

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 20, 2014 Session

**IN RE BRENNEN T.**

**Appeal from the Chancery Court for Robertson County**  
**No. CH11CV10234 Laurence M. McMillan, Jr., Chancellor**

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**No. M2013-01451-COA-R3-PT - Filed June 19, 2014**

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This is a termination of parental rights case. After the Appellants filed a termination petition against Biological Parents, Mother filed a counter-claim for malicious use of process, kidnapping, and perjury. The trial court dismissed the termination petition, but failed to rule on Mother's counter-claim. Accordingly, we dismiss this appeal for lack of a final judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal is Dismissed**

J. STEVEN STAFFORD, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

Kimberley L. Reed-Bracey, Goodlettsville, Tennessee, for the appellants, Kareena V. and Scott V.

Martin Sir, Jennifer L. Honeycutt, Peggy Smith, Nashville, Tennessee, for the appellees, Nicole S. F. and Kenneth E. T.

**MEMORANDUM OPINION<sup>1</sup>**

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<sup>1</sup> Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall

## Background

The Respondents/Appellees Nicole S. F. (“Mother”) and Kenneth E. T. (“Father,” together with Mother, “Biological Parents”) are the biological parents of one child, Brennen T. (“the child”).<sup>2</sup> Mother and Father married when the child was approximately 5 months old. The Petitioners/Appellants, Kareena V., the child’s paternal aunt, and her husband, Scott V. (together with Kareena V., “Appellants”), seek to terminate Biological Parents’ rights in this case.

The minor child lived with Mother and Father from birth until September 13, 2010, when the child was approximately ten months old. At that time, Mother and Father arrived at the home of paternal grandfather and allegedly indicated that they were facing eviction, and had no food or diapers for the child. Further, they were allegedly watering down the child’s formula to make it last longer. According to Biological Parents, they merely intended to seek financial assistance from paternal grandfather. Upon their arrival, Mother and Father learned from paternal grandfather that paternal grandfather and Kareena V., were leaving for a vacation to South Carolina. At the suggestion of Kareena V., Mother and Father allowed the child to go on vacation with Kareena V., upon being advised they would be gone only a few days. Mother, at Kareena V.’s request, signed a letter authorizing Kareena V. to seek medical attention for the child in the event of an emergency. During this trip, Kareena V. allegedly began seeking legal counsel in an effort to obtain custody of the child when the Appellants returned to Tennessee. On their return from vacation, both Mother and Father were sick with either pertussis or pneumonia. Because of their illnesses, Kareena V. told them she should keep the child until they were no longer contagious.

Without informing Biological Parents, Appellants filed an emergency petition for Dependency and Neglect in the Juvenile Court of Robertson County, Tennessee on September 21, 2010. As a result of the filing, Appellants obtained an *ex parte* order granting them temporary custody of the child. While still recuperating, Mother and Father visited the child at the Appellants’ residence on September 23, 2010. During this visit Kareena V. failed to inform Biological Parents that she had filed the dependent and neglect petition and had obtained a custody order on the previous day. Due to their illnesses, Mother and Father left

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be designated “MEMORANDUM OPINION,” shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

<sup>2</sup> It is the policy of this court to use the initials of children and parties involved in termination actions to protect the privacy of the children involved.

the child in the Appellants' care.

Between September 23, 2010 and October 2, 2010, the biological parents attempted on several occasions to contact the Appellants, but were denied any contact until October 2, 2010. On October 2, 2010, contact was finally made with Kareena V. and a dispute arose. Father advised Kareena V. that he was coming to retrieve the child and at this time Appellants disclosed that they had already obtained custody of the child, without Biological Parents' knowledge, and would call the police if Father came to get him.

Despite not yet being officially served with the Petition for Dependency and Neglect, Biological Parents filed their request, *pro se*, for a 72-hour hearing on October 4, 2010 in the Juvenile Court. The hearing was convened by the magistrate on or about October 7, 2010, at which time Biological Parents allegedly requested appointed counsel.<sup>3</sup> According to Biological Parents, however, the magistrate denied their request. The magistrate continued the hearing until Biological Parents could obtain private counsel. On October 10, 2010, the Appellants filed a motion to set the dependency and neglect hearing for January 14, 2011. At the hearing on January 14, 2011, private counsel entered an appearance for Mother and the final hearing was set for April 14, 2011.

However, the scheduled hearing never occurred. Prior to the hearing, on February 8, 2011, the Appellants filed a petition to terminate Mother and Father's parental rights in the Chancery Court for Robertson County on the ground of abandonment for failure to visit and/or support. The action taken by the trial court as to this petition is the subject of this appeal. The petition was filed almost exactly four months since Father had last attempted to remove the child from Appellants' custody, and had been threatened with police involvement. Although Appellants knew that Mother had retained counsel in the dependency and neglect proceeding, Appellants filed a motion with the Chancery Court on March 16, 2011 stating that Biological Parents' location was "unknown and unascertainable," despite "due and diligent search and inquiry." Thus, Appellants requested service by publication, which was granted by the trial court. The Juvenile Court proceedings were stayed pending the outcome of the Chancery Court termination proceedings.

Mother, through her retained attorney, filed an answer to the Appellants' termination petition on June 1, 2011. Mother did not raise as an issue the Appellants' method of service of process. Instead, Mother asserted that the petition was improper when a dependency and neglect case was pending in the juvenile court and that neither she nor Father had abandoned

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<sup>3</sup> Although the Appellants would later dispute that Biological Parents ever sought appointed counsel, rather than time to retain private counsel, Kareena V. testified at a later hearing that Biological Parents had requested appointed counsel in the initial Juvenile Court hearing.

the child. In her Answer, Mother also raised a counter-claim against the Appellants, asserting that the Appellants had committed malicious use of process, kidnapping, and perjury. In her counter-claim, Mother not only asked that the Appellants' termination petition be dismissed, but that she be awarded attorney's fees and punitive damages. On June 8, 2011, the Appellants filed an answer to Mother's counter-claim, denying the material allegations contained therein, raising the affirmative defense of failure to state a claim upon which relief can be granted, and generally denying that Mother was entitled to an award of attorney's fees or punitive damages.

On January 3, 2012, new counsel entered an appearance on behalf of both Mother and Father. The final hearing on the Appellants' termination petition was continued several times. First, Mother and Father sought a continuance when they retained new counsel. Appellants later requested a continuance because discovery had not been completed. Finally, the parties agreed to a continuance because the guardian *ad litem* was unavailable for trial until after the completion of her maternity leave on August 31, 2012. During the interim, Mother and Father requested visitation with the child, which the trial court granted.

The final hearing occurred on three non-consecutive days, months apart: October 16, 2012, January 16, 2013, and March 21, 2013. At the close of trial, the trial court asked the parties to prepare proposed findings of fact and conclusions of law and each party complied. On April 15, 2013, the trial court entered a Memorandum Opinion adopting the proposed findings of fact and conclusions of law of Biological Parents in their entirety. The trial court requested that counsel for Biological Parents prepare an order incorporating those findings. On June 10, 2013, the trial court entered an order containing detailed findings of fact and conclusions of law regarding the evidence at trial. In the order, the trial court determined that the Appellees failed to prove that either Mother or Father willfully abandoned the child by failure to visit and/or support him. Further, the trial court found that even though a best interest analysis was unnecessary in the absence of a ground for termination, that Appellants failed to prove that it would have been in the child's best interests for Biological Parents' rights to be terminated. Accordingly, the trial court dismissed the Appellants' petition. The trial court first appeared to decline to award Biological Parents any attorney fees, but did order Appellants to pay Biological Parents' "discretionary expenses, and the costs of this cause," for which the trial court asked that counsel for Biological Parents submit an affidavit of attorney's fees and discretionary expenses.<sup>4</sup> The Appellants filed a timely notice of appeal of the trial court's ruling.

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<sup>4</sup> It is unclear from the record as to whether "discretionary expenses" includes attorney's fees in this case, given the trial court's request for an affidavit of attorney's fees. Regardless, neither party raises an issue as to any award of discretionary expenses or attorney's fees in this case.

