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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-18-1024

Opinion Delivered: April 24, 2019

MINOR CHILDREN APPELLANTS V. ARKANSAS DEPARTMENT OF HUMAN SERVICES AND JACKLYN GABBARD APPELLEES	APPEAL FROM THE PERRY COUNTY CIRCUIT COURT [NO. 53JV-17-11] HONORABLE PATRICIA JAMES, JUDGE DISMISSED

WAYMOND M. BROWN, Judge

The Perry County Circuit Court granted permanent custody of the minor children, M.G.1, C.G., K.G., and M.G.2, to Lawrence and Melissa Gabbard and closed the dependency-neglect case that appellee Arkansas Department of Human Services (DHS) had brought against the children's parents, Jacklyn and Micah Gabbard. The minor children appeal, arguing that the court's order should be reversed because (1) the court failed to make a not-best-interest finding; (2) no written home study was presented to the court, so there was insufficient evidence to support the court's custody decision; and (3) the court failed to give the statutory required notice that the case would be closed. We dismiss for lack of jurisdiction because appellants failed to file a timely notice of appeal.

DHS took emergency custody of appellants on September 20, 2017. An ex parte petition for emergency custody and dependency-neglect was filed on September 22, 2017. An ex parte order for emergency custody was filed the same day, placing appellants in the custody of DHS. The probable-cause order of September 25, 2017, continued appellants in DHS's custody but mentioned a provisional placement. Appellants were adjudicated dependent-neglected as a result of parental unfitness and neglect by Jacklyn in an order filed on November 8, 2017. That order also found that Micah contributed to the dependency-neglect by agreeing to leave appellants in Jacklyn's care following their divorce, knowing her drug history. In the review order of March 7, 2018, the court indicated that the case goal was reunification with a concurrent goal of relative placement/guardianship. The order found that appellants should remain out of the custody of Jacklyn and noted that appellants were in the foster home of their aunt and uncle where their needs were being met.

Appellants filed a motion to suspend visitation and for no contact against Jacklyn on April 6, 2018. Jacklyn filed a response on April 20, 2018, asking the court to deny the motion. The court entered an order on April 23, 2018, suspending visitation and ordering no contact between Jacklyn and appellants.

The permanency-planning hearing (PPH) took place on August 27, 2018. At the hearing, DHS, the attorney ad litem, M.G.1, Lawrence, and Melissa all advocated for the termination of Jacklyn's and Micah's parental rights over permanent custody. The court took the testimony under advisement. It issued a PPH order and order of permanent custody on September 14, 2018, granting permanent custody of appellants to Lawrence and Melissa Gabbard and closing the case.

The attorney ad litem filed a motion for relief from judgment, decree, or order pursuant to Rule 60 of the Arkansas Rules of Civil Procedure on September 24, 2018, on behalf of appellants. Jacklyn filed a response on October 8, 2018, asking the court to dismiss the motion. A notice of appeal was filed on behalf of appellants on October 12, 2018, appealing the court's September 14, 2018 order. The court entered an order on October 23, 2018, denying appellants' Rule 60 motion. An amended notice of appeal was filed on November 2, 2018, appealing both the September 14 and October 23 orders.

The burden of proof in dependency-neglect proceedings, including permanency-planning hearings, is by a preponderance of the evidence.[1] The standard of review is de novo, but we, giving due deference to the circuit court's superior position to observe the parties and judge the credibility of the witnesses, will not reverse the circuit court's ruling in a dependency-neglect case unless the ruling was clearly erroneous or clearly against the preponderance of the evidence.[2] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.[3] Deference to the circuit court is even greater in cases involving child custody, as a heavier burden is placed on the circuit court to use to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children.[4]

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[1]*Anderson v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 522, 385 S.W.3d 367 (citing Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2017)).

[2]*Churchill v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 530, 423 S.W.3d 637.

[3]*Id.*

As an initial matter, we must determine whether appellants' October 12, 2018 notice of appeal was timely filed. In *Ashcroft v. Arkansas Department of Human Services*,[5] our supreme court specifically held that posttrial motions will not extend the time for filing the notice of appeal in dependency-neglect cases:

> Rule 6-9 sets twenty-one days as the time within which the notice of appeal must be filed in cases involving dependency neglect. Ark. Sup. Ct. R. 6-9(b)(1) (2009). In addition, Rule 6-9(b)(4) states that "[t]he time in which to file a notice of appeal or a notice of cross-appeal and the corresponding designation of record will not be extended." The express purpose of Rule 6-9(b) is to expedite the appellate process in dependency-neglect cases. *Ratliff v. Ark. Dep't of Health & Human Servs.*, 371 Ark. 534, 268 S.W.3d 322 (2007) (per curiam). Although Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure–Civil allows the deadline for a notice of appeal to be extended where certain post-trial motions have been filed, we have held that we will not extend that rule to dependency-neglect cases because doing so would vitiate the purpose of Rule 6-9(b). *Ratliff*, 371 Ark. at 535, 268 S.W.3d at 323.

