IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 10, 2002

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v. FLORENCE HOFFMEYER, ET AL.

Appeal from the Juvenile Court for Robertson County
No. D-18308 Max Fagan, Judge

No. M2002-00076-COA-R3-JV- Filed March 13, 2003

The natural parents of a seventeen year old girl appeal the action of the Juvenile Court of Robertson County terminating their parental rights based upon a finding of severe child abuse under Tennessee Code Annotated section 36-1-113(g)(4). Because the appellate record is incomplete, we vacate the judgment and remand the case to the trial court for further proceedings.

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

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., joined. PATRICIA J. COTTRELL, J., concurring.

Mark Walker, Goodlettsville, Tennessee, for the appellant, Florence Hoffmeyer.
Bryce C. Ruth, Jr., White House, Tennessee, for the appellant, Larry Hoffmeyer.

Paul G. Summers, Attorney General & Reporter and Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services; In the Matter of: A.L.H., child under the age of 18 years.

OPINION

Larry and Florence Hoffmeyer, husband and wife, are parents of two children, Susan Hoffmeyer, now an adult, and A.H., born August 7, 1985.

Following a hearing on November 5 and 10, 1999, upon a petition of the Department of Children's Services for temporary custody of Susan Hoffmeyer and A.H., the Juvenile Court of Robertson County, on November 30, 1999, entered an Order providing:

This cause came to be heard on the 5th and 10th days of November, 1999 before the Honorable Judge Max Fagan upon the petition of the Department of Children Services for temporary custody of SUSAN HOFFMEYER and [A.H.] (hereinafter referred to as 'minor children'). Upon testimony of the parties, Susan Hoffmeyer, Chris Bible, representative of the Department Children Services, Larry Hoffmeyer, and Florence Hoffmeyer; testimony of witness, Laura Brogdon; statements of counsel, James Allen, Regina Farmer, Joe R. Johnson, Randall Haynes; and review of the guardian ad litem report of John Holt; the Court makes the following findings of facts:

1. That the investigation conducted by the Department of Children Services in this matter over the past ten months has been woefully inadequate. Upon testimony the court finds that although the Hoffmeyer family has moved from state to state (including the states of Texas, Utah, Idaho, New Mexico, Arizona, Colorado, Nevada and Tennessee), the department has failed to make inquiry regarding these various residences to determine whether any prior history has been reported in these states. Furthermore, there have been at least two prior reported incidents of sexual abuse of the minor children by friends of Mr. and Mrs. Hoffmeyer, but there has been no reported inquiry as to these alleged incidents. There has been testimony that the younger child, [A.H.], has sustained a broken leg as a result of her mother[']s paddling her at age five, and a broken arm at age eight as a result of her mother's throwing her into a wall. The Department reports no investigation of these incidents, and there is no medical proof as to whether these fractures in fact exist. There has been testimony that Mrs. Hoffmeyer has consulted with Ms. Alice Thomas of the Robertson County Board of Education regarding 'home schooling' of the children, however there is no information provided to indicate whether the Department investigated the status of educational resources, or any coordination (or lack thereof) of 'home schooling' with the Board of Education. The testimony of Mr. Bible indicates that the State's investigation in this cause consisted of a one hour interview of each of the children and a visit and interview with Mr. and Mrs. Hoffmeyer;

2. By virtue of the aforementioned nomadic lifestyle, and the fact that the family has lived in a travel trailer/camper for a considerable amount of time, the Court finds that the Hoffmeyers have failed to provide a stable environment and residence for the minor children;

3. Upon testimony presented in this cause, the Court finds that the Hoffmeyer parents have failed to provide for the educational needs of the minor children, in that they have allegedly 'home schooled' the children. The children are reported to be substantially educationally challenged in that the 17 year old child is only in the 9th grade, and the 14 year old child is unable to read due to educational deprivation;

4. That the Hoffmeyer parents have failed to protect the minor child, [A.H.], from sexual abuse in that while Mrs. Hoffmeyer was living with and having an affair with a Mr. George Edward Kiley in Utah, Mr. Kiley allegedly molested the minor child. Furthermore, upon being told of the incident and upon testimony by

Mrs. Hoffmeyer that she believed the child's account of the molestation to be truthful, Mrs. Hoffmeyer neglected to report the incident to authorities, has failed to seek medical or psychological intervention for the minor child, and indeed left the state of Utah within days of the alleged incident; and

