IN THE SUPREME COURT OF FLORIDA

IN THE INTEREST OF E.P., A CHILD

TERRI JOHNSON,

PETITIONER,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

RESPONDENT.

Case No. 70,678

DCA Case No. 86-884

Appeal from the Second District Court of Appeal

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Miscellaneous

PREFACE

The parties will be referred to as the petitioner and the respondent, respectively.

The petitioner, Terri Johnson, was the respondent in the trial court proceeding and was the appellant in the district court proceeding

The respondent, Florida Department of Health and Rehabilitative Services, was the petitioner in the trial court proceeding and was the appellee in the district court proceeding.

The following symbols will be used in petitioner's brief:

A - Appendix

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE:

DOES FLORIDA RULE OF JUVENILE PROCEDURE 8.820(b)(3) RESCIND FLORIDA RULE OF APPELLATE PROCEDURE 9.020(g) THEREBY LIMITING THE TIME FOR TAKING AN APPEAL TO THIRTY DAYS AFTER RENDITION OF THE FINAL JUDGMENT INSTEAD OF THIRTY DAYS AFTER RENDITION OF A FINAL ORDER ON THE MOTION FOR REHEARING?

STATEMENT OF THE CASE AND OF THE FACTS

The matter under review has its genesis in an order dated January 30, 1986 of the Circuit Court of Hillsborough County, Juvenile Division, which placed the child, E.P., in foster care. (A 3) The order followed a "judicial review" hearing on January 21, 1986 which was held pursuant to the requirements of Fla.Stat. § 409.168(5) (1985). The child had previously been adjudicated dependent and had been placed in the custody of her mother, the petitioner, on July 10, 1985. (A 1)

The order of January 30, 1986 was never recorded in the Official Records by reason of Fla. Stat. § 39.411(3) (1985) which provides that juvenile court records are confidential and are protected from public inspection.

On February 11, 1986 petitioner served a timely motion for rehearing directed to the order of January 30, 1986. (A 5)

The trial court denied the motion for rehearing by written order dated March 11, 1986. (A 8) Petitioner filed her notice of appeal in the district court on April 4, 1986--within 30 days of the order denying rehearing. (A 11)

Upon motion by respondent, the district court dismissed the appeal as having been filed "untimely" under Fla.R.Juv.P. 8.820(b)(3) because petitoner did not file her notice of appeal within 30 days of the order

of January 30, 1987 "regardless of any motion for rehearing." In the Interest of E.P., ___ So.2d ___, 12 FLW 1251, 1252 (Fla. 2d DCA 1987). (A 12)

The district court acknowledged the conflict between Fla.R.Juv.P. 8.820(b)(3) and Fla.R.App.P. 9.020(g), and certified the question to the Supreme Court pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v). (A 12)

SUMMARY OF ARGUMENT

The certified question under review is a question of first impression. The Court's decision on the question should not rest on simply a "bare words" technical analysis of the conflicting rules under review. There are serious implications and consequences to litigants, the juvenile courts, and to appellate litigation, depending on how the certified question is answered by the Court.

The current Fla.R.Juv.P. 8.820 (1985) provides for the filing of motions for rehearing in juvenile dependency cases. Subsection (b)(3) of the rule states: "A motion for rehearing shall not toll the time for the taking of an appeal."

Fla.R.Juv.P. 8.820(b)(3) conficts with Fla.R.App.P. 9.020(g) and, by implication, with Fla.R.App.P. 9.110(b). Fla.R.App.P. 9.020(g) provides, in material part:

> Where there has been filed in the lower tribunal an authorized and timely motion for new trial or rehearing * * * the order shall not be deemed rendered until disposition thereof.

Fla.R.App.P. 9.110(b) requires that a notice of appeal be filed within 30 days of "rendition" a final order.

The history of civil practice, the Rules of Appellate Procedure, and

the Rules of Juvenile Procedure, and the overwhelming body of case law, establishes that Fla.R.Juv.P. 8.820(b)(3) is an anomaly, if not a "mistake", which should be found not to have superseded Apellate rule 9.020(g).

At least one one district court has, by implication, recognized the anomalous consequence of rule 8.820(b)(3) and several of the problems created when the rule is applied. In the Interest of R.N.G., C.A.G. & S.E.G., 496 So.2d 988 (Fla. 1st DCA 1986).

Among other consequences, Rule 8.820(b)(3) will literally force a party, who has filed a motion for rehearing, to commence an appeal before "it is determined that there will in fact be need" for an appeal. Ganzer v. Ganzer, 84 So.2d 591, 592 (Fla. 1956) (En banc). The litigant does not even have the benefit of fully knowing the degree of merit of his claim-- as represented by his notice of appeal--that reversible error has been committed by the trial court.

Even though the history of "rehearings" in civil actions is somewhat convoluted, the Supreme Court has, for the past few decades, consistently applied the rule that a timely motion for rehearing tolls the time limitation for the taking of an appeal.

Without question, Fla.R.Juv.P. 8.820(b)(3) sticks out like the proverbial "sore thumb" -- out of place and without any explanation of its rationale, purpose and departure from long established precedent.

ARGUMENT I

THE HISTORY OF PRACTICE IN JUVENILE PROCEEDINGS AND OF THE RULES OF JUVENILE PROCEDURE REQUIRES THAT THE CERTIFIED QUESTION BE ANSWERED IN THE NEGATIVE.

(a) PRE-1972 JUVENILE PROCEDURE - REHEARING

There were no formal rules of procedure applicable to juvenile cases prior to 1972 when the Supreme Court adopted the Florida Rules of Juvenile Procedure effective January 1, 1973. In re Transition Rule 11, 270 So.2d 715 (Fla. 1972). The applicable provisions of the Rules of Civil Procedure and the statutory provisions of Chapter 39, Florida Statutes, constituted the "rules" of juvenile procedure. See, In the Interest of D.A.W., 178 So.2d 745, 747 (Fla. 2d DCA 1965).

During this "pre-rules" period the courts uniformly recognized motions for rehearing in juvenile cases and further recognized such motions as tolling the time for taking an appeal by operation of Appellate Rules 1.3 and 3.2(b), and RCP 1.530. In the Interest of V.D., 245 So2d 273 (Fla. 4th DCA 1971); In the Interest of D.A.W., supra.

Appellate Rules 1.3 and 3.2(b) are the immediate precessors, respectively, of current Apopellate Rules 9.020(g) and 9.110(b).

The Florida Rules of Civil Procedure in effect as of January 1, 1967 provided, at RCP 1.010, that:

> These rules apply to all suits of a civil nature and all statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts and Civil Courts of Record except that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings unless these rules specifically provide to the contrary.

RCP 1.530 (1967) provided for the filing of motions for rehearing and new trials as to final orders.

(b) THE 1972 RULES OF JUVENILE PROCEDURE

On December 20, 1972 the Supreme Court adopted its first Rules of Juvenile Procedure "to govern practice and procedure in the juvenile division of the circuit court until permanent rules are submitted by The Florida Bar for adoption." In re Transition Rule 11, 270 So.2d 715 (Fla. 1972).

The Juvenile Court Rules Committee's draft of its proposed Rules of Procedure for Juvenile Cases was published in the Florida Bar Journal, Vol. XLVI, No. 11, p. 654, et seq. (December, 1972), but no comments were published with the proposed rules.

Even though there was no express rule for rehearings, Rule 8.180(b) provided that in all dependency cases "the Florida Rules of Civil Procedure shall apply, when not in conflict with these rules." Thus, RCP 1.530 was incorporated by reference into the Juvenile Rules of Procedure with the result that motions for rehearings continued to be recognized in juvenile proceedings. See, Lehmann v. Cloniger, 294 So.2d 344 (Fla. 1st DCA 1974).

