in some other manner provided by law* is essential to give the court jurisdiction of the parties; and judgment rendered without such jurisdiction is void and subject to attack from any angle.” (emphasis added))). “The record must establish that the plaintiff complied with the requisite procedural rules, and the fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve process in accordance with the rules.” *Ramsay*, 387 S.W.3d at 568. “A court ‘without personal jurisdiction of the defendant’ is wholly ‘without power to proceed to an adjudication’ binding on that defendant, regardless of the specific reason such jurisdiction is lacking.” *Id.* (quoting *Emps. Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381, 57 S. Ct. 273, 81 L. Ed. 289 (1937)).

The Tennessee Supreme Court has recognized that service by publication in the

⁶ The guardian ad litem also filed a brief in this case, but addressed only the issue of the children's best interests.

local newspaper “has been an accepted method of substituted service for well over a century.” *Turner*, 473 S.W.3d at 272 (citing *Pennoyer v. Neff*, 95 U.S. 714, 727, 24 L. Ed. 565 (1877)). However, “constructive service by publication is permissible only if it is accomplished in a manner reasonably calculated to give a party defendant adequate notice of the pending judicial proceedings.” *Id.* (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). Moreover, “constructive service by publication should be viewed as a last resort means of serving a party whose identity is known.” *Id.* at 273.

The Tennessee Supreme Court has further recognized that our “statutes permitting constructive service by publication incorporate safeguards to ensure that the foregoing constitutional principles are satisfied.” *Id.* (collecting cases). Due to the “constitutional dimensions” of service of process, “a plaintiff who resorts to constructive service by publication must comply *meticulously* with the governing statutes.” *Id.* at 274 (quoting *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *6 (Tenn. Ct. App. June 3, 2003)).

The Tennessee Rules of Civil Procedure do not expressly provide for service by publication, but do note that service of this kind may be authorized by statute. *See* Tenn. R. Civ. P. 4.08 (“In cases where constructive service of process is permissible under the statutes of this state, such service shall be made in the manner prescribed by those statutes, unless otherwise expressly provided in these rules.”). Several statutes address the topic of constructive service by publication. Two relevant statutes were cited by the trial court in its order granting DCS permission to serve Mother by publication. First, Tennessee Code Annotated section 21-1-203(a) provides that personal service “is dispensed with” in a variety of specified circumstances, including, “[w]hen the residence of the defendant is unknown and cannot be ascertained upon diligent inquiry.” Tenn. Code Ann. § 21-1-203(a)(5).⁷ To dispense with personal service of process in any of the instances set forth, however, subsection (b) of the statute requires that the facts “be stated under oath in the bill, or by separate affidavit, or appear by the return.” Tenn. Code Ann. § 21-1-203(b).

Also cited by the trial court, Tennessee Code Annotated section 36-1-117 specifically applies in the context of parental termination actions. It provides that when a plaintiff seeks to dispense with personal service of process, the plaintiff must move “for an order of publication” and states that the plaintiff’s motion “shall be accompanied by an affidavit of the petitioners or their legal counsel attesting, *in detail*, to all efforts to determine the identity and whereabouts of the parties against whom substituted service is sought.” Tenn. Code Ann. § 36-1-117(m)(3) (emphasis added). The Tennessee Supreme Court has therefore held that for service by publication to be authorized in a termination

⁷ Section 21-1-203 specifically applies “in a court of chancery[.]” Tenn. Code Ann. § 21-1-203(a). This case was filed in circuit court. Nevertheless, Mother assigns no error to the trial court’s citation of this statute.

action, the following must be shown “(1) the defendant’s residence is unknown and cannot be ascertained upon *diligent inquiry*; and (2) the plaintiff has asked for an order authorizing constructive service by publication and has supported the request with an affidavit attesting, in detail, to all efforts to determine the identity and whereabouts of the parties against whom substituted service is sought.” *Turner*, 473 S.W.3d at 274 (internal quotation marks and citations removed). Thus, “[o]nly when the residence of the defendant cannot be obtained through diligent inquiry may a party resort to constructive service by publication.” *Id.* Moreover, “[t]he statute permitting constructive service by publication in parental termination proceedings specifically ‘places the burden of demonstrating diligent inquiry upon the petitioners by requiring a detailed affidavit from the petitioners or their legal counsel attesting to all efforts made to determine the whereabouts of the unserved party.’” *Id.* at 274–75 (quoting *In re Adoption of F.M.B.P.W.*, No. M2007-01691-COA-R3-PT, 2008 WL 821670, at *2 (Tenn. Ct. App. Mar. 26, 2008)). The issue of whether diligent inquiry was made prior to an attempt at service by publication under the above statutes “is a question of fact to be determined at trial.” *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 148 (Tenn. Ct. App. 2007) (quoting *Freeman v. City of Kingsport*, 926 S.W.2d 247, 250 (Tenn. Ct. App. 1996)).

Both parties cite *In re Stormie M.*, No. M2015-02336-COA-R3-PT, 2016 WL 5025999 (Tenn. Ct. App. Sept. 15, 2016), as the closest case on point to the case-at-bar. In *In re Stormie*, the child’s putative father was served only by publication. Although the putative father did not participate in the appeal, the Court of Appeals chose to address whether he was properly served as an issue “of fundamental fairness[.]” *Id.* at *8.

