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COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

... judgment entered February 29, 1996 , @n\Dr\

In Interest of J.E.S., a Minor Child

No. 09-95-198 CV

Appealed from the 1st District Court of Jasper County

Per Curiam

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below is reversed and the cause remanded for a new trial. REVERSED AND REMANDED. All costs of the appeal shall be assessed against the appellee, Dennis K. Smart. A copy of this judgment shall be certified below for observance.



Carol Anne Flores,
Clerk

In The

Court of Appeals

Ninth District of Texas at Beaumont

FILED

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CAROL ANNE FLORES, CLERK
COURT OF APPEALS
NINTH DISTRICT
BEAUMONT, TEXAS

NO. 09-95-198 CV

IN THE INTEREST OF J.E.S., A MINOR CHILD

**On Appeal from the First Judicial District Court
Jasper County, Texas
Trial Cause No. 16680**

OPINION

This Writ of Error proceeding is filed by Geraldine D. (Smart) Greenfield, appellant. Appellee, Dennis K. Smart, the ex-husband of appellant, makes no appearance before this Appellate Court by way of reply brief or otherwise. For purposes of this writ of error proceeding, this Court shall consider appellant's brief along with the record on appeal.

Factually, Geraldine D. (Smart) Greenfield and Dennis K. Smart were husband and wife living in the State of Louisiana, Parish of Beauregard. To this marriage was born two male children. On November 10, 1986, Geraldine and Dennis were divorced in Beauregard Parish, Louisiana, under Cause No. C-85-133. In that Louisiana proceeding, only one child was referenced as being a child of the marriage between the parties, to-wit: D .K.S., II. J.E.S. was

not mentioned in that divorce proceeding although J.E.S. was born on July 16, 1985. This Appellate Court does not have before it the final divorce judgment entered in the State of Louisiana.

We determine from the record that at some time following the Louisiana divorce, appellee, Dennis K. Smart, relocated his residence to Jasper County, Texas. We further conclude from the record, that appellant, Geraldine Greenfield, continued to live in the State of Louisiana. Appellee filed in the trial court an instrument entitled, "Brief Supporting Authority for Court to Retain Jurisdiction." In it, appellee contends that the final Louisiana judgment, "awarded the parties Joint Custody of the minor children with Geraldine D. (Smart) Greenfield as the domiciliary parent, subject to Dennis K. Smart's rights of reasonable visitation."

On December 1, 1993, Dennis Smart filed an Original Petition in Suit Affecting Parent-Child Relationship, in the District Court of Jasper County, Texas, bearing Cause No. 16,680. In this lawsuit, Dennis Smart contended that no court had continuing jurisdiction of the suit or of the child, J.E.S., being the subject of the suit. Responding to this lawsuit, appellant Geraldine Greenfield, filed her "Special Appearance And Plea To Jurisdiction," which included a general denial. This responsive pleading also bore Cause No. 16,680.

On January 10, 1994, temporary orders were signed by the trial court in Cause No. 16,680. These temporary orders basically appointed appellee, Dennis K. Smart as temporary sole managing conservator of the child, J.E. S . According to these temporary orders, same "shall continue in full force and effect until the signing of the Final Decree in this matter or until further order of this Court."

Most intriguing is that on the same day, January 10, 1994, that the above referenced temporary orders were signed in Cause No. 16,680, the trial court also signed "ORDER DENYING SPECIAL APPEARANCE AND PLEA TO THE JURISDICTION AND PLEA AND (Sic) ABATEMENT." The intrigue results from the transcript's documentation that this order denying special appearance, etc., was entered in Cause No. 16,428, even though appellee's trial court brief supporting authority for the trial court to retain jurisdiction was filed in Cause No. 16,680, as was appellant's written pleadings on the issues

On December 8, 1994, the Jasper County trial court signed the following order:

**IN THE DISTRICT OF JASPER COUNTY
STATE OF TEXAS**

IN THE INTEREST OF	X	
	X	
J.E.S.	X	CAUSE NO. 16,680
	X	
MINOR CHILD	X	

**ORDER SETTING HEARING ON MOTION TO MODIFY
IN SUIT AFFECTING PARENT-CHILD RELATIONSHIP**

IT IS ORDERED that the Clerk shall issue notice to Respondent, **GERALDINE D. (SMART) GREENFIELD**, to appear, and Respondent is hereby ordered to appear in person, before this Court in the courthouse at Jasper, Jasper County, Texas, on the 16th day of December, 1994, at 9:00 o'clock A.M. for final hearing in this cause.

SIGNED this 8 day of December, 1994.

This Order was filed with the district clerk on December 9, 1994. Trial was apparently had on December 16, 1994, as evidenced by "Order On Petition On Suit Affecting The Parent-Child Relationship, " Cause No. 16,680. This order recites that, "[t]he Respondent, Geraldine D. (Smart) Greenfield, Social Security No. 434-86-3440, although duly and properly notified did not appear and wholly made default." The order further provides that, "The making of a record of testimony was waived by the parties with the consent of the court." The substantive thrust of this order was to appoint Dennis K. Smart as sole managing conservator of the child, J.E.S. This order was signed January 9, 1995, and filed of record with the district clerk on that same date.

On December 21, 1994, subsequent to the noticed final hearing in Cause No. 16,680, counsel for appellant filed his motion, "Motion For Withdrawal Of Counsel." On December 22, 1994, the trial court granted counsel's motion which permitted counsel to withdraw as counsel of record for Geraldine (Smart) Greenfield. The record is not clear as to how counsel for appellant reentered this case however, on February 7, 1995, in Cause No. 16,680, counsel, on behalf of appellant Geraldine (Smart) Greenfield, filed "Motion For New Trial." In her motion for new trial, appellant contends that her failure to appear at trial was the result of accident or mistake rather than her intentional or conscious indifference. Appellant further contends that appellee, Dennis K. Smart, failed to give her notice of the trial on the merits in accordance with TEX. R. CIV. P. 245. In support of her "Motion for New Trial," appellant filed the following affidavit:

IN THE DISTRICT COURT OF JASPER COUNTY

STATE OF TEXAS

IN THE INTEREST OF	X	
	X	
J.S.,	X	CAUSE NO. 16,680
	X	
A MINOR CHILD.	X	

AFFIDAVIT

STATE OF TEXAS	X
	X
COUNTY OF JASPER	X

BEFORE ME, the undersigned Notary Public, on this day personally appeared **GERALDINE (SMART) GREENFIELD**, who being by me duly sworn on her oath deposed and said:

1. I am the Respondent in the above-entitled and numbered cause.
2. That at the time of trial of this cause I was not given notice this matter was set for trial or hearing on December 16, 1994.
3. I received notice of final hearing on a Motion to Modify in Suit Affecting Parent-Child Relationship, In the Interest of D .K.S., II, Cause No. 1,6,428, for December 16, 1994, from Petitioner. A copy of this notice is attached to this affidavit and is incorporated by reference the same as if fully set forth at length.
4. I received notice of final hearing on an Application to Extend Protective Order, In the Interest of D.S., II, Cause No. 16,428, for December 16, 1994, from Applicant. A copy of this notice is attached to this affidavit and is

incorporated by reference the same as if fully set forth at length.

5. As a result of Petitioner's failure to give notice of trial on this cause, Respondent was not present for trial of this cause on December 16, 1994. Respondent's absence was not intentional or a result of conscious indifference. Respondent's failure to appear at the trial of this cause was due to an accident or mistake involving notice of same.

6. I am the biological mother of the child the subject of this suit.

7. I think it is in the best interest of **J.E.S.**, the subject child, that I be appointed as his sole managing conservator for the following reasons which are not all inclusive:

- a> Petitioner has denied paternity in the past to avoid parental responsibility, including the payment of child support;
- b) Petitioner has unlawfully denied Respondent possession and access to the subject child under the Temporary Orders of this Court dated January 10, 1994.
- c> Petitioner has turned the subject child against Respondent causing the child not to want to visit his mother.
- d) Petitioner is not providing the subject child with a stable environment conducive to the subject child's moral and emotional development.

IS/

GERALDINE (SMART) GREENFIELD

Attached to appellant's "Motion For New Trial" and affidavit is the following letter from counsel for appellee, Dennis K. Smart:

December 5, 1994

Steven E. Hollimon
East Texas Legal Services, Inc.
P.O. Box 2552
Beaumont, TX 77704-2552

CM:RR P 003 048 461

RE: CAUSE NO. 16,428; IN THE INTEREST OF D.K.S., II
CAUSE NO. 16,680; IN THE INTEREST OF J.E.S.