During the pendency of the appeal, Appellants filed a motion with this Court captioned: Motion Pursuant to Rule 14<sup>5</sup> to include Document into Evidence Which was Unknown at Trial and Could Not Have Been Obtained.” The Appellants sought to supplement the record on appeal with an order from the Juvenile Court of Robertson County, which the Appellants asserted “goes directly to the Court’s findings and refusal to terminate the parental rights of [Mother and Father] and proves their untruthfulness under oath.” Specifically, the Appellants asserted that the order from the Juvenile Court showed that the Mother and Father never requested appointed counsel, but instead merely requested time to retain private counsel, in direct contradiction to the testimony at the termination hearing. On August 20, 2013, this Court denied the Appellants’ motion and, instead, directed the Appellants to seek recourse with the trial court:

While the Juvenile Court order was entered post-judgment, the facts referenced in the Juvenile Court order occurred well before the judgment in this case was entered and are thus not truly post-judgment facts. Moreover, these facts affect the credibility of the parties and relate directly to the merits. The appellants are, in essence, attempting to relitigate issues already decided by the trial court by placing before this court evidence not considered by the trial court. Tenn. R. App. P. 14 does not permit consideration of such facts. Relief, if any, must be sought pursuant to Tenn. R. Civ. P. 60 following a remand from this Court pursuant to *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 596 (Tenn. 1994).

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<sup>5</sup> The Appellants cited Rule 14 of the Tennessee Rules of Appellate Procedure, which provides, in pertinent part:

**Power to Consider Post-Judgment Facts.** The Supreme Court, Court of Appeals, and Court of Criminal Appeals on its motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. While neither controlling nor fully measuring the court’s discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters. Nothing in this rule shall be construed as a substitute for or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act.

Tenn. R. App. P. 14(a).

Accordingly, on August 27, 2013, the Appellants filed a Rule 60 motion in the trial court asking the court to reconsider its ruling in light of the order from the juvenile court and/or to allow the record on appeal to be supplemented with the Juvenile Court order. The trial court denied the Appellants' motion on October 7, 2013.<sup>6</sup>

### **Issues Presented**

Appellants raise three issues on appeal, which we summarize as follows:

1. Whether trial court erred in finding that the Appellants failed to prove, by clear and convincing evidence, the ground of abandonment by failure to support and/or visit?
2. Whether the trial court erred in considering claims of due process violation in the Juvenile Court dependency and neglect action?
3. Whether the trial court erred in finding that termination was not in the child's best interest?<sup>7</sup>

### **Analysis**

Before we can address the merits of the Appellants' appeal, we must first determine whether this matter is properly before us for appellate review. Rule 13 of the Tennessee Rules of Appellate Procedure provides that our "review generally extends only to those issues presented for review. [We] shall also consider whether the trial and appellate court

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<sup>6</sup> Neither party raises the trial court's denial of the Rule 60 motion as an issue on appeal.

<sup>7</sup> Also while this appeal was pending, on October 16, 2013, Biological Parents filed a motion in the trial court to restore custody of the child to Biological Parents. The order noted that Biological Parents had petitioned for a change in custody in the Juvenile Court, which request had been denied based upon the Juvenile Court's determination that its proceedings were stayed pending the appeal of the Chancery Court case. On December 9, 2013, the Chancery Court denied Biological Parents' motion, concluding that "jurisdiction is solely and exclusively with the Juvenile Court of Robertson County regarding custody and parenting time." Biological Parents' brief in this appeal was filed after the entry of the order denying this motion in the trial court. In their brief, Biological Parents state that "custody of the minor child should be immediately returned to the parents." However, Biological Parents do not raise this issue in their Statement of the Issues Presented for Review. Typically, an issue not properly raised is waived. *See Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (holding that an Appellee waives an issue by failing to raise the issue in the Statement of the Issues Presented for Review section of the appellate brief). Regardless, based on our holding that this Court lacks jurisdiction to consider this appeal, as discussed *infra*, we cannot address this issue.

have jurisdiction over the subject matter, whether or not presented for review.” *See* Tenn. R. App. P. 13(b). We “cannot exercise jurisdictional powers that have not been conferred directly to [us] expressly or by necessary implication.” *Tennessee Envtl. Council v. Water Quality Control Bd.*, 250 S.W.3d 44, 55 (Tenn. Ct. App. 2007) (citations omitted).

Rule 3(a) of the Tennessee Rules of Appellate Procedure limits the subject matter jurisdiction of appellate courts to final judgments:

In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in rule 9 or in Rule 54.02 of the Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

*Id.* Rule 54.02 of the Rules of Civil Procedure further provides that:

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.