First, we noted that the termination petition did not allege that the putative father’s whereabouts were unknown, but listed a specific address for him. *Id.* at *9. An affidavit was filed by a DCS case manager that stated the efforts DCS made to assist the putative father, including dates upon which the case manager had spoken to him. Moreover, the affidavit stated that returned mail was received from the putative father, but did not state to what address this mail was sent. On May 13, 2015, DCS filed a motion for service by publication stating that the putative father’s address was unknown. No affidavit was filed on that date, however. Instead, an affidavit of diligent search was filed the next day, May 14, 2015. The trial court nevertheless granted the motion for publication by order of May 13, 2015, citing an at-that-time non-existent affidavit of diligent search. *Id.*

Obviously, the lack of affidavit itself was troubling to the Court. *Id.* But even considering the affidavit, the Court found much to be desired. Specifically, we concluded that the affidavit left us with substantial questions as to whether DCS actually exercised due diligence in attempting to locate the putative father. *Id.* For example, the affidavit of diligent efforts included no outline of any conversations DCS had attempted with the putative father, despite the fact that the prior affidavit indicated that the putative father had been in contact with DCS. The affidavit further noted that the putative father was located on social media, but did not respond to messages. *Id.* While the affidavit did state that DCS

attempted to determine if the putative father was incarcerated, it did not mention even a single attempt to serve the putative father at the address listed in the termination petition, despite the fact that the trial court later found this address to be the proper address for the putative father. *Id.* at *10. Based on these facts, we concluded that DCS failed to show that it made a diligent effort to locate the putative father before it sought service by publication. The termination of the putative father’s parental rights was therefore vacated. *Id.*

Mother argues that the facts in this case are analogous to *In re Stormie* and that DCS’s lack of diligence in attempting to locate her should mandate the same result. DCS disagrees, arguing that *In re Stormie* is distinguishable from the present case because the termination petition in that case alleged a specific address for the putative father, whereas the petition here alleged that Mother was homeless and that DCS only had a last known address. And DCS points out that by the time that DCS filed its affidavit of diligent search and motion for publication, DCS had a different, more recent, last known address for Mother. DCS further mentions that the evidence presented at trial confirmed the affidavit’s statement that Mother repeatedly refused to inform DCS of her correct address.

Respectfully, we disagree that DCS exercised the requisite diligence in this case. First, we note that Tennessee Code Annotated section 36-1-117(m)(3) expressly mandates that the evidence of DCS’s diligent efforts be detailed in an affidavit. And despite the motion for publication alleging that service was attempted by a process server at the Clyde Vickers Road address, the affidavit contains no such allegation. It is axiomatic that unsworn statements of counsel are not evidence. *Elliott v. Cobb*, 320 S.W.3d 246, 250 (Tenn. 2010). Therefore, the record contains no *evidence* that DCS ever attempted to serve Mother personally at even a single address.

Moreover, there is no indication that DCS followed up on the information that “[Mother] was incarcerated on 8/2/2020 for possession of meth.” DCS’s affidavit is devoid of clarifying information regarding this odd one-day incarceration for possession of methamphetamine. There is no detailing of DCS’s communication with law enforcement, the clerk’s office, bail bonding entities, or jail or prison officials in an attempt to locate Mother, who ultimately contacted this court from prison.

The term “diligent” is defined as “[c]areful; attentive; persistent in doing something.” *Black’s Law Dictionary* 523 (9th ed. 2009). With that in mind, “[a]ctions taken to achieve service of process in these cases should not be merely perfunctory.” *Adoption Place*, 273 S.W.3d at 148 (citing *In re C.L.M.*, No. M2004-02922-COA-R3-PT, 2006 WL 842917, *5 (Tenn. Ct. App. March 30, 2006)). This is particularly true where the identity of the parent is known. *Turner*, 473 S.W.3d at 273. Here, Mother’s identity was known by DCS. Although we understand DCS’s frustration that Mother refused to cooperate by providing an easy means of being located, DCS has cited no law that states that Mother’s refusal to provide an address excused it from making a diligent effort to locate her.

The efforts that DCS did make simply do not rise to the level of diligence. For one, the affidavit indicates that Father was the only person associated with Mother, as she had no other relatives. But the affidavit of diligent search detailed only a single conversation with Father in which DCS attempted to discern Mother's whereabouts; this conversation occurred in October 2019, approximately one-and-one-half years before DCS attempted to obtain permission to serve Mother by publication. Other information contained in the affidavit dated to April 2020 (child support inquiry) and August 2020 (jail search), without any indication that more recent searches had been attempted in the Spring of 2021 when publication was actually sought. Moreover, the record shows that DCS had at least two addresses that Mother was associated with around the time of the filing of the termination petition. DCS's affidavit, however, does not state in detail that any efforts beyond internet searches and asking Mother for an address were made to personally locate and serve Mother. Indeed, unlike in *In re Stormie*, the affidavit does not state that DCS ever sent even a single letter to Mother at any address that was returned, much less that notice of the termination petition was mailed to Mother's last known address. See *In re Z.J.S.*, No. M2002-02235-COA-R3-JV, 2003 WL 21266854, at *6 (Tenn. Ct. App. June 3, 2003) ("When the identity of a biological parent is known, constructive notice by publication must be supplemented by notice mailed to the parent's last known available address or by personal service." (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S. Ct. 2706, 2711 (1983))).

Based on the foregoing, we have substantial questions as to whether DCS exercised diligent efforts prior to resorting to service by publication in this case. It is true that vacating the judgment of the trial court will delay a permanent solution for the children at issue in this case, who sorely deserve stability. And the outcome of any future proceedings may very well be the same, given Mother's alleged failure to be any part of the children's lives for the totality of these proceedings. But we cannot ignore the simple fact that without personal jurisdiction over Mother, the termination order is void. *Turner*, 473 S.W.3d at 270. So we must vacate the judgment of the trial court terminating Mother's parental rights.

IV. CONCLUSION

The judgment of the Coffee County Circuit Court is vacated, and this matter is remanded to the trial court for further proceedings. Costs of this appeal are taxed to Appellee, the Tennessee Department of Children's Services, for which execution may issue if necessary.

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE