

FILED

11/19/2020

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 15, 2020

IN RE ZANE M.O.¹

Appeal from the Circuit Court for Knox County
No. 2-419-17 William T. Ailor, Judge

No. E2019-00022-COA-R3-JV

This action involves a maternal grandmother's objection to the denial of her petition for custody of her minor grandchild and his adoption by his foster parents. We affirm.

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

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J. and KENNY W. ARMSTRONG, J. joined.

Linda G., Knoxville, Tennessee, pro se.

Herbert H. Slatery, III, Attorney General & Reporter, and Amber L. Seymour, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I. BACKGROUND

Zane M. O. ("the Child") was born to Rebecca B. ("Mother") and Christopher W. ("Father") in January 2011. The Tennessee Department of Children's Services ("DCS") removed the Child from Mother's care in July 2014 based upon an allegation of abandonment. The Child was initially placed in kinship foster care with his maternal aunt and uncle.

¹ This court has a policy of protecting the identity of children in parental rights termination cases by initializing the last name of the parties. While this is not an appeal from the termination proceeding, we adhere to the principle of protecting the identity of the child at issue who has been the subject of a termination proceeding and now an adoption proceeding.

DCS developed a permanency plan with Mother's participation. Mother stipulated to the Child's adjudication as dependent and neglected. At some point, the Child's maternal grandmother, Linda G. ("Grandmother"), filed a petition for custody of the Child. Meanwhile, Mother completed the requirements of the permanency plan and was restored to full custody on July 9, 2015. Accordingly, the court dismissed the pending custody petition filed by Grandmother.

One month later, DCS removed the Child when Mother appeared intoxicated at the Child's daycare. The Child was initially returned to his kinship placement; however, he was later placed with non-relative foster parents in September 2015. Meanwhile, a second permanency plan was developed that required Mother to redo the requirements previously agreed upon, in addition to a few new requirements. The Child was again adjudicated as dependent and neglected. Mother again completed the requirements of her permanency plan, permitting the Child's return on a trial home placement basis.

DCS removed the Child for a third time after Mother was arrested for violation of probation following a positive drug screen. The Child was again placed in a kinship foster placement with his maternal aunt and uncle. Two months later, he was transferred to non-relative foster parents ("Adoptive Parents"), on April 8, 2016, where he has remained since that time.

On April 13, 2016, Grandmother filed a second petition for custody of the Child in the Knox County Juvenile Court. Her petition was denied by the juvenile court magistrate. The juvenile court judge affirmed the denial, and Grandmother appealed the denial to the Knox County Circuit Court.

Meanwhile, Mother and Father's parental rights were terminated. *See generally In re Zane W.*, No. E2016-02224-COA-R3-CV, 2017 WL 2875924, at *14–15 (Tenn. Ct. App. July 6, 2017) (affirming the trial court's termination). While Grandmother's petition was pending, Foster Parents filed an adoption petition in the Knox County Circuit Court on November 9, 2017. DCS stayed the custody appeal pursuant to Tennessee Code Annotated section 36-1-116(f)(2), which provides as follows:

“[A]ny proceedings that may be pending seeking the custody or guardianship of the child or visitation with the child who is in the physical custody of the petitioners on the date the petition is filed . . . shall be suspended pending the court's orders in the adoption proceeding[.]”

The custody appeal was then transferred to the same division as the adoption proceeding and placed under the same docket number.

Grandmother filed a number of documents, including her own adoption petition. DCS and Adoptive Parents opposed the pleadings, arguing that Grandmother was not a proper party to the proceeding and that her custody appeal had been stayed. The custody matter proceeded to a hearing, after which the trial court agreed that Grandmother was not a necessary party to the adoption proceeding and that her custody petition had been properly stayed. The court's order, entered on February 23, 2018, continued the stay of the custody proceeding, pending the court's consideration of the adoption petition. All stayed matters were scheduled for a status conference in April 2018.