5. That the father, Mr. Larry Hoffmeyer, has sexually battered the minor child, SUSAN HOFFMEYER.

Based on the aforementioned findings of fact, the Court finds specifically as follows:

1. That the father, Mr. Larry Hoffmeyer, having sexually battered the minor child, SUSAN HOFFMEYER, is found to have violated Tenn.Code Ann. §39-13-527 as it relates to sexual battery by an authority figure;

2. That there has been severe child abuse as defined by Tenn.Code Ann. §37-1-102(b)(21)(A)(B)(C); and

3. That the minor children, SUSAN HOFFMEYER and [A.H.], are dependent and neglected as defined by Tenn.Code Ann. §37-1-102(b)(12)(F).

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

1. That the minor children shall not be returned to the legal custody of the parents, LARRY and FLORENCE HOFFMEYER, unless and until such time the Court determines by clear and convincing evidence that the safety, protection, and well being of the minor children can be ensured;

2. That an updated psychological evaluation be conducted with recommendations as to both minor children provided to the Court;

3. That the Department of Children Services conduct a thorough investigation in this cause, including but not limited to:

a) A review of the history of the prior residences of the Hoffmeyer family, including but not limited to any prior referrals to state child protective agencies;

b) The status of any criminal proceedings involving George Edward Kiley;

c) The utilization of any state services;

d) The academic records and reports of both minor children, including any information which may be available from the Robertson County Board of Education regarding coordination of home schooling;

e) The past medical history and records of both minor children; and

f) The allegation that Mr. Hoffmeyer participated in the sexual abuse of Susan Hoffmeyer by permitting his friend, a Mr. Robert Kiest, to molest the child while the family was in Red Oak, Texas.

4. That an updated psychological evaluation of the parents, LARRY HOFFMEYER and FLORENCE HOFFMEYER, be conducted by Dr. Anne Durrant and that she be provided with any and all information necessary to provide a comprehensive and complete evaluation. The results of the aforesaid evaluation shall be provided to the court, with recommendations, if any, regarding the possibility and

advisability of reunification of either of the minor children with their parents. The cost for such evaluation shall be paid by the State if resources are not available to the Hoffmeyers elsewhere;

5. That said requested reports of the minor children and parents be provided to the Court with copies provided to all parties by December 16, 1999 at 9:00 a.m. whereupon the Court will consider the reports and notify the parties of a review date; and

6. That no visitation arrangements be made during the interim pending the Court's review.

Entered this *30th* day of *November*, 1999.

Under the same docket number, the State of Tennessee Department of Children Services, on September 7, 2000, filed a Petition to Terminate the Parental Rights of Larry and Florence Hoffmeyer as to A.H., the elder child, Susan Hoffmeyer, having attained her majority on August 2, 2000.

Following a hearing on October 10, 2001, the Juvenile Court of Robertson County terminated the parental rights of Larry Hoffmeyer and Florence Hoffmeyer as to A.H. as reflected in an Order entered December 13, 2001, providing:

> This cause came on to be heard on October 10, 2001 before the Honorable Max Fagan, Judge of the Juvenile Court of Robertson County, Tennessee at Springfield, upon the sworn Petition of the State of Tennessee, Department of Children's Services; against the parents, Florence Hoffmeyer and Larry Hoffmeyer. Present for the hearing were: Florence Hoffmeyer, duly represented by Mark Walker; Larry Hoffmeyer, duly represented by Bryce Ruth; Laurinda Hogan, DCS case manager; John Holt, GAL; Regan Cothron, Attorney for the Department of Children's Services; Louellen Benton, Your Villages' case manager; Chennaye Greeer, foster parent; and Sandra Hendricks, prior foster parent.
>
> Upon evidence presented and the entire record, from all of which the Court finds upon clear and convincing evidence that it is in the best interest of the child and the public as follows;
>
> That substantially little has been done to help this family, i.e.: contact has been almost non-existent, the goal of reunification has never been ratified and we don't actually have a plan of care ratified in this case, there has been no home visit, and the state has not facilitated matching this family with resources to try to get them to attempt to ratify the problems that brought the children before the court.
>
> The court further finds that [A.H.]'s progress is remarkable. [A.] came into custody with a variety of issues that needed to be addressed, including, having sores all over head, thinning hair which appeared to be pulled out, behavioral issues, issues as far as hygiene is concerned, her educational situation was difficult to believe in that she couldn't add and was working on a 1st grade educational level. Today, [A.] is a different person, she is more grown-up, cleaner, more outgoing, and

demonstrates better social skills. That the foster parent is to be commended for [A.]'s progress.

