

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

: Case No.

14-0181

B.C.

: On Appeal from the Clark County
Court of Appeals, Second Appellate
District

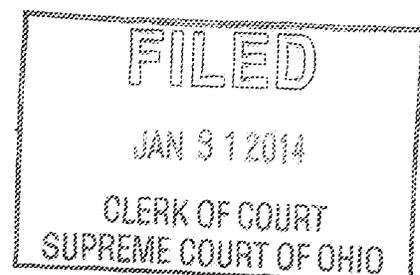
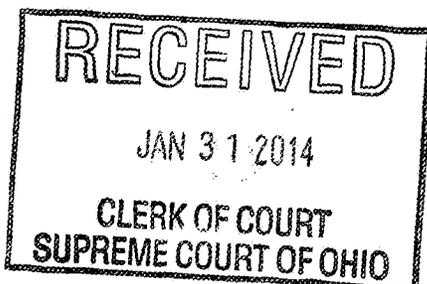
: Court of Appeals
Case No. 13-CA-0072

:

NOTICE OF CERTIFICATION OF CONFLICT

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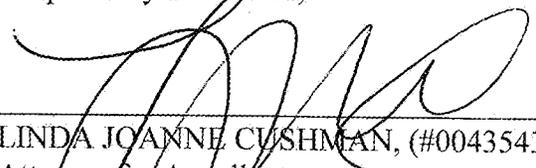


NOTICE OF CERTIFICATION OF CONFLICT

Pursuant to S.Ct.Prac.R. 5.03, Appellant gives this Court notice that the Second District Court of Appeals has certified a conflict to this Court. The issue certified is: Do the delayed appeal provisions of App.R. 5(A) extend to cases involving the termination of parental rights?

Pursuant to S.Ct.Prac.R. 8, a copy of the entry certifying the conflict as well as copies of the Second District's decision and the decision it found itself to be in conflict with are attached to this notice.

Respectfully Submitted,

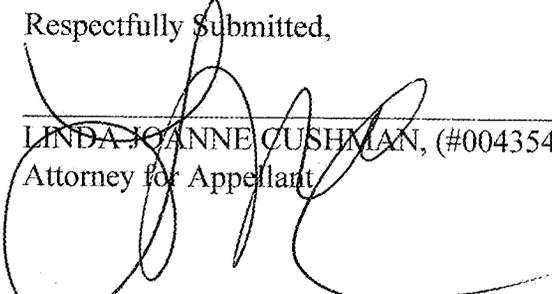


LINDA JOANNE CUSHMAN, (#0043543)
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion was served upon Lisa Fannin, 50 E. Columbia Street, Springfield, Ohio 45501, by regular U.S. Mail, on this 14 day of January 2014.

Respectfully Submitted,



LINDA JOANNE CUSHMAN, (#0043543)
Attorney for Appellant

APPENDIX

Decision and Entry of the Second District Court of Appeals certifying a conflict in *In the matter of: B.C.*, Case No. 2013-CA-72, issued January 10, 2014.

Decision and Final Judgment Entry of the Second District Court of Appeals in *In the matter of: B.C.*, Case No. 2013-CA-72, issued October 24, 2013.

Decision of the Fifth District Court of Appeals in *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717.

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN THE MATTER OF: B.C.

: Appellate Case No. 2013-CA-72

: Trial Court Case No. 2011-1489

DECISION AND ENTRY

January 10, 2014

PER CURIAM:

This matter comes before the court upon an App.R. 25(A) motion to certify a conflict filed by Cassidy Campbell.

The record shows that Campbell filed a motion for leave to file a delayed appeal from a judgment entered by the Clark County Common Pleas Court, Domestic Relations Division, Juvenile Section, granting permanent custody of Campbell's minor child to Family and Children Services of Clark County. On October 24, 2013, this Court overruled Campbell's motion, finding there to be no authority for filing a notice of appeal in a juvenile case regarding the termination of parental rights after expiration of the time prescribed by App.R. 4(A). We cited to two decisions in which the Supreme Court of Ohio earlier

determined a conflict existed: *In re T.M. & S.R.*, 6th Dist. Lucas Nos. L-10-1245, L-10-1246, 2010-Ohio-5506 and *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717. However, that matter was ultimately dismissed by the supreme court for lack of prosecution. *In re T.M.*, 128 Ohio St.3d 1452, 2011-Ohio-1712, 944 N.E.2d 1177.

Campbell argues that our October 24, 2013 judgment is in direct conflict with *Westfall*, where the Fifth District Court of Appeals permitted the filing of a delayed appeal from a final judgment terminating the appellant's parental rights.

Upon consideration, we find that the judgment upon which we have agreed in this matter is in conflict with the judgment pronounced on the same question by the Court of Appeals for the Fifth District in *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717.

The rule of appellate procedure upon which the conflict exists involves App.R. 5(A), which provides:

(1) After the expiration of the thirty day period provided by App.R. 4(A) for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

- (a) Criminal proceedings;
- (b) Delinquency proceedings; and
- (c) Serious youthful offender proceedings.

Given the conflict between our district and the Fifth District Court of Appeals, we certify the record of this case to the Supreme Court of Ohio for review and final determination, under section 3(B)(4), Article IV, of the Ohio Constitution, on the following

question:

Do the delayed appeal provisions of App.R. 5(A) extend to cases involving the termination of parental rights?

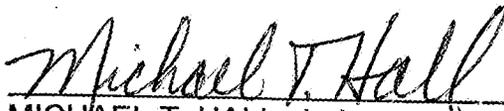
SO ORDERED.


JEFFREY E. FROELICH, Presiding Judge


JEFFREY M. WELBAUM, Judge

HALL, J., dissenting.

Given the lack of explanation in *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717, as to the circumstances under which "[a]ppellant filed a delayed appeal * * *," or under which the appeal was considered, I am unable to conclude that our judgment is in conflict. *Id.* at ¶ 3.


MICHAEL T. HALL, Judge

Copies mailed to:

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Hon. Joseph N. Monnin
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CA3/JN

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN THE MATTER OF: B.C. : Appellate Case No. 2013-CA-72
: :
: : Trial Court Case No. 2011-1489
: :
: :
: :
: :
: :
: :

DECISION AND FINAL JUDGMENT ENTRY
October 24, 2013

PER CURIAM:

This matter is before the court on Appellant's August 27, 2013 motion to file a delayed appeal. Appellant, the mother of the minor children, filed a notice of appeal on August 27, 2013 from the February 12, 2013 judgment entry of the Clark County Common Pleas Court, Domestic Relations Division, Juvenile Section, granting permanent custody of the minor child to Family and Children's Services of Clark County.

For the following reasons, Appellant's motion is not well-taken.

App.R. 4(A) provides that "[a] party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the

three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.”

We begin by noting that the decision of the trial court from which Appellant appeals is a final order. See, e.g., *In re Z.W.*, 2d Dist. Montgomery No. 23657, 2010-Ohio-1619. Moreover, the Civil Rules and the Appellate Rules pertaining to the filing of a civil notice of appeal apply to appeals from the juvenile court. *In re Anderson*, 92 Ohio St.3d 63, 67, 748 N.E.2d 67 (2001). To that extent, the trial court was obligated to comply with Civ.R. 58(B), which mandates that a trial judge direct “the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal.” Service then becomes complete upon the clerk serving the parties and noting such service in the appearance docket.

In relevant part, the court’s February 12, 2013 judgment entry provides the following:

“IT IS FURTHER ORDERED that this judgment entry shall be entered by the clerk in the journal on this date and further served within three days upon all parties not in default for failure to appear.”

This Court finds that the above paragraph satisfies the trial judge’s requirement under Civ.R. 58(B). Furthermore, the clerk entered a notation of service in the appearance docket on February 12, 2013 that reads: “JUDGMENT ENTRY ENTERED UPON JOURNAL THIS DATE AND SENT TO PARENT/CUSTODIAN AND/OR COUNSEL THIS DATE BY ORDINARY MAIL.”

Thus, the time for filing a notice of appeal ran for thirty days from February 12, 2013. Other than the limited exceptions provided for by App.R. 4(B), there is no authority for filing a notice of appeal in a juvenile case regarding the termination of parental rights after expiration of the time prescribed by App.R. 4(A). *In re T.M. & S.R.*, 6th Dist. Lucas Nos. L-

10-1245, L-10-1246, 2010-Ohio-5506. *But, see, In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717.

Because Appellant has failed to timely file her notice of appeal, this Court lacks subject matter jurisdiction to proceed. The above-captioned appeal is DISMISSED.

Appellant's October 10, 2013 Request for Stay is OVERRULED.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Clark County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.


MICHAEL T. HALL, Judge


JEFFREY M. WELBAUM, Judge

FROELICH, J., dissenting, in part, and concurring in judgment.