(c) THE 1977 JUVENILE RULES AMENDMENTS

In 1977 the "permanent" Rules of Juvenile Procedure were adopted. There were major revisions to the prior "temporary" rules. In re Florida Rules of Juvenile Procedure, 345 So.2d 655 (Fla. 1977).

The former provision, RCP 8.180 (1972), which had expressly incorporated the non-conflicting provisions of the Rules of Civil Procedure, was deleted. There were no Comments by the Juvenile Rules Committee explaining the deletion.

The 1977 changes brought forth the first express reference to a motions for rehearing. The reference appeared in Rule 8.330, a new rule, which provided that the provision for enlargement of time shall not extend the time for making "a motion for rehearing".

The new rules also expressly provided for a "motion to vacate judgment" which must be made within 10 days of an order of adjudication, and which "shall not toll the time for the taking of an appeal." Rule 8.230(b). This rule was the progenitor of present Fla.R.Juv.P. 8.820.

(d) THE 1981 AND 1985 JUVENILE RULES AMENDMENTS

In 1981 there again were substantial amendments to the juvenile rules. In re Florida Rules of Juvenile Procedure, 393 So.2d 1077 (Fla. 1980).

A "motion to vacate judgment" was changed to a "motion for rehearing".

Rule 8.230. Other than the change in names, the "new" motion for rehearing retained the substance of its former nom de plume. There were no published Comments by the Juvenile Rules Committee explaining the change.

Effective January 1, 1985 the rules governing dependency cases and the rules governing delinquency cases were separated within the body of the Rules of Juvenile Procedure. Petition of Florida Bar, Rules of Juv. Proc., 462 So.2d 399 (Fla. 1984). Motions for rehearing in dependency proceedings were transferred to new rule 8.820; motions for rehearing in delinquency proceedings retained the former number 8.230.

Fla.R.Juv.P. 8.820 retained the substance of the prior provision, but expanded the class of orders subject to a motion for rehearing in dependency proceedings to include orders of disposition as well as the previously delineated orders of adjudication and orders withholding adjudication.

Thus, Rule 8.820(b)(3), as amended in 1981 (then 8.230), also departed from its own well-established history of recognizing the tolling effect of a motion for rehearing during (a) the many years of the "pre-rules" era and (b) during the first eleven years of formal Rules of Juvenile Procedure from 1972 to 1981. That long-established history is, no doubt, one of the reasons--although unspoken and perhaps unrecognized--for the "limbo" faced by the First District Court of Appeal in In the Interest of R.N.G., C.A.G. & S.E.G., 496 So.2d 988 (Fla. 1st DCA 1986), where the court was faced with a notice

of appeal and an undecided motion for rehearing in the juvenile proceeding--both of which had been "timely" filed.

ARGUMENT II

THE LONG STANDING PRINCIPLE THAT A FINAL ORDER IS NOT "RENDERED" FOR APPELLATE PURPOSES UNTIL THE LOWER TRIBUNAL HAS DISPOSED OF A TIMELY MOTION FOR REHEARING, REQUIRES THAT THE CERTIFIED QUESTION BE ANSWERED IN THE NEGATIVE.

In the decision of Ganzer v. Ganzer, 84 So.2d 591 (Fla. 1956) (En banc) the Supreme Court took the opportunity to: (i) to review several of its prior decisions concerning the tolling effect of motions for rehearings in equity proceedings; (ii) to reconcile its holding as to the tolling effect of such motions; and (iii) to explain the reasons for its view of the tolling effect, for purposes of appeal, of motions for new trial and for rehearing. The Court stated:

> In Beck v. Littlefield, Fla.1953, 65 So.d 722, we stated that where an equity decree grants no affirmative relief so that there are no proceedings for a stay order to operate upon, there is nothing to stay and the timely filing of a petition for rehearing tolls the time within which appeal may be taken. And in Lauderdale by the Sea Development Co. v. Lauderdale Surf & Yacht Estate, 1948, 160 Fla. 929, 37 So2d 364, 10 A.L.R.2d 1072, we said that if the decree grants affirmative relief, the petition for rehearing of itself will not toll the time for appeal but there must also be obtained a stay order pursuant to what is now rule 3.16, 1954 Florida Rules of Civil Procedure.