Dear Mr. Hollimon:

Enclosed you will find a Motion to Modify in Suit Affecting Parent-Child Relationship and an Application to Extend Protective Order in Cause No. 16,428.

Both matters have been set for final hearing on December 16, 1994 at 9:00 o'clock A.M. in the Jasper County Courthouse, Jasper, Texas 75951.

Sincerely yours,

The record reflects that this December 5, 1994 letter was received by appellant's counsel on December 8, 1994. On that same date counsel for appellant sent the following letter to appellant:

December 8, 1994

Mrs. Geraldine Greenfield
1608 Center St
Vinton LA 70668

RE: Cause No. 16,428; In the Interest of D.K.S., II
Cause No. 16,680; In the Interest of J.E.S.

Dear Mrs. Greenfield;

Enclosed is a copy of a Motion to Modify in Suit Affecting Parent-Child Relationship, an Application to Extend Protective Order, and a copy of Mr. Ratcliff's letter that were sent to me. East Texas Legal Services is not providing you with representation at this time. You do not have to appear at the hearing unless you are served with the papers.

Please contact me upon receipt of this letter and advise whether you have been served.

Your attention to this matter is greatly appreciated.

Sincerely,

The transcript before us contains a "COPY, " of "MOTION TO MODIFY IN SUIT AFFECTING A PARENT-CHILD RELATIONSHIP, ' Cause No. 16,428. This copy contains no file marking. This lawsuit, Cause No. 16,428, sought to modify the final judgment for divorce granted in the State of Louisiana. This motion to modify basically sought to have appellee, Dennis Smart, appointed as Sole Managing Conservator of D.K.S., II.

The transcript also includes "APPLICATION TO EXTEND PROTECTIVE ORDERS" in Cause No. 16,428. This application, though signed by counsel for Dennis K. Smart, also bears no file mark. The record further contains, "ORDER SETTING HEARING ON MOTION TO MODIFY IN SUIT AFFECTING PARENT-CHILD RELATIONSHIP AND APPLICATION TO EXTEND PROTECTIVE ORDER," Cause No. 16,428. This order bears no signature of the court nor a file marking.

On April 18, 1995, appellant Geraldine (Smart) Greenfield filed her "Petition For Writ Of Error." On that same date, the trial court entered its Order allowing appellant to appeal by

way of Petition for Writ of Error, without bond or cash deposit in lieu of bond.

To succeed by way of a writ of error, appellant must show four necessary requisites. First, appellant must bring petition for writ of error within six months of the date the judgment is signed by the court; second, appellant must have been a party to the suit from which appeal by writ of error is taken; third, appellant must show that appellant did not participate in the actual trial of the case; and, fourth, the error must be apparent on the face of the record. See *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 392 (Tex. 1982). It should also be noted that where a party has filed an answer but fails to appear for trial, that failure, standing alone, is not an abandonment of the party's answer or confession of any issue. The plaintiff must proceed with proof as a plaintiff would do in an ordinary trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979); *Tholp v. Adair & Meyers*, 809 S.W.2d 306, 307 (Tex. App.--Houston [14th Dist.] 1991, no writ).

An appeal by way of writ of error differs slightly from normal appeal due to the requirement that appeal by writ of error must establish that error appears on the face of the record. Our Dallas Court of Appeals concluded that "the face of the record" in a writ of error appeal is the same as the appellate record in regular appeals. See *First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 643 (Tex. App.--Dallas 1987, no writ).

Examples of error "apparent on the face of the record," justifying and supporting an appeal by writ of error are those cases where the record does not reflect proper service on the defendant; and where the record does not reflect that the defendant was notified of the trial

setting; *see Anderson v. Anderson*, 698 S.W.2d 397, 399 (Tex. App.--Houston [14th Dist.] 1985, writ dismissed); *Wilson v. Industrial Leasing Co.*, 689 S.W.2d 496, 498 (Tex. App.--Houston [1st Dist.] 1985, no writ).