Although a conflict was certified between *In re T.M. & S.R.*, 6th Dist. Lucas Nos. L-10-1245, L-10-1246, 2010-Ohio-5506 and *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717, the matter was ultimately dismissed by the Supreme Court of Ohio for lack of prosecution. *In re T.M.*, 128 Ohio St.3d 1452, 2011-Ohio-1712, 944 N.E.2d 1177.

I would hold that Appellant has the right to file for a delayed appeal.

Regardless, such a motion must set forth the reasons for the failure to perfect a timely appeal, and the burden is on the appellant. *See, e.g., State v. Robinson*, 10th Dist.

Franklin No. 04AP-713, 2004-Ohio-4654, ¶ 2. Here, the trial court's judgment was entered February 12, 2013, and the notice of appeal was filed six months later; Appellant simply states that "she believed that there was nothing to appeal," and that she "was misinformed at the time of trial * * * ."

With the record before us, I would, as a matter of discretion, deny the motion and, therefore, concur in the dismissal of the appeal and overruling the request for a stay.



JEFFREY E. FROELICH, Judge

Copies mailed to:

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Hon. Joseph N. Monnin
Clark County Domestic Relations/Juvenile
Court
101 E. Columbia Street
Springfield, Ohio 45502

CA3/JN

[Cite as *In re Westfall Children*, 2006-Ohio-6717.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

WESTFALL CHILDREN

A Minor Child

JUDGES:

Hon. John W. Wise, P. J.
Hon. W. Scott Gwin, J.
Hon. Sheila G. Farmer, J.

Case No. 2006 CA 00196

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Juvenile Division, Case No. JU
135198

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 18, 2006

APPEARANCES:

For Plaintiff-Appellant Crystal Westfall

For Defendant-Appellee SCDJFS

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JERRY A. COLEMAN
Stark County DJFS
221 Third Street SE
Canton, Ohio 44702

Wise, P. J.

{¶1} Appellant Crystal Westfall ("appellant") appeals the decision of the Stark County Court of Common Pleas, Juvenile Division, that granted Appellee Stark County Department of Job and Family Services' ("SCDJFS") motion for permanent custody of appellant's two minor children. The following facts give rise to this appeal.

{¶2} On January 24, 2005, SCDJFS filed a complaint seeking protective supervision of appellant's two minor children on the basis that they were dependent and neglected. The trial court conducted a shelter care hearing on January 25, 2005. Appellant failed to appear at this hearing and the trial court placed the children in the temporary custody of SCDJFS. On April 20, 2005, the trial court found the children to be neglected and awarded temporary custody to SCDJFS.

{¶3} Thereafter, on November 8, 2005, SDCJFS filed a motion for permanent custody of the children. The trial court conducted a hearing on the motion on March 1, 2006. Subsequently, on March 24, 2006, the trial court granted the motion for permanent custody and terminated appellant's parental rights. Appellant filed a delayed appeal and sets forth the following assignments of error for our consideration:

{¶4} "I. APPELLANT WAS DENIED HER DUE PROCESS RIGHTS WHEN THE COURT DENIED APPELLANT ASSISTANCE OF COUNSEL DURING THE PERMANENT CUSTODY TRIAL.

{¶5} "II. THE TRIAL COURT ERRED IN FINDING THESE CHILDREN HAD BEEN IN THE CUSTODY OF THE STARK COUNTY DEPARTMENT OF HUMAN SERVICES FOR TWELVE OR MORE MONTHS OF A CONSECUTIVE TWENTY-TWO MONTH PERIOD."

I

{¶6} In her First Assignment of Error, appellant maintains she was denied her due process rights when the trial court denied her the assistance of counsel during the permanent custody hearing. We disagree.

{¶7} In civil actions, litigants have no generalized right to appointed counsel. *Roth v. Roth* (1989), 65 Ohio App.3d 768, 776. In *Lassiter v. Dept. of Social Services of Durham Cty.* (1981), 452 U.S. 18, the United States Supreme Court addressed a parent's right to appointed counsel in parental termination proceedings. In doing so, the Court held that generally, the right to appointed counsel is recognized only when the litigant's interest in personal freedom may be impaired. *Id.* at 26-27. Thus, the Court concluded that the Constitution does not require the appointment of counsel in every parental termination proceeding. *Id.* at 31-32.