Here, appellants' notice of appeal for the September 14, 2018 order was not filed until October 12, 2018, approximately twenty-eight days after the order was entered. Therefore, it was untimely. Although appellants filed a Rule 60 posttrial motion and notice of appeal from the court's denial of that motion, it was outside of the twenty-one-day limit set in our Rules. Our supreme court has been clear that posttrial motions will not extend the time in which to file an appeal from dependency-neglect cases. Because appellants failed to file a timely notice of appeal, we dismiss for lack of jurisdiction.

Dismissed.

HARRISON, J., agrees.

HIXSON, J., concurs.

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[4] *Ashcroft v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 244, 374 S.W.3d 743.

[5] 2009 Ark. 461, at 2–3.

KENNETH S. HIXSON, Judge, concurring. This is a clarion call to any attorney who practices dependency-neglect law. To ignore the majority opinion herein may well cause your client to effectively forfeit his or her right of appeal. The narrow issue that has devolved in this case sua sponte is which appellate rules apply to a permanency-planning order where the disposition is permanent custody of the minor: Arkansas Supreme Court Rule 6-9 or Ark. R. App. P.–Civ. 2(d) and 4(a). This is a particularly devastating trap for the unwary.

In this case the order being appealed is a permanency-planning order awarding *permanent custody* to relatives. Supreme Court Rule 6-9(a) provides that certain orders in a dependency-neglect case are appealable. Here, the order was *not appealable* under Rule 6-9 because subsection (a)(B) of the Rule provides that a permanency-planning order is appealable only when there is a Rule 54(b) certificate, which is absent in this case. This order was, however, appealable under Ark. R. App. P.–Civ. 2(d), which provides that "[a]ll final orders awarding custody are final and appealable orders."

This is consistent with supreme court caselaw. In *West v. Arkansas Department of Human Services*, 373 Ark. 100, 281 S.W.3d 733 (2008), we certified the case to the supreme court to decide whether a permanency-planning order granting permanent custody was final and appealable where there was no Rule 54(b) certificate. The supreme court held that such an order is appealable—not under Supreme Court Rule 6-9 but under Ark. R. App. P.–Civ. 2(d)—because it was an order of permanent custody. The *West* court wrote:

The court of appeals certifies the question of whether Rule 2(d) is applicable in dependency-neglect cases and notes a potential conflict between Rule 2(d) and Rule 6-9 of the Arkansas Supreme Court Rules. . . . Rule 6-9(a) provides:

> Rule 6-9. Rule for appeals in dependency-neglect cases.
>
> (a) *Appealable Orders*.
>
> (1) The following orders may be appealed from dependency-neglect proceedings:
>
> (A) adjudication order;
>
> (B) disposition, review, and permanency planning order if the court directs entry of a final judgment as to one or more of the issues or parties based upon the express determination by the court supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b);
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> (C) termination of parental rights; and
>
> (D) denial of right to appointed counsel pursuant to Ark. Code Ann. § 9-27-316(h).

It is readily apparent from its text that Rule 6-9 does not specifically refer to permanent custody orders in the context of a dependency-neglect case. Accordingly, there is no direct conflict between Rule 2(d) and Rule 6-9, as Rule 6-9 does not state that permanent custody orders are not final, appealable orders or that a Rule 54(b) certificate is necessary for a permanent custody order relative to one child to be appealable. Rule 2(d), on the other hand, specifically states that custody orders are final appealable orders. *See also Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002) (holding that Rule 2(d) permits an appeal from any order that is final as to the issue of custody, regardless of whether the order resolves all other issues).

In the order appealed from in this case, the circuit court specifically said that "[t]he case is closed as to [B.W.] and [C.W.]" because permanent custody was granted to Curtis West. *We hold that Rule 2(d) applies to permanent custody orders in dependency-neglect cases*, and, thus, Shannon West's appeal from the order granting permanent custody of B.W. and C.W. to Curtis West is a final, appealable order. We further hold that a Rule 54(b) certificate is not required under Rule 6-9 for an appeal of the permanent custody order regarding B.W. and C.W.

West, 373 Ark. at 103–04, 281 S.W.3d at 735–36 (emphasis added). Notably, there was no discussion in *West* with respect to when the notice of appeal was due; the supreme court simply held that a permanent custody order in a dependency-neglect case is appealable under Ark. R. App. P.–Civ. 2(d).