> This Court has also observed that, except where a stay order is required, a petition for rehearing operates to toll the time for appeal under a rule which is 'the same as that applicable in common law * * * actions.' Redwing Carriers, Inc. v. Carter, Fla.1953, 64 So.2d 557, 559. We have reviewed and reconsidered what was said with reference to the exception where a stay order is required. It appears that there is no basis for this distinction. The purpose of a stay order provided for in Rule 3.16, supra, is to regulate the enforcement of the decree in the trial court. It does not pertain to nor affect appellant [sic] proceedings. Therefore, we now hold that a petition for rehearing in equity timely filed has the same effect for tolling the time for appeal whether or not a stay order has been entered. A petition for rehearing in equity therefore operates to toll the time for appeal in the same manner as does a motion for new trial filed on the law side of the court. This result establishes uniformity in procedure and eliminates uncertainty and doubt.
>
> The purpose of tolling the time for appeal where a timely motion for a new trial is pending on the law side of the court is to avoid the necessity for taking an appeal until it is determined that there will in fact be need for that. The same reasoning is equally applicable in equity. Until a timely petition for rehearing has been ruled upon, the decree does not become final for purposes of appeal. The judicial labor has not been completed.

Id. at 591-592 [Emphasis in original]; see also, Casto v. Casto, 404 So.2d 1046 (Fla. 1981); Wagner v. Bieley, Wagner & Associates, Inc., 263 So.2d 1 (Fla. 1972); In re Estate of Zimbrick, 453 So.2d 1155 (Fla. 4th DCA 1984); Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983); Snyder v. Gulf American Corp., 224 So.2d 405 (Fla. 2d DCA 1969).

Several years later, in State v. Pearson, 156 So.2d 4, (Fla. 1963) the

Court reaffirmed it pronouncements in Ganzer and expanded its articulation of the rationale for the tolling requirement of a motion for rehearing. The Pearson court stated:

> The pronouncement in Ganzer was a reiteration of the long-standing rule of this Court pronounced in many decisions that the test of finality of judgments and decrees is to be determined by whether the judicial labor has been completed. This Court has never departed from the principle that where a petition for rehearing has been properly made within the time fixed by appropriate statute or rule, the trial court has complete control of its decree with the power to alter or change it until said motion has been disposed of. It therefore follows that the judicial labor has not been terminated and could not be terminated until the trial court had disposed of such petition. Until that time the decree or judgment was not final and the time for taking the appeal did not commence to run until the date of the entry of such order.
>
> Any other rule would result in complete confusion in the disposition of litigation. If an appeal taken within the critical period vested jurisdiction in the appellate court to the complete exclusion of the trial court, it would in the first place nullify the provisions of the rules and statutes authorizing an affected party to file a petition for rehearing, and at the same time would effectively prevent the trial court from correcting mistakes, errors or altering or modifying its decrees. Such a rule could result in many instances of needless appellate litigation. Jurisdiction under such circumstances, after the filing of a timely petition, must be exclusively in one court or another. It cannot be in both courts at the same time. * * * We have held that in the event a petition for rehearing is filed then the subsequent filing of a notice of appeal amounted to an abandonment of such petition, thereby vesting in the appellate court jurisdiction of the cause.

Id. at 7 [Citations omitted]

Fla.R.Juv.P. 8.820(b)(3) clearly departs from the long-established principles pronounced in Ganzer and Pearson, and in countless other decisions of the appellate courts of this state.

If given full force and effect, Fla.R.Juv.P. 8.820(b)(3) would, by its effects, generate issues would have to be addressed either by future appellate litigation and additional amendments to the Rules of Juvenile Procedure, or both. Some of the obvious issues are:

(1) Does an appeal remain in limbo until the juvenile court renders its decision on the pending motion for rehearing? See, Williams v. State, 324 So.2d 74 (Fla. 1975); In the Interest of R.N.G., C.A.G. & S.E.G., supra. If so, what are the time limits for the filing of briefs, the record on appeal, etc. during the limbo hiatus?

