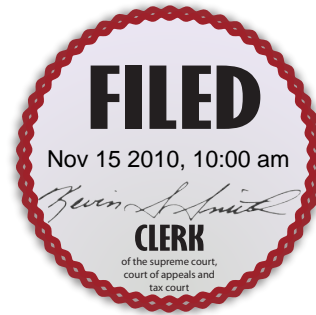


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF:

JAMES R. STEPHENS,

Appellant-Respondent,

vs.

BRENDA STEPHENS,

Appellee-Petitioner.

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No. 33A05-1006-DR-434

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Richard T. Payne, Judge Pro Tempore
Cause No. 33C01-9512-DR-319

November 15, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

James R. Stephens (“Husband”) appeals the trial court’s order regarding his child support arrearage. We find one issue dispositive, which is whether Husband’s notice of appeal is untimely. We dismiss.

The relevant facts follow. The marriage of Husband and Brenda Stephens (“Wife”) was dissolved in May 1996, and an agreed order on Wife’s petition to modify support was entered in September 1997. On September 23, 2009, Husband filed a petition to emancipate child, terminate support, and determine no arrearage or overpayment of support. After a hearing, the trial court issued an order terminating child support and determining arrearage on March 5, 2010.

On March 30, 2010, Husband filed a motion to correct error which alleged that the arrearage determined by the court was erroneously calculated and that there was evidence of additional payments by Husband. On April 1, 2010, the court issued an order which provided:

A review of [Husband’s] Motion to Correct Errors and the Court’s ruling on the arrearage amount reveals that the issue involves the effect of the Order entered by the Court on March 30, 2000 granting relief on [Husband’s] Motion for Relief from Judgment.^[1] The support calculation referred to in such order is not stated nor is there a CSW in the record from which to readily determine the correct weekly amount. The parties are given 14 days to file additional information with the Court relating to the effect of the March 30, 2000 order on weekly support and the periods impacted.

Appellant’s Appendix Volume One at 22.

¹ Father had filed a Trial Rule 60(B) Motion for Relief on February 25, 2000 regarding an alleged error in calculating support. On March 30, 2000, the court issued an Order on Trial Rule 60(B) Motion for Relief which found that a previous order entered on December 7, 1999, contained a mathematical error in calculating year-to-date income from Husband’s pay stub and that the order should be modified to eliminate the clerical mathematical error.

On April 15, 2010, Husband filed “ARGUMENT IN SUPPORT OF CALCULATIONS IN MOTION TO CORRECT ERROR.” Appellant’s Appendix Volume One at 23. Also on that date, Wife filed a “motion for additional time to respond,” and the court ordered that Wife was “granted 15 days to respond to [Husband’s] Motion to Correct Errors.” Id. at 11. On May 6, 2010, Wife filed a second motion for additional time to respond, and the court again ordered that Wife was “granted 15 days from this date to file Response” Id. at 12. On May 14, 2010, Wife filed a response to motion to correct error.

On May 27, 2010, the trial court denied Husband’s motion to correct error. On June 28, 2010, Husband filed a notice of appeal.

We address the issue of whether Father’s appeal was untimely. Wife argues in her appellee’s brief that Husband’s appeal is untimely. Specifically, Wife argues that Husband filed his motion to correct error on March 30, 2010, and that, while the court did grant extensions of time to submit a response, Husband’s motion was never set for a hearing. Wife argues that the trial court did not extend the time period for ruling as provided under Rule 53.3(D) and that thus Husband’s motion was deemed denied forty-five days after the motion was filed.² Wife argues that Husband’s notice of appeal was filed more than thirty days after the deemed denial, and that therefore Husband’s appeal was untimely and must be dismissed.

² Wife argues that the date forty-five days after Husband filed his motion to correct error was May 17, 2010. Husband filed his motion on March 30, 2010, and our calculation shows that the date forty-five days after the motion was filed was May 14, 2010.

Husband argues that “the timeframes of Trial Rule 53.3 are not implicated and the appeal of [Husband] is timely.” Appellant’s Reply Brief at 3. Specifically, Husband argues that the court ordered the submission of additional argument on the motion to correct error “within the 45 day time period provided by [] Trial Rule 53.3” and that Husband “filed his argument within the provided-for timeframe.” Id. at 2. Husband argues that Wife requested two continuances and did not respond for nearly one month. Husband further argues that he “would contend that the Order of April 1, 2010 was a hearing under Indiana Trial Rule 73, and that this gave the Trial Court time to hear additional argument and the Trial Court ruled promptly on the motion to correct error within 13 days of [Wife] submitting her argument.” Id. at 2-3.

We note that generally a trial court has wide discretion to correct errors and we will reverse only for an abuse of that discretion. Paulsen v. Malone, 880 N.E.2d 312, 313 (Ind. Ct. App. 2008). An abuse of discretion occurs when the trial court’s action is against the logic and effect of the facts and circumstances before it and the inferences that may be drawn therefrom, or is based on impermissible reasons or considerations. Id.

Trial Rule 53.3(A) provides:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

This rule is self-activating upon the passage of the thirty days. Demmond v. Demmond, 706 N.E.2d 566 (Ind. Ct. App. 1999), trans. denied. Once the motion to correct error is

deemed denied, the trial court's power to rule on the motion is extinguished. Id. (citing Rose v. Denman, 676 N.E.2d 777, 781 (Ind. Ct. App. 1997)). Any subsequent ruling is therefore a nullity. Id.

The time limitation for ruling on a motion to correct error under Rule 53.3(A) does not apply where the parties or their counsel stipulate or agree on record that the time limitation will not apply or the court files an entry in the cause advising all parties of the extension of time for ruling. See Rule 53.3(B). With respect to an entry filed by the court, Rule 53.3(D) provides:

The Judge before whom a Motion to Correct Error is pending may extend the time limitation for ruling for a period of no more than thirty (30) days by filing an entry in the cause advising all parties of the extension. Such entry must be in writing, must be filed before the expiration of the initial time period for ruling set forth under Section (A), and must be served on all parties. Additional extension of time may be granted only upon application to the Supreme Court as set forth in Trial Rule 53.1(D).

(Emphasis supplied).

In addition, Ind. Appellate Rule 9 provides that “if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court’s ruling on such motion, or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.” See also Ind. Trial Rule 53.3(A) (“Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.”).

Here, the record reveals that Husband filed his motion to correct error on March 30, 2010, and thus the initial time period of forty-five days for ruling on the motion under

Rule 53.3(A) expired on May 14, 2010. The court did not extend the time limitation for ruling and did not rule on Husband's motion until May 27, 2010.

Husband does not argue, and the record does not reflect, that the parties or their counsel stipulated or agreed, as permitted by Rule 53.3(B), that the time limitation under Rule 53.3(A) would not apply. Further, our review of the record indicates that the court did not take the step of filing an entry advising the parties of an extension, as permitted under Rule 53.3(D), to properly extend the time limitation for ruling under Rule 53.3(A). Indeed, any such entry was to be in writing, served on all parties, and filed before the expiration of the initial time period for ruling set forth under Rule 53.3(A). See Rule 53.3(D).

We recognize that the trial court issued an order on April 1, 2010, which provided in part that the parties were given fourteen days "to file additional information with the Court," see Appellant's Appendix Volume One at 22, that Husband filed his argument in support of calculations in motion to correct error on April 15, 2010, and that Wife, after seeking and obtaining two continuances of fifteen days each, filed a response to Husband's motion on May 14, 2010. With respect to whether the court's April 1, 2010 order (and continuances) extended the time period for ruling under Rule 53.3(A), we find this court's opinions in Paulsen v. Malone and Demmond v. Demmond to be instructive.

In Paulsen, Malone filed a motion to correct error, and the trial court held a hearing on the motion. 880 N.E.2d at 313. On the date of the hearing, which was June 18, 2007, the trial court made an entry in the CCS which stated: "Counsel for [Malone] to submit additional authority . . . for the [c]ourt's consideration." Id. Malone filed a

supplemental post-hearing brief on July 6, 2007, and Paulsen filed a response to Malone's supplemental brief on July 12, 2007. Id. The trial court granted Malone's motion to correct error and entered an amended final judgment on August 3, 2007. Id. The date of the court's grant of the motion to correct error did not occur within the thirty-day period following the hearing as required under Rule 53.3(A). Id. at 313-314.

On appeal, Malone argued that the trial court left the record of the hearing on the motion open by asking Malone to provide additional authorities so that the period under Rule 53.3(A) did not begin to run until both parties submitted their additional authority to the trial court. Id. at 314. This court disagreed and stated that "[t]he plain language of this rule states that the allotted time period to rule on the motion begins to run at the conclusion of the hearing itself, and not at some later date" and that "[n]othing in the language of the rule suggests that the matter is still being 'heard' after the hearing terminates and while supplemental authority is being offered." Id. at 314-315. The court further noted that "[i]f the trial court found that the submission of additional authority necessitated an extension of the court's allotted time to rule on the motion, the trial court was required to file a written entry, prior to the expiration of the initial thirty-day time period." Id. at 315. The court held that because the trial court failed to file a written entry extending its allotted time to rule on Malone's motion under Rule 53.3(D), Malone's motion was deemed denied thirty days after the hearing, and thus the trial court did not have the authority to rule on Malone's motion to correct error and abused its discretion by issuing an amended final judgment. Id.

In Demmond, husband and wife filed motions to correct error, a hearing was held on those motions on July 16, 1998, and the court took the motions under advisement. 706 N.E.2d at 566. The court requested the parties to agree to an extension of time for the court to rule, but wife refused to agree to such an extension. Id. On July 20, 1998, the trial court ordered the parties to submit proposed orders by July 26, 1998, and the parties did so. Id. The court issued an amended decree on August 19, 1998, which was two days after the expiration of the time period specified in Rule 53.3. Id.

On appeal, husband argued that the trial court's order that the parties submit proposed orders by July 26, 1998 extended the time limit for the trial court to rule. Id. at 567. However, this court disagreed with husband and noted that the "comments made by the trial judge indicate that he intended to comply with the Trial Rule 53.3 thirty-day time limit" and that the court "could have, pursuant to Trial Rule 53.3(D), made an entry of extension of time without the approval of the attorneys." Id. at 567-568. The court held that the trial court lost its power to rule on the motions to correct error prior to the date that it entered the amended decree, and thus the amended decree was rendered a nullity. Id. at 567-568.

In the present case, based upon Paulsen and Demmond, we conclude that the trial court's order and CCS entry dated April 1, 2010 which required the parties to file additional information, and the court's two CCS entries/orders granting Wife fifteen additional days to respond, did not extend the deadline or time period for the court to rule on the motion to correct error under Rule 53.3(A). Further, as noted in Paulsen and Demmond, if the court here had determined that the submission of additional information

necessitated an extension of the court's allotted time to rule on the motion, the court could have extended its deadline by written entry as set forth under Rule 53.3(D), but the court here did not make such an entry.

Because we conclude that there was no extension of the Rule 53.3(A) deadline or time period for the court to rule on Husband's motion to correct error, the motion was deemed denied on May 14, 2010, which was the date forty-five days after the motion was filed. Husband filed his notice of appeal on June 28, 2010, which was not, as required by Trial Rule 53.3(A) and Ind. Appellate Rule 9, within thirty days after the motion to correct error was deemed denied. As a result, Husband's notice of appeal is untimely, and we must dismiss. See Paulsen, 880 N.E.2d at 313-315; Demmond, 706 N.E.2d at 566-568; see also Johnson v. Johnson, 882 N.E.2d 223, 226-227 (Ind. Ct. App. 2008) (citing to Paulsen and concluding that a motion to correct error was deemed denied pursuant to Rule 53.3 after the initial time period to rule had elapsed where the court did not extend the deadline for ruling under Rule 53.3(D)); Roscoe v. Roscoe, 673 N.E.2d 820, 821 (Ind. Ct. App. 1996) (finding that the trial court failed to extend its time to rule within the initial time period, that the appellant's motion to correct error was deemed denied, that the appellant did not initiate an appeal within thirty days after the motion was deemed denied, and that as a result this court was required to dismiss the appeal).³

³ In addition, with respect to Husband's argument that the court's order to submit additional information constituted a hearing, we note that the last sentence of Trial Rule 73 states: "To expedite its business the court may direct the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition, or direct or permit hearings by telephone conference call with all attorneys or other similar means of communication." We initially note that the court here did not state that it was holding a hearing, state that its order to submit additional information amounted to or was in lieu of a hearing, or request the parties to submit arguments in lieu of a hearing.

For the foregoing reasons, we dismiss this appeal.

Dismissed.

DARDEN, J., and BRADFORD, J., concur.

Moreover, the express language of Rule 73 does not support, and Husband does not cite to authority to support, the argument that a trial court's order for parties to submit additional information constitutes a hearing under Rule 53.3(A).