The court granted the adoption petition filed by the Adoptive Parents on February 26, 2018. Grandmother then filed a motion to set aside the adoption pursuant to Rule 60 of the Tennessee Rules of Civil Procedure, which provides as follows:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Grandmother again argued that she was a necessary party to the adoption proceeding, claiming that she had once been granted custody of the Child pursuant to an order entered in July 2015, which referenced an unnamed maternal great-grandmother.

The matter proceeded to a hearing, after which the trial court held that the reference to a maternal great-grandmother was a typographical error that conflicted with another, more detailed order entered the same day, in which the Child was returned to Mother. The court denied the motion by order, entered on August 27, 2018, and certified the order as final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.²

² "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 September 2018, Grandmother filed two additional documents, in which she again asked the trial court to set aside the adoption. In response to the documents, Adoptive Parents provided Grandmother with a safe-harbor letter pursuant to Rule 11 of the Tennessee Rules of Civil Procedure,³ advising her that a motion for sanctions would be filed if she did not withdraw her motions within 21 days. Adoptive Parents then filed a motion for Rule 11 sanctions, claiming that the motions, which had not been withdrawn, were frivolous and raised no new issues. Grandmother filed no response.

The court denied the two motions, by order entered on December 7, finding that the documents filed by Grandmother raised nothing new for the court's consideration. The court imposed sanctions upon Grandmother pursuant to Rule 11 of the Tennessee Rules of Civil Procedure.

On appeal to this court, filed on January 3, 2019, Grandmother, appearing pro se, again argues that the adoption should be set aside. She also argues, in passing, that the court abused its discretion in imposing sanctions. In the event that this court does not set aside the adoption, she alternatively requests post-adoptive contact with the Child. DCS claims that any appeal from the denial of Rule 60 relief is untimely because Grandmother failed to file her notice of appeal within 30 days of the entry of the final order. Further, DCS argues that the trial court did not abuse its discretion in its denial of the September motions that do not explicitly fall under any Tennessee Rule of Civil Procedure.

³ Providing the trial court with the authority to impose monetary sanctions if counsel's conduct is in violation of Rule 11.02 of the Tennessee Rules of Civil Procedure, which provides as follows:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

As a threshold issue, we must inform Grandmother that her request for post-adoptive contact with the Child is not properly before this court. Appellate courts “cannot exercise original jurisdiction” and act as the “trier-of-fact.” *Peck v. Tanner*, 181 S.W.3d 262, 265 (Tenn. 2005) (citations omitted); *see also Pierce v. Tharp*, 461 S.W.2d 950, 954 (Tenn. 1970) (rejecting appellants’ “novel” request to adduce proof in support of their motion). The jurisdiction of this court is “appellate only.” Tenn. Code Ann. § 16-4-108.

Next, any appeal from the denial of Rule 60 relief is untimely. The order, entered on August 27, 2018, became final thirty days later. “The date of entry of a final judgment in a civil case triggers the commencement of the thirty-day period in which a party aggrieved by the final judgment must file either a post-trial motion or a notice of an appeal.” *Ball v. McDowell*, 288 S.W.3d 833, 836 (Tenn. 2009); *see also* Tenn. R. App. P. 4(a) (providing that a notice of appeal must “be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from”). “The thirty-day time limit for filing a notice of appeal is mandatory and jurisdictional in civil cases.” *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004). This court is not at liberty to waive the untimely filing of a notice of appeal. Tenn. R. App. P. 2.

Finally, Grandmother’s September motions are most properly characterized as motions to reconsider the court’s denial of the Rule 60 motion. The Tennessee Rules of Civil Procedure provide that motions to *reconsider* the denial of certain post-trial motions that ordinarily extend the time for filing an appeal “are not authorized” and do not “operate to extend the time for appellate proceedings.” Tenn. R. Civ. P. 59.01. Accordingly, we reason that motions to reconsider the denial of a Rule 60 motion are likewise unauthorized and frivolous. We affirm the trial court’s denial of the motions and its imposition of sanctions. Any additional issues raised by Grandmother in this appeal are pretermitted.

II. CONCLUSION

The judgment of the trial court is affirmed. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Linda G.

JOHN W. McCLARTY, JUDGE