(2) What is the result if both a motion for rehearing and a notice of appeal are timely filed, but the notice of appeal is filed first in time? Is the appeal thereby abandoned? See, Allen v. Town of Largo, 39 So.2d 549 (Fla. 1949); Frank v. Pioneer Metals, Inc., 114 So.2d 329 (Fla. 3d DCA 1959).

(3) Is a juvenile court order "final" for purposes of Fla.R.Juv.P. 8.820(b)(3) but not final for other purposes?

In Dibble v. Dibble, 377 So.2d 1001, 1003 (Fla. 3d DCA 1979) the court stated:

> [T]he doctrine that rules promulgated by the supreme court which deal with the same subject matter should be construed together and

> in light of each other * * * so that incongruous results may, if possible, be avoided. Many such anomalies would arise if, contrary to our holding, an order is deemed final for one post-judgment purpose, but not for another.

[Citations omited; emphasis supplied.]

This Court has a timely opportunity to avoid sanctioning, in appellate and trial court proceedings, the kind of incongruous results referred to in Dibble, by answering the certified question in the negative and holding that it was not the Court's intent in 1980 to rescind the legal effectiveness of Fla.R.App.P. 9.020(g), and decades of precedence, when the Court approved the "name change" of the motion to vacate to a motion for rehearing.

The decision in In the Interest of D.B., T.B., & A.B., 383 So.2d 278 (Fla 5th DCA 1980) is especially instructive in answering the question under review in the instant appeal. At the time the decision was rendered Fla.R.Juv.P. 8.230, as amended in 1977, had been in effect for three years and, as pointed out earlier, allowed for a motion to vacate judgment "which shall not toll the time for the taking of an appeal."

The appellant/parent filed a "Motion for New Trial or to Vacate Judgment" directed to an order of permanent commitment of adoption. The juvenile rules did not have a provision for motions for new trials, and motions to vacate judgment did not apply to permanent commitment cases by virtue of Fla.R.Juv.P. 8.230 (1977).

The district court held, id. at 279, that: (i) Florida Rule of Civil Procedure 1.530 was to be applied because of the "mention" of a motion for new trial in the juvenile speedy trial rule, and because the "civil rules take over" where the juvenile rules are silent; and (ii) that the appellant's notice of appeal, which was filed more than 30 days after the order of commitment, was timely under Fla.R.App.P. 9.020(g), i.e., that the order of commitment was not "rendered" until the motion for new trial was ruled upon by the trial court.

There are other important considerations, besides the historical grounds, which require that this Court hold that Fla.R.Juv.P. 8.820(b)(3) does not require the filing of a notice of appeal within 30 of a final order.

A motion for rehearing "is not merely a vehicle by which the trial judge can reconsider facts alone; rather, it provides a chance for the trial court to correct any error that it committed if it becomes convinced that it has erred." Elmore v. Palmer First Natl. B. & T. Co. of Sarasota, 221 So.2d 164, 166 (Fla. 2d DCA 1969).

The purpose of a motion for rehearing is to provide the trial court with "an opportunity to consider matters which it failed to consider or overlooked." Pingree v. Quaintance, 394 So.2d 161, 162 (Fla. 1st DCA 1981).

A holding by this Court that Fla.R.Juv.P. 8.820(b)(3) does not rescind the applicability of Fla.R.App.P. 9.020(g) as to juvenile appeals would

encourage less litigation and would promote certainty and uniformity in court procedures.

Parties will also be relieved of the expense of appellate filing fees in the instances where the trial court should grant a motion for rehearing. There will also be a concomitant reduction in the volume of "paperwork" flowing to the district courts.

ARGUMENT III.