*Id.* Accordingly, without a final judgment, this Court does not have subject matter jurisdiction. Tenn. R. App. P. 3(a).

Subject matter jurisdiction concerns the authority of the court to hear a matter and cannot be waived. *Meighan v. U.S. Sprint Commc'ns Co.*, 924 S.W.2d 632, 639 (Tenn. 1996). Subject matter jurisdiction pertains “to the right of the court to adjudicate, or to make an award through the remedies provided by law upon facts proved or admitted in favor of, or against, persons who are brought before the court under sanction of law.” *Brandy Hills Estates, LLC v. Reeves*, 237 S.W.3d 307, 314–15 (Tenn. Ct. App. 2006) (quoting 17 *Tennessee Jurisprudence Jurisdiction* § 2 (1994)). The court may consider subject matter jurisdiction *sua sponte*. Tenn. R. App. P. 13(b); *Ruff v. State*, 978 S.W.2d 95, 98 (Tenn. 1998). The Tennessee Supreme Court has held that “[u]nless an appeal from an interlocutory order is provided by the rules or by statute, appellate courts have jurisdiction over final judgments only.” *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990).

A final judgment is one that adjudicates all claims, rights and liabilities of all parties to an action. See Tenn. R. App. P. 3(a). In other words, “[a] final judgment is one that resolves all the issues in the case, ‘leaving nothing else for the trial court to do.’” “*In re Estate of Ridley*, 270 S.W.3d 37, 40 (Tenn.2008) (quoting *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003)). In this case, the trial court properly disposed of the Appellant’s termination petition. However, the trial court failed to rule on Mother’s counter-claim against the Appellants. In her counter-claim, Mother asserted causes of action based on malicious use of process, kidnapping, and perjury. In addition to dismissal of the termination petition, Mother also sought an award of attorney’s fees and punitive damages. The trial court failed to rule on these claims or to certify its ruling as final pursuant to Rule 54.02, as discussed above. While Mother may not ultimately be entitled to relief on these causes of action, the trial court was still obligated to dispose of Mother’s claims in some way. Because the trial court did not rule on Mother’s counter-claim, there remains something for the court to do. Accordingly, the judgment in this case is not final and this Court lacks subject matter jurisdiction to adjudicate this appeal.

Further, in bench trials, trial courts must make findings of fact and conclusions of law to support their rulings. Rule 52.01 of the Tennessee Rules of Civil Procedure provides, in pertinent part:

In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.



*Id.* Prior to July 1, 2009, trial courts were only required to make specific findings of fact and conclusions of law “upon request made by any party prior to the entry of judgment.” See **Poole v. Union Planters Bank N.A.**, No. W2009-01507-COA-R3-CV, 337 S.W.3d 771, 791 (Tenn. Ct. App. 2010) (noting the amendment). However, the current version of Rule 52.01 requires the court to make these findings regardless of a request by either party. *Id.*

This Court has previously held that the General Assembly’s decision to require findings of fact and conclusions of law is “not a mere technicality.” *In re K.H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at \*8 (Tenn. Ct. App. May 15, 2009). Instead, the requirement serves the important purpose of “facilitat[ing] appellate review and promot[ing] the just and speedy resolution of appeals.” *Id.*; **White v. Moody**, 171 S.W.3d 187, 191 (Tenn. Ct. App. 2004); **Bruce v. Bruce**, 801 S.W.2d 102, 104 (Tenn. Ct. App. 1990). “Without such findings and conclusions, this court is left to wonder on what basis the court reached its ultimate decision.” *In re K.H.*, 2009 WL 1362314, at \*8 (quoting *In re M.E.W.*, No. M2003-01739-COA-R3-PT, 2004 WL 865840, at \*19 (Tenn. Ct. App. April 21, 2004)).

The trial court made detailed findings of fact and conclusions of law to support its dismissal of Appellant’s termination petition. No such findings or conclusions are contained in the record with regard to Mother’s counter-claim. Under these circumstances, we must dismiss this appeal for lack of a final judgment, and remand to the trial court to dispose of Mother’s remaining claims with appropriate findings of fact and conclusions of law to support that decision.

Based on the foregoing, we dismiss this appeal for lack of a final judgment. Costs are assessed to Petitioners/Appellants Kareena V. And Scott V., and their surety.

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J. STEVEN STAFFORD, JUDGE