NC Supreme Court Addresses Jurisdiction in TPRs of Out-of-State Parents

In the last two years, the North Carolina Supreme Court has published two opinions that answer questions raised about whether a North Carolina district court has personal and/or subject matter jurisdiction to terminate the parental rights of a parent who lives outside of North Carolina. Both opinions are cases of first impression. Both opinions held that the district court had personal jurisdiction over the respondent parent. One opinion held the district court also had subject matter jurisdiction in the TPR action. Both opinions affirmed the challenged TPR orders. Both opinions overturn previous court of appeals opinions on the issues raised. Here's what you need to know.

No Minimum Contacts Required: *In re F.S.T.Y.*, 374 N.C. 532 (2020)

The first opinion, *In re F.S.T.Y*., 374 N.C. 532 (2020), addressed whether due process requires an out-of-state parent to have minimum contacts with North Carolina before terminating the rights of that parent. The Supreme Court held that "due process does not require a nonresident parent to have minimum contacts with the State to establish personal jurisdiction for purposes of termination of parental rights proceedings." *In re F.S.T.Y*., 374 N.C. at 541. In its reasoning, the Supreme Court noted that although due process generally requires a nonresident to have "…sufficient 'minimum contacts' with the forum state so 'that the maintenance of the suit does not offend traditional notions of fair play and substantial justice' ", the U.S. Supreme Court has recognized exceptions to minimum contacts in status cases (e.g., divorce). *In re F.S.T.Y*., 374 N.C. at 534 quoting *Int'l Shoe Co*. *v. Washington,* 326 U.S. 310, 316 (1945)).

The opinion in *F.T.S.Y.* explains that in status cases, the trial court's jurisdiction is established by the status of the plaintiff, rather than the location of the defendant. In looking at appellate opinions from other states and the purposes of the North Carolina Juvenile Code (G.S. Chapter 7B), the N.C. Supreme Court held that the status exception applies to TPR proceedings because the child's status to their parent and the child's best interests are at issue. With this opinion, North Carolina has joined other states that have held that minimum contacts are never required in TPR proceedings on the basis that these cases fall within the "status" exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g.*, *In re R.W.*, 39 A.3d 682 (Vt. 2011) and cases cited in *In re F.S.T.Y*.

In its opinion, the N.C. Supreme Court further recognized that in North Carolina, the best interests of the child are the paramount consideration in a TPR, and when there is a conflict between the interests of a child and parent, the child's best interests prevail. *See* G.S. 7B-1100(3). Because a TPR involves a parent who allegedly does not adequately care for their child, "fairness requires that the State have the power to provide permanence for children living within its borders[,]" which is a matter of state concern. *In re F.S.T.Y.*, 374 N.C. at 540. The N.C. Supreme Court reasoned that not favoring the child's home state when determining jurisdiction would run contrary to the

principle of acting in the child's best interests. The N.C. Supreme Court further held that even without minimum contacts, the respondent parent continues to have a right to actively participate in the TPR proceeding and that any burden imposed on the out-of-state respondent parent is mitigated by the appointment of counsel (*see* G.S. 7B-1101.1) and right to seek participation through remote technology (*see* G.S. 50A-111; 7A-49.6).

Prior to *In re F.S.T.Y.*, there were four opinions published by the North Carolina Court of Appeals that addressed personal jurisdiction in a TPR of nonresident parents. In all four opinions, the respondent parent whose rights were terminated were fathers. The opinions addressing whether minimum contacts were required split (2 and 2) based upon whether the child was born in wedlock. *In re F.S.T.Y*. expressly overruled two of the court of appeals' opinions: *In re Finnican*, 104 N.C. App 157 (1991), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644 (1992) and *In re Trueman*, 99 N.C. App. 579 (1990). Both those opinions involved a child who was born during the marriage between the mother (petitioner) and the father (respondent) and was the legitimate child of the marriage. Both opinions held that to satisfy due process a nonresident parent must have minimum contacts with the state before a court in North Carolina may terminate the parent's rights. *In re F.S.T.Y*. did not overrule the two other opinions that determined minimum contacts were not required for a child who is born out of wedlock when the respondent father fails to demonstrate a commitment to the responsibilities of parenthood – *In re Dixon*, 112 N.C. App. 248 (1993) and *In re Williams*, 149 N.C. App. 951 (2002). Note that the analysis the court of appeals applied in these two opinions is no longer law given the holding of *In re F.S.T.Y*.

G.S. 7B-1101 Service Requirements on Nonresident Parents Impacts Personal Jurisdiction, Not Subject Matter Jurisdiction: *In re A.L.I.*, 2022-NCSC-31.

The Juvenile Code addresses jurisdiction in TPRs in G.S. 7B-1101. The title of G.S. 7B-1101 is "Jurisdiction," but the statute does not identify whether it applies to subject matter jurisdiction or personal jurisdiction. Instead, the statute consists of a single paragraph that addresses several different factors. In prior opinions, the court of appeals has looked to the language of G.S. 7B-1101 when holding the district court lacked subject matter jurisdiction in a TPR action where the provisions of this statute were not followed. (For a discussion of the cases that hold G.S. 7B-1101 equates the county in which the TPR action is filed with subject matter jurisdiction, see my earlier blog post here.)

One sentence of G.S. 7B-1101 specifically addresses nonresident parents:

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

G.S. 7B-1101 (emphasis added).

The referred to statute, G.S. 7B-1106, governs issuance and service of the summons in a TPR proceeding.

Recently, the N.C. Supreme Court decided *In re A.L.I.*, 2022-NCSC-31, which examines the language of G.S. 7B-1101 when making a determination as to whether the district court had subject matter jurisdiction over the nonresident father whose parental rights were terminated. In *A.L.I*., the father whose parental rights were terminated was incarcerated, and therefore, residing in New York. The father wrote letters to the court, participated in the hearing remotely, and was represented by court appointed counsel. On appeal, father's sole challenge was to the district court's lack of subject matter jurisdiction, arguing it was lacking because he was not served pursuant to G.S. 7B-1106 as required by G.S. 7B-1101. The father relied on an unpublished court of appeals opinion, *In re P.D*., 254 N.C. App. 852 (2017), that vacated a TPR order for lack of subject matter jurisdiction when the nonresident parent was not served as required by G.S. 7B-1106.

In *A.L.I*., the Supreme Court answered the question as to whether the provision of G.S. 7B-1101 that addresses nonresident parents applies to subject matter or personal jurisdiction. The Supreme Court held the language applies to personal jurisdiction and reiterated that unlike subject matter jurisdiction, personal jurisdiction is a defense that can be waived by the parties. In *A.L.I*., the Supreme Court discussed two prior opinions – *In re K.J.L*., 363 N.C. 343 (2009) and *In re J.T.,* 363 N.C. 1 (2009) – both of which distinguished the difference between subject matter jurisdiction and defects in personal jurisdiction. In *K.J.L*., despite no summons being issued, the Supreme Court held the summons applies to personal jurisdiction and not subject matter jurisdiction and determined that the parent waived the defense that there was no summons when making a general appearance in the action. In *J.T.,* the summons did not name the juveniles and were not served on the juveniles or their GAL (which was required under the statutory language at that time), and the Supreme Court determined those defects applied to personal jurisdiction, not subject matter jurisdiction. The Supreme Court held the juveniles waived their defense by making a general appearance through their GAL's and attorney advocate's participation in the TPR proceeding, without objection. In both opinions, the Supreme Court determined the district court had subject matter jurisdiction to proceed in the juvenile actions.

Relying on that precedent, in *A.L.I*. the Supreme Court stated, "[a] parent's status as a nonresident does not alter the fact that arguments of insufficient service of a summons pertain to personal jurisdiction rather than subject matter jurisdiction[;] . . . the issuance and service of a summons do not affect a trial court's subject matter jurisdiction in a TPR action." 2022-NCSC-31, ¶¶ 9, 10. Here, the father who was a nonresident parent waived his defense of a lack of personal jurisdiction when he participated in the TPR proceeding without objecting to the service defect.

The holding of *In re A.L.I.* supersedes the court of appeals holding in *In re P.D*., 254 N.C. App. 852

(2017) (unpublished). You may remember from my last blog post, announcing the February 2022 edition of the Abuse, Neglect, Dependency and TPR Manual, that this area of the law is constantly changing. Well, the *A.L.I*. opinion further illustrates that point. Note that *A.L.I*. should replace any reference to *In re P.D.* in Chapter 3 (Jurisdiction) and Chapter 9 (TPR) of the Manual.