That the court further finds that the parents no longer live in a trailer, that they have obtained housing for which they are to be commended. That there are still conditions that persist that the Court does not know if they could have been effectively remedied. That the parents were told to do several things and left to fend for themselves in accessing certain services and assistance. It should be obvious that if this family was able to address those needs on their own, they probably would not have been brought to this court. That it is the function that the Department of Children's Services is expected to help facilitate so that the persons are provided every opportunity to succeed and then if they fail it is a much clearer decision for the judge than if they are left to try to do the best that they can.

That the Petition filed by the State of Tennessee, Department of Children's Services is well-taken and should be sustained and relief granted thereunder for the causes stated pursuant to T.C.A. §36-1-113(g)(4) that the defendants, Florence Hoffmeyer and Larry Hoffmeyer have been found to have committed severe child abuse as defined by T.C.A. §37-1-102, under an order of the Juvenile Court of Robertson County entered November 30, 1999 against said child and her sibling, Susan Hoffmeyer, notwithstanding the fact that there is no showing that there was any effort to help the family that has been unsuccessful.

That pursuant to T.C.A. §36-1-113(g)(3)(A) et seq. in that the child, [A.H.] has been removed from the custody of the Defendants, Florence Hoffmeyer and Larry Hoffmeyer, for more than six (6) months, and that the conditions which led to the child's removal or other conditions which in all reasonable probability cause said child to be subjected to further neglect and which, therefore, prevent said child's safe return to the care of the Defendants, still persist, including: the lack of stable employment, the lack of counseling, the lack of evaluations to deal with the past history, and the issues of denial; however, the parents have addressed the housing issue; that there is little likelihood that these conditions will be remedied in the near future; and, that said child is of such an that the continuation of the legal parent and child relationship greatly diminishes said child's chances of early integration into a stable and permanent home.

That the ground for termination pursuant to T.C.A. 36-1-113(g)(2) in that the defendants have failed to comply with the Statements of Responsibilities in the plan of care entered into by said Defendants with the State of Tennessee, Department of Children's Services has not been sustained due to the fact that there was not a ratified plan of care and the Court does not hold the parents liable to abide by that plan.

That pursuant to T.C.A. §36-1-113(g)(3) the continuation of the parent child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home due to the sparse visitation by the parents, the difficulties in the interaction between the child and the parents, that the parents, while not assisted by the state, have not taken it upon themselves to be proactive in looking into the child's schooling and welfare.

That due to the child's age and the amount of time that she has been removed from the home that by clear and convincing evidence it is in the best interest of said child, {A.L.H.] and the public that all of the parental rights of FLORENCE HOFFMEYER AND LARRY HOFFMEYER to said child, be forever terminated and that guardianship of said child be awarded to the State of Tennessee, Department of Children's Services as guardian with the right to place said child for adoption and to consent to such adoption in *loco parentis*. That this decree shall have the effect of terminating all rights and obligations of said Defendants to said child and or said child to said Defendants arising from the parental relationship, and said Defendant is not hereinafter entitled to notice of any proceedings for the adoption of said child by another nor has he or she any right to object to such adoption or otherwise participate in such proceedings.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That pursuant to T.C.A. §36-1-113(g)(3)(A) et. seq. in that the child, [A.H.] has been removed from the custody of the Defendants, Florence Hoffmeyer and Larry Hoffmeyer, for more than six (6) months, and that the conditions which led to the child's removal or other conditions which in all reasonable probability cause said child to be subjected to further neglect and which, therefore, prevent said child's safe return to the care of the Defendants, still persist, including: the lack of stable employment, the lack of counseling, the lack of evaluations to deal with the past history, and the issues of denial; however, the parents have addressed the housing issue; that there is little likelihood that these conditions will be remedied in the near future; and, that said child is of such an that the continuation of the legal parent and child relationship greatly diminishes said child's chances of early integration into a stable and permanent home.
2. That pursuant to T.C.A. §36-1-113(g)(4) that the defendants, Florence Hoffmeyer and Larry Hoffmeyer have been found to have committed severe child abuse as defined by T.C.A. §37-1-102, under an order of the Juvenile Court of Robertson County entered November 30, 1999 against said child and her sibling, Susan Hoffmeyer notwithstanding the fact that there is no showing that there was any effort to help the family that has been unsuccessful.
3. That due to the child's age and the amount of time that she has been removed from the home that by clear and convincing evidence it is in the best interest of said child, [A.L.H.] and the public that all of the parental rights of FLORENCE HOFFMEYER AND LARRY HOFFMEYER to said child, be forever terminated and that guardianship of said child be awarded to the State of Tennessee, Department of Children's Services as guardian with the right to place said child for adoption and to consent to such adoption in *loco parentis*. That this decree shall have the effect of terminating all rights and obligations of said Defendants to said child and or said child to said Defendants arising from the parental relationship, and said Defendant is not

hereinafter entitled to notice of any proceedings for the adoption of said child by another nor has he or she any right to object to such adoption or otherwise participate in such proceedings.

Enter this the *13th* day of *December*, 2001.

From the Order of December 13, 2001, Larry and Florence Hoffmeyer timely appeal.

Applicable in this case is the observation of the Supreme Court of Tennessee: "We are presented with a classic case for the application of T.R.A.P. 13(b) that expressly grants the appellate courts authority to consider issues not brought up for review by any party. We invoke that rule to prevent needless litigation and to prevent prejudice to the judicial process, two of the reasons expressly mentioned in the Rule." *Panzer v. King*, 743 S.W.2d 612, 616 (Tenn. 1988).

The trial court treated its Order of November 30, 1999, following the hearing on November 5th and 10th, 1999, to have *res judicata* effect as to a finding of severe child abuse as defined by Tennessee Code Annotated section 37-1-102(b)(21)(A)(B)(C). The trial court erred in such determination.

The transcript of the October 10, 2001 hearing, resulting in the Final Decree of Guardianship entered December 13, 2001, discloses:

> MS. COTHRON: Your Honor, first, just as a preliminary matter, I'd ask the Court to take judicial notice as res judicata, the Court order regarding the children, Susan and [A.], of dependent neglect, which was entered in November of 1999.
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> MR. WALKER: I'm objecting, Judge, and this - - just some temporary issues that we need to talk about. The State filed an amended petition August 6th of this year, and nowhere in that petition do they incorporate the prior petition.
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> The allegations in the amended petition are two references to the statute, neither of which refer to the severe abuse or child abuse, those kinds of things. That's not been pled, and we object to the prior order.
>
> I think that under the Rules about how you amend pleadings, they didn't incorporate that prior petition.
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> MS. COTHRON: Judge, I guess I'm deficient on the Rules, but I have always amended pleadings to just add whatever - - I guess, added to the amendment, or added to the original petition.
>
> THE COURT: I think that even though the pleadings may be deficient in the form in the reference to the prior pleading, I will allow you to amend the petition based on the fact that the record is clear that there has been a prior finding. So I will allow you to orally amend your pleadings.
>
> MR. RUTH: Judge, before we go any further, what is she amending it to? What are we expected to put proof on to defend, if necessary?
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> THE COURT: That is certainly fair. I think that, if I'm understanding correctly, her motion is to incorporate the prior petitions, discussions of the finding

of the Court of severe abuse, which was held in 1999, upon the issue of dependent neglect, at which time we had a full hearing and heard all of the evidence and made a finding of dependency neglect and severe abuse at the same time. Is that correct?

MS. COTHRON: Yes. I think the first petition alleged the severe abuse, and then the amended petition I filed alleged the persistence of conditions and the failure to comply with the permanency plan.

MR. RUTH: So before I objected to that, she's asking you to take judicial notice of the prior order?

THE COURT: Yes.

MR. RUTH: And that order is part of this file, this Court's file?

THE COURT: That's correct.

MR. WALKER: I assume you're going to do that, then?

THE COURT: Yes.

MR. RUTH: Judge, now regarding that, that's obviously one of the statutory provisions. That's all they've got to do to show that, and the second prong is to best interest of the child. So that obviously makes a big difference in how we proceed with this case.

I don't know that it's necessary to go into the other reasons, which we were prepared to address with failure to follow the plan of care. I don't think - - if you need to hear those objections, we want to make them now, before we go forward.

But it looks to me like the prong of having a statutory reason is already there; is that correct?

THE COURT: Correct.

MR. WALKER: I guess I'm asking yo to make a finding there instead of spending the time to say the plans of care were never ratified by the Court, in fact, were rejected by the Court.

THE COURT: Yes, you're correct. We are basically at a best interest determination at this point because of prior finding. And now, some of those issues may relate to that best interest issue. But as far as the additional grounds, the State certainly can argue them, but they're not required to do so to get the relief that they're seeking, . . .

The record that is before us from the October 10, 2001 hearing shows clearly that the Department did absolutely nothing by way of counseling or any other efforts to reunite the children with their parents. The Department's closing argument shows that the omission of counseling was deliberate:

> In this case, the parents have done some things that we asked them to do on the initial plan. They did get housing. She testified that they had employment, but it was kind of staggered. I think she testified that Mr. Hoffmeyer never really got employment.
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> They never received counseling, and counseling is the big thing that needs to re-unify these families. They need to deal with the issues, work through them, so that the children can safely be returned home. However, in this case, since there was a

> severe abuse finding - - and according to the ASPA 1997 Federal Law which was adopted by this State in 1998, there is an exception to the reasonable efforts that need to be made by the Department, and one of those cases is in a severe abuse case. And the law states that the Department does not have to make reasonable efforts to re-unify the family when there is a finding of severe abuse.
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> Since the Court found severe abuse, I would state that that is res judicata. That issue has already been litigated. The court had entered that finding, and that order has been marked as an exhibit to this hearing.

The Order of November 30, 1999 does not purport to be a final judgment as to any issue. It is not designated as a final order as to the issue of severe child abuse under T.R.C.P. Rule 54.02. This rule provides:

> Multiple Claims for Relief. – When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties. [Added July 1, 1979.]

Since the November 30, 1999 Order lacks the required designation and the necessary findings of the court to effect finality as to the severe child abuse issue, the Order is interlocutory in nature and thus is not a final determination supporting the application of the *res judicata* bar.

It has long been held that a party relying upon *res judicata* has the burden of proving all of the elements necessary to establish it. *Gregory v. Gregory*, 803 S.W.2d 242 (Tenn. Ct. App. 1990); *American National Bank v. Bradford*, 28 Tenn. App. 239, 188 S.W.2d 971d (1945); *Carter County v. Street*, 36 Tenn. App. 166, 252 S.W.2d 803 (1952).

Res judicata cannot apply in the absence of finality of the prior judgment.

> To sustain a plea of res judicata, the party pleading such has the burden of proof and it must appear that the issue of fact or right was not only involved in the former suit but was litigated and determined. *Ragsdale v. Hill*, 37 Tenn. App. 671, 269 S.W.2d 911. It is also essential the parties must be identical, in the same capacity or character in both suits and the decree or judgment in the former suit must be on the

> merits and final. *Harris & Cole Bros. v. Columbia Water & Light Co.*, 114 Tenn. 328, 85 S.W. 897; *Railroad v. Brigman*, 95 Tenn. 624, 32 S.W. 762.

Merchants & Manufacturers Transfer Co. v. Johnson, 55 Tenn. App. 537, 540, 403 S.W.2d 106, 107 (1966).

The November 30, 1999 judgment lacking finality *res judicata* is not applicable and Appellants are entitled to appellate review of the evidence upon which the trial court determined severe child abuse to exist. No transcript of the evidence in the November 5th and November 10th, 1999 hearings is before this Court. In *In re: Adoption of J.D.W.*, this Court was presented with a substantially similar situation. Our consideration of the issue follows:

> No transcript or other substantially complete record was made of the proceedings below or provided to us. The lack of such a record prevents our review of the evidence to determine whether it supports or preponderates against the trial court's findings and prevents our application of the clear and convincing evidence standard. While in other types of civil cases we would be required to conduct our review using the Statement of the Evidence, *see* Tenn. R. App. P. 24 (c), or to accept as conclusive the trial court's findings, *see King v. King*, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998), such procedures do not satisfy the constitutional requirements applicable to an appeal from an order terminating parental rights.
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> In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the U.S. Supreme Court held that a parent's interest in defending against a state's action in terminating parental rights required a record complete enough to allow fair appellate consideration of the parent's claims. *See M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. Relying on previous rulings regarding due process and equal protection, the Court in *M.L.B.* held, "we place decrees forever terminating parental rights in the category of cases in which the state may not 'bolt the door to equal justice.' " *M.L.B.*, 519 U.S. at 124, 117 S. Ct. at 568, 136 L. Ed. 2d at 493. The Court ruled that the State could not withhold from an indigent parent seeking review of a termination of parental rights "a 'record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *M.L.B.*, 519 U. S. at 128, 117 S. Ct. at 570, 136 L. Ed. 2d at 495.
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> The Court noted that the trial judge in *M.L.B.* had simply recited the statutory language, and that his order "describes no evidence, and otherwise details no reasons for finding M.L.B. 'clear[ly] and convincing[ly]' unfit to be a parent." *M.L.B.*, 519 U.S. at 121, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. The Court then stated, "Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." *M.L.B.*, 519 U.S. at 121-22, 117 S. Ct. at 566, 136 L. Ed. 2d at 491. While the trial court in the case before us made findings of fact and did not merely recite conclusions in statutory language, we think that distinction does not alter the effect of the lack of a complete record of the events at trial on our ability to provide the type of complete appellate

> review required in termination of parental rights cases. Without a complete record of the evidence below, we are unable to conduct the type of review required in termination cases.

In re: Adoption of J.D.W., No. M2000-00151-COA-R3-CV, 2000 WL 1156628, * 3-4, (Tenn. Ct. App. Aug. 16, 2000) (alteration in original) (footnotes omitted).

The Order of November 30, 1999 is not a "disposition" within the meaning of Tennessee Code Annotated section 37-1-159(a). It is not an ". . . Order of Final Disposition" within the meaning of Rule 36 of the Rules of Juvenile Procedure. It is, not having determined all issues between the parties and not having been certified as final under the Multiple Claims for Relief Provisions of T.R.C.P. Rule 54.02, not a final judgment. The order is a testimonial in self-contradiction. After being bitterly critical (justifiably so) of the inadequacy of the investigation by the Department of Children's Services and observing that "the testimony of Mr. Bible indicates that the state's investigation in this cause consisted of a one hour interview of each of the children and a visit and interview with Mr. and Mrs. Hoffmeyer," the court then proceeds to give credence to allegations, not proof. More critically, when one looks to the adjudicatory provisions of the November 30, 1999 Order we find the court ordering, *in futuro*, what should have been done before making an adjudication based upon evidence of which it had been strongly critical. The Department of Children's Services is ordered to ". . . conduct a thorough investigation in this cause. . ." This investigation is ordered to include a history of the prior residences of the Hoffmeyer family, prior referrals to state protective agencies, the status of criminal proceedings against George Edward Kiley, utilization of any state services, academic records of both minor children, past medical history of the children, and the allegation that Mr. Hoffmeyer participated in sexual abuse of Susan Hoffmeyer, relative to Robert Kiest. It further orders an updated psychological evaluation of Mr. and Mrs. Hoffmeyer with the recommendations of the psychological evaluator to be provided to the court. It then provides" "That said requested reports of the minor children and parents be provided to the court with copies provided to all parties by December 16, 1999 at 9:00 a.m. whereupon the court will consider the reports and notify the parties of a review date. . ."

If anything happened thereafter on December 16, 1999, or at any other time prior to the filing of the Petition to Terminate Parental Rights on September 7, 2000, it does not appear in the record before the Court. Thus, we have the Hoffmeyers in the position of awaiting their psychological evaluation ordered by the court to be completed and supplied to the court by December 16, 1999 and awaiting the review date, then to be ordered by the court. In the meantime, the order of November 30, 1999, being deemed a final order, their ten days for appeal pursuant to Tennessee Code Annotated section 37-1-159 expires. This simply can not be.

The judgment of the trial court is vacated the case is remanded to the trial court without prejudice to the right of any party to appeal upon supplementing of the record to provide proper appellate review of the evidence heard by the trial court in the hearings of November 5th and November 10th, 1999.

Costs of the cause are assessed to Appellee.

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WILLIAM B. CAIN, JUDGE