A year later in 2009, the supreme court again was confronted with a possible conflict between Supreme Court Rule 6-9 and Ark. R. App. P.–Civ. 2(d). In *Schubert v. Arkansas Department of Human Services*, 2009 Ark. 596, 357 S.W.3d 458, the supreme court held, in a dependency-neglect case, that a denial of a motion to intervene could not be appealed under Supreme Court Rule 6-9 because it was not specifically appealable under that rule,[1] and instead that it was appealable only under Ark. R. App. P.–Civ. 2(a)(2), adopting the same principle that the supreme court enunciated in *West*. In *Schubert*, the appellant failed to sign the notice of appeal. Rule 6-9(b)(1)(B) requires the appellant to sign the notice of appeal; Ark. R. App. P.–Civ. 2 does not. Hence, the issue was whether the appellant was required to sign the notice of appeal as required by Rule 6-9, as a jurisdictional requirement. The supreme court held that the lack of a signature on the notice of appeal was not fatal to its jurisdiction because the appeal was predicated on Ark. R. App. P.–Civ. 2(a)(2) and not on Rule 6-9(b)(1)(B).

That brings us to the present case. Neither *West* nor *Schubert* discussed the timeliness of the notice of appeal. Under Supreme Court Rule 6-9, the notice of appeal must be filed within twenty-one days. However, under Ark. R. App. P.–Civ. 4(a), the notice of appeal

[1]Rule 6-9 has since been amended to include a denial of a motion to intervene as an appealable order.

must be filed within thirty days. Relying on the principles set forth by the supreme court in *West* and *Schubert*, one would reasonably conclude that because the order was appealable *only* under Ark. R. App. P.–Civ. 2(d), the notice of appeal should be filed within thirty days pursuant to Ark. R. App. P.–Civ. 4(a), which provides that a notice of appeal shall be filed within thirty days of the judgment.

However, our more recent caselaw indicates otherwise. In *Clark v. Arkansas Department of Human Services*, 2016 Ark. App. 286, 493 S.W.3d 782, the court of appeals indicated that the twenty-one-day period for filing the notice of appeal prescribed by Supreme Court Rule 6-9(b)(1) was applicable to an order of permanent custody entered in a dependency-neglect case. More importantly, the supreme court announced as much in *Lee v. Arkansas Department of Human Services*, 2016 Ark. 87. *Lee* was an appeal from a permanent-custody order emanating from a dependency-neglect case. Despite the holdings and rationale in *West* and *Schubert*, the supreme court wrote:

> According to Ms. Lee, she attempted to file notices of appeal in April 2015 and in June 2015, but both were "denied." On January 19, 2016, Ms. Lee filed with the clerk of this court a motion requesting to appeal the June 29, 2015 order. Pursuant to Supreme Court Rule 6-9(b)(1), *Ms. Lee's notice of appeal was due within 21 days of the entry of the order.* Therefore, the notice of appeal was not timely filed. Accordingly, this motion will be treated as a motion for belated appeal.

Lee, 2016 Ark. 87, at 1 (emphasis added).

In *Lee*, the facts were such that the appellant would have missed either the 21-day deadline or the 30-day deadline as the notice of appeal was untimely regardless of which rule applied, and therefore, the supreme court's statement that "Ms. Lee's notice of appeal was due within 21 days of the entry of the order" could be construed as dicta. As such, the supreme court did not explain why the twenty-one-day limit prescribed by Supreme Court

Rule 6-9(b)(1) was applicable instead of the thirty-day limit prescribed by Ark. R. App. P.–Civ. 4(a). Despite the fact the opinion was silent on its reasoning, the supreme court plainly stated in *Lee* that the notice of appeal from a dependency-neglect order awarding permanent custody was due within twenty-one days of the entry of the order.

Hence, the clarion call to practitioners. In *West*, the supreme court held that the right to appeal an order of permanent custody arising out of a dependency-neglect proceeding has its basis in Ark. R. App. P.–Civ. 2(d). In *Schubert*, the supreme court held that the mandatory requirement in Rule 6-9 that the appellant must sign the notice of appeal is not applicable to an appeal under Ark. R. App. P.–Civ. 2. Then, the supreme court apparently reversed course, or at least changed course, in *Lee* and held that the notice of appeal for permanent custody arising out of a dependency-neglect proceeding must be filed within the time parameters in accordance with Supreme Court Rule 6-9 instead of Ark. R. App. P.–Civ. 2(d) and 4(a). The court of appeals is bound to follow the decisions of our supreme court. *Surratt v. State*, 2013 Ark. App. 167. That being so, I must concur with the majority's decision today to dismiss the appellants' appeal in this dependency-neglect case on the grounds that the notice of appeal was not filed within twenty-one days of the entry of the order being appealed. The result is that we have a virtual smorgasbord of rules to choose from; some from column A and some from column B. Some appellate rules in the case at bar emanate from Ark. R. App. P.–Civ. 2(d); some appellate rules in this case emanate from Supreme Court Rule 6-9. It is up to the practitioner to divine which subsection of which rule applies to his or her case. If the practitioner divines incorrectly, the appellate courts will summarily dismiss the appeal for lack of jurisdiction, and the parent

who lost custody of his or her child will be left without recourse. Until or unless the supreme court reviews this menagerie of rules—practitioner beware.

Chrestman Group, PLLC, by: *Keith L. Chrestman*, for appellants.

Dusti Standridge, for appellee Jacklyn Gabbard.