

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 13, 2008 Session

IN THE MATTER OF A. G.

**Appeal from the Circuit Court for Davidson County
No. 07D-979 Carol Soloman, Judge**

No. M2008-00879-COA-R3-CV - Filed September 28, 2009

The Juvenile Court gave a father custody of his seven year old daughter, and it suspended the child's visitation with her mother after hearing proof that the mother had persistently ignored court orders and tried to undermine the father's relationship with his child. About seven months later, the mother filed an appeal of the Juvenile Court's order to the Circuit Court. The Circuit Court dismissed the appeal as untimely because Tenn. Code Ann. § 37-1-159 sets strict time limits for the filing of appeals from final orders of the Juvenile Court to Circuit Court. The mother argues that her appeal to Circuit Court was in fact timely because the Juvenile Court's order was not final since it was not "marked on its face as filed for entry," as is required by the Tennessee Rules of Civil Procedure. Based on the evidence in the record that the order had been filed and stamped, we affirm the Circuit Court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and DON P. HARRIS, SR. J., joined.

Cynthia A. Cheatham, Manchester, Tennessee, for the appellant, C. G.

Joel Stephen Mills, Nashville, Tennessee, for the appellee, M. H.

OPINION

I. BACKGROUND

The appeal before us arises from a lengthy dispute over the custody of the parties' daughter. The order that is the subject of this appeal was the result of a hearing held August 28, 2006, to review a temporary custody arrangement. That arrangement resulted from an *ex parte* order entered October 28, 2005, placing the child in the temporary custody of Father. The court found that it was contrary to the child's best interest to stay in the mother's custody "because [Mother] is a flight risk,

who has refused to allow the child to visit with [Father] and refuses to contact the guardian ad litem and disregards the orders of the court.”

II. THE FINAL ORDER

On August 28, 2006, the Juvenile Court of Davidson County conducted a hearing to review the temporary parenting arrangement. Judge Betty Adams Green, who had presided over the earlier hearing, granted Mother’s motion for recusal. Judge Donna Scott Davenport of the Juvenile Court of Rutherford County sat by interchange.

In the order resulting from that hearing, signed by Judge Davenport on September 20, 2006, the court stated that Mother “has questionable credibility.” It declared that it had found by clear and convincing evidence that Mother’s accusations against Father “continue to be unfounded” and that “[Mother] has told [A.G.] to lie about the alleged sex abuse.” It also found clear and convincing evidence that Mother had intentionally and willfully interfered with the relationship between Father and child in numerous ways, including publication on the internet of the child’s history and Mother’s allegations against Father. The court accordingly found that a material change of circumstances had occurred. *See* Tenn. Code Ann. § 36-6-101(a)(2).

The court then performed a meticulous analysis of the statutory factors set out in Tenn. Code Ann. § 36-6-106 to determine whether a change of custody was in the child’s best interest and found that almost every one of the factors favored custody by Father. The court accordingly awarded Father “final and complete custody” of A.G. and suspended Mother’s visitation unless and until she completed two previously ordered parenting classes and underwent individual counseling to address her mental health issues. Mother was also found in willful criminal contempt for withholding visitation from Father in direct violation of the previous court order. The resulting forty day sentence was suspended, contingent on Mother’s strict compliance with the court’s orders in the future. Mother was given an unsigned copy of the court’s proposed order on September 8, 2006. The order was entered October 9, 2006.

III. PROCEEDINGS IN CIRCUIT COURT

Parties who are dissatisfied with any final order of the Juvenile Court in a dependent and neglect proceeding are entitled to a trial *de novo* in the Circuit Court if they perfect their appeal within ten days of the Juvenile Court’s disposition. Tenn. Code Ann. § 37-1-159(a). The time limit for appeal of a final order in a custody case is 30 days. *See* Tenn. Code Ann. § 37-1-159(c); Tenn. R. App. P. 4. Therefore, whether we consider the proceeding in the trial court to have been a custody case or an extension of a dependency and neglect proceeding, Mother could secure her right to an appeal in Circuit Court only by acting within a specified window of time, the longest being 30 days.

Mother did file an appeal of the Juvenile Court’s order, but not until May 11, 2007, over seven months after Judge Davenport signed that order and Mother received a copy of the proposed order. Father filed a motion to dismiss the appeal on the basis of untimeliness. Mother’s counter-

argument in the Circuit Court, (as well as in this court) involved an anomaly in the copy of the order from the August 28, 2006, hearing which was included in a record that had been sent up on March 14, 2007, by the Juvenile Court to the Circuit Court in a different appeal by Mother. The record in that appeal had been certified as a “full, true and complete copy.”¹ The copy of the Juvenile Court’s final order that was contained in that record did not show that it was marked for entry by the Clerk of the Juvenile Court, as is required by the Rules of Civil Procedure.

Mother argued that the time for appeal had not yet passed because, under Tenn. R. Civ. P. 58, entry of a properly signed final judgment only becomes effective when it “is marked on the face by the clerk as filed for entry.” As we noted above, the copy of the order in the record in another appeal was not so marked. Father attached as an exhibit to his motion to dismiss another copy of the Juvenile Court’s order resulting from the hearing of August 28, 2006. That copy had been stamped as filed on its face, with the date October 9, 2006, filled in, as well as the initials of the Deputy Clerk. It is important to note that no record from the Juvenile Court had yet been filed in the case before us because Father challenged the timeliness of the appeal.

Both parties were represented by counsel at the Circuit Court hearing, which was conducted on June 29, 2007. The hearing focused on the question of the timeliness of Mother’s appeal, for the parties agreed that resolution of that question in Father’s favor would render all other issues moot. As we have indicated above, the question of whether Mother’s appeal could be considered timely depended on whether the trial court found the stamped and initialed copy of the Juvenile Court’s final order tendered by Father’s attorney to be valid.

Mother’s attorney argued that the only copy of the final order which the court could consider was the one found in the record (again, the record in another appeal) that was certified as “full, true and complete.” He suggested that the order Father had attached to his motion to dismiss was not genuine, and that perhaps it was the product of tampering with the file. The court then questioned Father’s attorney about that attachment.

The attorney stated that when he learned that the absence of a date stamp on the order in the record of the prior appeal had become an issue, he went to the Juvenile Court Clerk’s office and found, within the voluminous record of the case, an additional copy of the same order which had been stamped with the date October 9, 2006, and initialed by Deputy Clerk James Utley. He then had that order copied, and attached it as an exhibit to his motion. Father’s attorney accordingly argued that the order in the record in the other appeal was not a copy of the last order in the case and that the Juvenile Court Clerk had simply copied the wrong document for inclusion in that record.

¹The record (including the order in question) was sent up to the Circuit Court in March as a result of an appeal by Mother in February of 2007 from a finding by the Juvenile Court that Mother had committed violations of its ruling from the August 2006 hearing and was subject to contempt sanctions. The record was therefore initially assembled for a different case from the one that is the subject of this appeal. Father argues that there is no legal authority for the proposition that “a party has the right to rely on the record in one matter to create a method of relief in another matter.” See *Fry v. Cermola*, No. 03A01-9507-JV-00246, 1996 WL 30903 (Tenn. Ct. App. Jan. 29, 1996). Our decision herein, in essence, establishes the official and correct order.

However, Mother's attorney stated that he himself had looked through the same record, and he had not seen a final order that was dated and stamped on its face.

To resolve this contradiction, the court telephoned James Utley and had him put on speaker phone so the attorneys and the court could question him about the Juvenile Court's files. The Deputy Clerk stated that the court's files might contain multiple copies of the same order, and he explained the procedures followed when, as in this case, a fax of a signed order is received and then the original order is subsequently received in the mail.² Mr. Utley testified that the original order is always retained by the Juvenile Court Clerk, and that copies are made to satisfy requests from other courts.

The trial court did not find Mr. Utley's answers sufficiently definite, so the court asked him to come to the Metro Courthouse with the original order and the rest of the original record in hand so he could submit to additional questioning by counsel and by court. The court recessed until Mr. Utley arrived. After he was sworn in, he was questioned in greater detail about the procedures followed by the Juvenile Court Clerk's office and about the possibility that errors could arise from those procedures. While Mr. Utley acknowledged that he could not personally guarantee that every act by his office was free from error, he identified his initials on the original order in this case, and he confirmed that he had personally stamped the order in his office on October 9, 2006. He further testified that he had checked the Juvenile Court's minute book, which showed that the order in question had in fact been entered in October of 2006.

Mr. Utley's testimony satisfied the trial court, for after closing arguments the court announced that it was dismissing Mother's appeal for untimeliness. The court's ruling was memorialized in an order filed July 19, 2007. In that order, the court stated that it found by clear and convincing evidence that Mother's appeal of the Juvenile Court's order was not timely filed because the order was entered on October 9, 2006 and "the Court has no reason not to believe James Utley, the Deputy Juvenile Court Clerk who testified that he entered the order as stamped." This appeal followed.

IV. ANALYSIS

Rule 58 of the Tennessee Rules of Civil Procedure sets out specific procedures for trial courts to follow for the entry of its final orders. It reads in relevant part,

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

- (1) the signatures of the judge and all parties or counsel, or

²The delays in signing and stamping the final order in this case can be partially attributed to the fact that the clerk for this case is in Nashville and Judge Davenport is in Murfreesboro. Thus, the order had to be transmitted through the mail.

(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all parties or counsel.

In other words, the effective date of a judgment is the date that the judgment is filed in accordance with Rule 58. *Grantham v. Board of Equalization*, 794 S.W.2d 751, 752 (Tenn. Ct. App. 1990). The purpose of the rule “is to insure that a party is aware of the existence of a final appealable judgment in a lawsuit in which he is involved.” *Masters v. Rishton*, 863 S.W.2d 702, 705 (Tenn. Ct. App. 1992). This is important for purposes of appeal because the time for filing an appeal from the final judgment of a trial court begins to run from the date the judgment is entered. *See Siebers v. Cunningham*, No. M2002-02782-COA-R3-CV, 2003 WL 21051741 (Tenn. Ct. App. May 12, 2003) (no Tenn. R. App. P. 11 application filed) (holding that filing of appeal 11 days after entry of judgment when statute gives only 10 days deprives appeals court of jurisdiction and requires dismissal of appeal).

In a case involving child support, this court has held that the Juvenile Court is required to follow Rule 58. *State ex rel Taylor v. Taylor*, W2004-02589-COA-R3-JV, 2006 WL 618291 (Tenn. Ct. App. March 13, 2006) (no Tenn. R. App. P. 11 application filed). In that case, we dismissed an appeal from Juvenile Court because neither the signature of counsel nor a certificate of service was found on the order appealed from. The court reasoned that when a judgment of the trial court is not validly entered in compliance with the Rule, there is no final judgment which may be appealed. *Id.*, at *3.

In the present case, Mother insists that the Juvenile Court Clerk failed to stamp the court’s order as filed for entry in accordance with Rule 58. She contends that the only order resulting from the August 28, 2006 hearing that the Circuit Court could consider was the one found in the record sent up by the Juvenile Court on March 14, 2007 in the prior appeal. That order bears the signature of the judge and of counsel for Father and a certificate of service stating that a copy was mailed to Mother and that another copy was hand delivered to the guardian ad litem on September 8, 2006.³ However, it is not marked on its face as filed for entry, and Mother argues that this means that the time for filing an appeal had not expired and had not even begun to run on May 11, 2007, when she filed her appeal to Circuit Court.

The trial court did not find fault with the logic of Mother’s argument as to the effect of a trial court’s failure to enter a final judgment. However, after hearing testimony from James Utley, it found that the Juvenile Court’s final order had been validly entered on October 9, 2006 when the Juvenile Court Clerk stamped it for entry. Mother tacitly concedes that if the trial court was correct,

³ Although the certificate recites that the order was mailed to Mother, it appears that she actually received it by hand delivery.

then the time limit for filing appeals to Circuit Court began to run on that date, rendering her appeal untimely.

The resolution of the appeal in this court, therefore, depends on the correctness of the trial court's factual finding. Our review of findings of fact in non-jury cases is accompanied by a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006).

As set out above, James Utley produced an original signed and stamped final order from the record on file in the Juvenile Court Clerk's office. He testified that he personally stamped and initialed that order on October 9, 2006, and that an entry for that order in the court's minute book corresponded to that date. Mother did not present any evidence to contradict the Deputy Clerk's testimony.⁴ Thus, the evidence does not preponderate against the court's factual finding.

Further, where the trial court has seen and heard witnesses, its judgment regarding their credibility and the weight to be given their testimony is accorded considerable deference on appeal. *Clark v. Nashville Machine Elevator Co. Inc.*, 129 S.W.3d 42, 46 (Tenn. 2004); *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999); *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989). The reason for that deference is that the trial court is in a position to observe the manner and demeanor of witnesses and the appeals courts are not. *McCaleb v. Saturn Corp.*, 910 S.W. 412, 415 (Tenn. 1995); *Fell v. Rambo*, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). The trial court found Mr. Utley to be a credible witness, and we have no basis upon which to disagree. He is an employee of the Juvenile Court Clerk's office and is presumed to have performed his duties in good faith. His testimony that he personally stamped and entered the order is not easily subject to refutation.

We accordingly affirm the trial court.

V.

The order of the trial court is affirmed. We remand this case to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant, C.G.

PATRICIA J. COTTRELL, P.J., M.S.

⁴The statement of Mother's attorney that he looked through the record at one point and did not see a stamped copy of the Juvenile Court's final order is not evidence and, in any event, does not dispute Mr. Utley's testimony.