In the record before us, we find nothing verifying appellant's notice of the court's order setting hearing on Motion to Modify in Suit Affecting Parent-Child Relationship, Cause No. 16,680, dated December 8, 1994. What we do find is the letter of December 5, 1994, from appellee's counsel to appellant's counsel which references both Cause Nos. 16,428 and 16,680, respectively. The letter, previously set forth herein, is, at least, misleading to appellant in that said letter suggests that "Both matters, (Motion to Modify in Suit Affecting Parent-Child Relationship and an Application to Extend Protective Order in Cause No. 16,428) have been set for final hearing on December 16, 1994." From the statement of facts of the motion for new trial hearing, it is clear that the letter notice from appellee's counsel led appellant and appellant's counsel to believe that only Cause No. 16,428 would be heard on December 16, 1994.

Failure to comply with rules of notice in contested cases deprives a party of his constitutional right to be present at the hearing, to voice his objections in an appropriate manner and results in a violation of fundamental due process. *Armstrong v. Manzo*, 380 U.S. 545, 550; 85 S.Ct. 1187, 1190; 14 L.Ed.2d 62, 65 (1965); *Langdale v. Villamil*, 813 S.W.2d 187, 191 (Tex. App.--Houston [14th Dist.] 1991, no writ). Contrary to the language in the Petition on Suit Affecting Parent-Child Relationship, Cause No. 16,680, that "Respondent, Geraldine D. (Smart) Greenfield, Social Security No. 434-86-3440, although duly and properly notified did

not appear and wholly made default,” appellant did not receive sufficient and adequate notice of trial in Cause No. 16,680.

Appellant’s point of error one contends that it was error for the trial court to proceed to trial when an answer had been filed and an appearance made without giving notice of trial setting. Rules 245 and 21(a) of the Texas Rules of Civil Procedure read, in pertinent part, as follows:

Rule 245: The court may set contested cases on written request of any party, or on the court’s own motion, with reasonable notice of not less than forty-five days to the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties. . . .

Rule 21a: Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party’s duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party’s last known address, or by telephonic document transfer to the recipient’s current telecopier number, or by such other manner as the court in its discretion may direct. . . .

The record does not reflect that appellant ever received a copy of the court’s order setting Cause No. 16,680 for trial. Additionally, the December 8, 1994 trial setting Order allowed, appellant only seven days notice prior to trial. Appellant was entitled to forty-five days notice of trial in accordance with Rule 245 of the Texas Rules of Civil Procedure. We hold that the “ORDER SETTING HEARING ON MOTION TO MODIFY IN SUIT AFFECTING PARENT-CHILD RELATIONSHIP” did not comply with Rule 245, therefore denying unto appellant her right to reasonable notice as required under the *rule*. See *Bruneio v. Bruneio*, 890 S. W.2d 150,

155 (Tex. App.--Corpus Christi 1994, no writ); *Lang&e v. Villamil*, 813 S.W.2d at 191.

Appellant admits, by brief, that she received an unsigned copy of the “ORDER SETTING HEARING ON MOTION TO MODIFY,” under cover letter dated December 5, 1994, however, appellant denies receiving notice of trial (or final hearing) on appellee’s Original Petition in Suit Affecting the Parent-Child Relationship. Appellant admits receipt of notice of hearing on appellee’s Motion to Modify, Cause No. 16,428, same being an unsigned Order setting hearing, but denies any notice of the actual trial in Cause No. 16,680. We sustain appellant’s point of error one.

Appellant’s point of error two contends that the trial court erred by its refusal to grant appellant a new trial. Having determined that the notice for final hearing in Cause No. 16,680 failed to comply with Rules 245 and 21(a) of the Texas Rules of Civil Procedure, we sustain appellant’s point of error two and hold that the trial court abused its discretion in refusing to grant appellant’s motion for new trial.’

For reason stated, the “Order On Petition On Suit Affecting The Parent-Child Relationship,” Cause No. 16,680, dated January 9, 1995, is reversed and held for naught, and a new trial is hereby ordered on that cause.

REVERSED AND REMANDED.

PER CURIAM

‘It remains unclear to this Court, from the record, as to how appellee’s Original Petition in Suit Affecting Parent-Child Relationship bears a higher cause number than the Motion to Modify bearing Cause No. 16,428, but filed on a later date.

Submitted on December 11, 1995
Opinion Delivered February 29, 1996
Do Not Publish

Before Walker, C.J., Burgess and Stover, JJ.