SUGGESTION OF CONFLICT: IN THE INTEREST OF R.N.G., C.A.G. & S.E.G. WITH IN THE INTEREST OF E.P.

Petitioner respectfully suggests that the First District's decision In the Interest of R.N.G., C.A.G. & S.E.G., 496 So.2d 988 (Fla. 1st DCA 1986), conflicts with the decision of the Second District in the instant case under review, In the Interest of E.P., ___ So.2d ___, 12 FLW 1251 (Fla. 2d DCA 1987).

The First District held that it did not have jurisdiction over the appeal notwithstanding that the appellant/parent first filed a "timely motion for rehearing" under Fla.R.Juv.P. 8.820(b)(3) and a "timely notice of appeal" under Fla.R.App.P. 9.110(b). In the Interest of R.N.G., C.A.G. & S.E.G., supra at 988. Whereas the Second District's decision implied that it would have had jurisdiction of the appeal if the notice of appeal had been timely filed within 30 days of the lower court's final order. In the Interest of E.P., ___ So.2d ___, 12 FLW 1251 (Fla. 2d DCA 1987).

ARGUMENT IV

FLA. W.C.R.P RULE 4.141, WITH ITS DOCUMENTED PURPOSE, RATIONALE AND HISTORY, CAN BE DISTINGUISHED FROM Fla.R.Juv.P. 8.820(b)(3).

Peitioner has only been able to locate one other rule of practice and procedure which has a similar "non-tolling" provision as appears in Fla.R.Juv.P. 8.820(b)(3). This other rule is found in the Florida Workers' Compensation Rules of Procedure.

Fla. W.C.R.P. 4.141 allows for the filing of a motion for rehearing directed to "an order not yet final" and further provides that the filing of such a motion "does not toll either the time within which an order becomes final or the time within which an appeal may be filed." Fla. W.C.R.P. 4.141 is a recent amendment which became effective on January 1, 1985.

On its face, Fla. W.C.R.P. 4.141 would appear to lend strong support to the argument that Fla.R.Juv.P. 8.820(b)(3) is viable and should be enforced by this Court. However, there are important distinctions to be drawn, and detailed reasons and documentation for the Workers' Compensation "exception" to the tolling principle. See generally, Parsons v. Orkin Exterminating Co., Inc., ___ So.2d ___, 12 FLW 1452 (Fla. 1st DCA 1987).

First of all, the Workers' Compensation Rules of Procedure contain in toto the entire body of provisions dealing with both procedures and with

appeals in workers' compensation cases. The rules "govern all workers' compensation proceedings in and before Deputy Commissionsers and the District Court of Appeal, First District." Fla. W.C.R.P. 4.010.

Even the time period for taking an appeal to the First District Court of Appeal (30 days), and the place and manner of filing, is prescribed in Fla. W.C.R.P 4.160--not in the Florida Rules of Appellate Procedure.

Secondly, Fla. W.C.R.P. 4.141 has a clearly articulated rationale for its existence. See, Comments to Fla. W.C.R.P. 4.141 and 4.161. Also, even though a motion for rehearing does not toll the time for taking an appeal, subsection (b) of Fla. W.C.R.P. 4.141 "specifically invites use of a deputy's power to vacate as a means of affording the parties additional time for processing a motion for rehearing where the circumstances warrant." Comment to Fla. W.C.R.P. 4.141. There is no similar provision in the Florida Rules of Juvenile Procedure.

Thirdly, there is no requirement (or definition) of "rendition" of orders--as contrasted with Fla.R.App.P. 9.020(g)--to commence the time period for filing the notice of appeal. The time period begins to run on the date the order is mailed to the parties. Fla. Stat. § 440.25(4)(a); Fla. W.C.R.P. 4.160(a).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this, Petitioner's Initial Brief on the Merits, has been served by regular United States mail on this 9th day of July, 1987, on: ROBERT A. BUTTERWORTH, Attorney General, and JOSEPH LEWIS, JR., Assistant Attorney General, Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32301.

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