{¶8} However, it has been recognized that state statutes may provide a right to appointed counsel which exceeds constitutional requirements. *State ex rel. Asberry v. Payne*, 82 Ohio St.3d 44, 46, 1998-Ohio-596. In Ohio, R.C. 2151.352 and Juv.R. 4 provide that an indigent parent is entitled to appointed counsel in all stages of juvenile proceedings under the jurisdiction of the juvenile court. In addition to these authorities, the Ohio Supreme Court found that "in actions instituted by the state to force the permanent, involuntary termination of parental rights, the United States and Ohio Constitutions' guarantees of due process and equal protection of the law require that indigent parents be provided with counsel and a transcript at public expense for appeals of right." *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 13-14.

{¶9} Turning to the facts of the case sub judice, we conclude appellant would have been entitled to the appointment of counsel had she requested such from the trial court. However, the record in this matter establishes that appellant failed to appear at any of the trial court proceedings prior to the commencement of the permanent custody hearing in this matter. Appellant also never filed a written request asking the trial court to appoint counsel on her behalf.

{¶10} Rather, on the day of the permanent custody hearing, when questioned by the trial court whether she ever asked for the appointment of counsel, appellant responded that, “* * * I asked them, and they told me that they were going to appoint me an attorney, I nver (sic) have heard from one yet.” Tr. Hrng., March 1, 2006, at 8. It is unclear who appellant allegedly asked, however, it is apparent she did not ask the trial court. Thus, although appellant would have been entitled to the appointment of counsel, her failure to request such did not result in the denial of her due process rights.

{¶11} Appellant's First Assignment of Error is overruled.

II

{¶12} In her Second Assignment of Error, appellant contends the trial court erred when it determined the children had been in the custody of SCDJFS for twelve or more months of a consecutive twenty-two month period. We agree, however, other grounds under R.C. 2151.414(B) support the trial court's decision to terminate appellant's parental rights and grant the motion for permanent custody.

{¶13} SCDJFS concedes, in its brief, that the trial court incorrectly determined the children had been in its temporary custody for twelve or more of the prior twenty-two consecutive months. In the case of *In re C.W.*, 104 Ohio St.3d 163, 2004-Ohio-6411,

the Ohio Supreme Court explained the method by which the twelve of the twenty-two month period should be calculated. In doing so, the Court found that the time should be calculated upon the filing of the permanent custody motion since a motion must allege grounds that are in existence at the time of the filing. *Id.* at ¶ 24. The record establishes that when SCDJFS filed its motion for permanent custody, the children had not been in its custody for twelve or more months of a consecutive twenty-two month period.

{¶14} However, this is not fatal to the permanent custody motion filed by SCDJFS. R.C. 2151.414 sets forth the procedures a juvenile court must follow and the findings it must make before granting a motion filed pursuant to R.C. 2151.413. According to R.C. 2151.414(B)(1), before a court can grant permanent custody to the moving agency, it must “determin[e] * * *, by clear and convincing evidence, that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶15} “(a) The child is not abandoned or orphaned or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents.

{¶16} “(b) The child is abandoned.

{¶17} “(c) The child is orphaned, and there are no relatives of the child who are able to take permanent custody.

{¶18} "(d) The child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two month period ending on or after March 18, 1999.

{¶19} "For the purposes of division (B)(1) of this section, a child shall be considered to have entered the temporary custody of an agency on the earlier of the date the child is adjudicated pursuant to section 2151.28 of the Revised Code or the date that is sixty days after removal of the child from home."

{¶20} In its Findings of Facts and Conclusions of Law, the trial court found, under R.C. 2151.414(B)(1)(b), that appellant abandoned her children by virtue of her lack of contact with them for greater than 90 days, their lack of bonding with her, and her failure to attempt any form of reunification. See Findings of Fact and Conclusions of Law, Mar. 24, 2006, at p. 4, ¶ 11. Appellant had not visited with her children from May 12, 2005 until early 2006, a period in excess of six months. Tr. Hrng., Mar. 1, 2006, at 19-20. This finding, in conjunction with the best interest findings, is sufficient to support a termination of appellant's parental rights.

{¶21} Appellant's Second Assignment of Error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is hereby affirmed.

By: Wise, P. J.

Gwin, J., and

Farmer, J., concur.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

JWW/d 1211

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

WESTFALL CHILDREN

A Minor Child

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JUDGMENT ENTRY

Case No. 2006 CA 00196

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Juvenile Division, Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

HON. JOHN W. WISE

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER