

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

: Case Nos. 2013-1932
2014-0181

B.C.

:
: On Appeal from the Clark County
: Court of Appeals, Second Appellate
: District
:
: Court of Appeals
: Case No. 13-CA-0072

MERIT BRIEF OF
APPELLANT, CASSIDY CAMPBELL

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SUPREME COURT OF OHIO

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STATEMENT OF THE CASE AND FACTS

This is a permanent custody case which originated in the Clark County Juvenile Court. On October 25, 2011, Appellee filed an ex parte motion for custody of the minor child, B.C., which the juvenile court granted. The trial court found Mother/Appellant, Cassidy Campbell indigent and appointed her counsel. On December 26, 2011, Family and Children Services of Clark County (hereinafter FCSCC) was granted temporary custody of the minor child and appointed a Guardian Ad Litem.

FCSCC originally became involved with Appellant from a referral for assistance in housing, employment, and setting up benefits. As the social worker was closing the case a new referral came in with concerns that Appellant had overdosed and that the child was not being properly supervised. The social worker was able to arrange for Appellant and child to move into the Hannah House; however, shortly after the move into Hannah House, the social worker received concerns that Appellant was not participating in the program and that she was being removed from Hannah House. Due to these circumstances and the social workers concerns that Appellant was unable to provide for child's medical treatment for a cleft palate and additionally the minor child's basic needs FCSCC filed for temporary custody.

A case plan was established for reunification but unfortunately Appellant was unable to complete the case plan and FCSCC filed for permanent custody on 10/25/2012.

On October 25, 2012, Steve and Susan Franko (hereinafter "the Franko's"), filed a motion to be made a party to the proceeding and a complaint for legal custody. FCSCC filed a memorandum in opposition to the Franko's motions and subsequently the trial court held a

motion hearing on December 17, 2012 in which it denied the Franko's motions without the appearance of Appellant. (Appendix A-17). At the time of the Franko's motion hearing appellant was incarcerated in the Clark County Jail and was denied attendance by the trial court.

Appellant's counsel failed to provide her with any information concerning the Franko's and their interest in the legal custody of B.C, nor was Appellant afforded the opportunity to read the Franko's motions, view the pictures, watch the videos, or read the many letters written on behalf of the Franko's.

On February 12, 2013, on the advice of her court appointed counsel, Appellant acknowledged and agreed that she had substantially failed to complete her case plan and agreed that permanent custody would enable the child to obtain stability and predictability.

Appellant did not originally file an appeal in this case as she relied on the advice of trial counsel which informed her she had no appealable issues.

Appellant later discovered, after the time for appeal expired, that information was withheld from her by her appointed counsel that would have had a direct impact on her decision to relinquish her rights. Appellant asserts that if she had been properly informed of all facts in this case that she would have taken the matter to trial.

On August 27, 2013, Appellant filed a Motion for Leave to File a Delayed Appeal which the Second Appellate Court overruled stating that it lacked subject matter jurisdiction to proceed.

It is from this decision that Appellant appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: The delayed appeal provisions of App.R. 5 extend to cases involving the termination of parental rights and privileges.

The evident issue in this case is whether App.R. 5 extends to cases involving the termination of parental rights and privileges. The underlying and fundamental issue before this Court however, is whether the due process rights this State has consistently afforded in the termination of parental rights cases encompasses the right to a delayed appeal.

App.R. 5(A) Motion by defendant for delayed appeal, which was amended on July 1, 2003, to include delinquency and serious youthful offender proceedings, states:

“(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”

Both the United States Supreme Court and this Honorable Court have established that the right to raise one's children is an "essential" and "basic civil right." *In re Murray* (1990), 52 Ohio St.3d 155, 157 citing *Stanley v. Illinois* (1972), 405 U.S. 645, 651. Parents have a "fundamental liberty interest" in the care, custody, and management of the child. *Santosky v. Kralner* (1982), 455 U.S. 745, 753. Further, it has been deemed "cardinal" that the custody, care and nurture of the child reside, first in the parents. *H.L. v. Matheson* (1981), 450 U.S. 398, 410. In *In re Smith*

(1991), 77 Ohio App.3d 1, 16, 601 N.E.2d 45, the court noted, "Permanent termination of parental rights has been described as 'the family law equivalent of the death penalty in a criminal case.'"

In *In re Hoffman*, 776 N.E.2d 485, 97 Ohio St.3d 92, 2002-Ohio-5368 this Court quoted the United States Supreme Court:

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood [776 N.E.2d 488] relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-754, 102 S.Ct. 1388, 71 L.Ed.2d 599

In *Lassiter v. Dept. of Social Serv. of Durham Cty.*, North Carolina (1981), 452 U.S. 18, 24-25, 101 S.Ct. 2153, 68 L.Ed.2d 640, the United States Supreme Court stated, "For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined. * * * Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

The Fifth District Court of Appeals in *In re Westfallen Children*, 5th Dist. No. 2006 CA 00196, 2006-Ohio-6717, allowed a father to file a delayed appeal and set forth his assignments of error for the court's consideration where the trial court granted the motion for permanent custody and terminated appellant's parental rights.

The Sixth Appellate Court certified this very issue to this Court when its decision in *In re T.M.*, 2010-Ohio-5506, L-10-1245, L-10-1246, was in direct conflict with *Westfallen*. The Sixth Appellate Court acknowledged the due process rights afforded parties in termination of parental

rights cases even stating that they “share aspects of criminal proceedings” but was unwilling to encompass the right to include delayed appeals. The appellate court noted that App.R. 5 was amended on July 1, 2003, and that the amendment did not specifically include the termination of parental rights. The court asked this Court for guidance.

In this case, the State filed for permanent custody of the minor child and Mother, on advice of counsel, and without all of the facts, relinquished her parental rights. Several months after the close of this matter Mother was provided with information that, had it been provided to her at the time of her decision, would have ultimately altered her choice to relinquish her parental rights. The court of appeals determined in this case that App.R. 5 does not apply to the termination of parental rights regardless of the reasons for the delay. That decision violates the due process rights in cases involving the termination of parental rights established by this state. Judge Jeffrey Froelich, dissented in part but concurred in judgment stating, “I would hold that Appellant has the right to file for a delayed appeal”. (Appendix A-8)

Our system provides criminal cases with the safeguard of delayed appeals because it recognizes that we as imperfect beings are not infallible and that errors in judgment can occur. Such as in a murder trial where the defendant was found guilty and DNA evidence is later discovered that could prove the defendant’s innocence. For this reason the appellate courts make an informed decision in each criminal case based on the facts and the reasoning of why those facts were not presented in a timely manner.

These same standards should apply in cases terminating parental rights as the impact upon the parties is just as substantial. The permanency and completeness of an action to terminate parental rights make it the most severe legal intrusion into the sanctity of the family. A

parental bond is a bond that goes to the very fabric of our existence and one that can never truly be replaced. This bond is as vital to the child as it is the parent and “***must be afforded every procedural and substantive protection the law allows”, *In re Hayes* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, quoting *Smith*. History is riddled with accounts of adopted children reaching the age of majority and choosing to seek out their biological parents in the hope of discovering a love denied and to have that distressing and unrelenting question of “WHY” finally answered.

Appellant understands the importance of expeditious resolution in these matters to provide stability and permanency for the child, and that by allowing a delayed appeal we are effectively delaying that permanency. However, numerous children in foster care experience instability in their lives as they are moved from foster home to foster home even after permanent custody has been given to the State. B.C. himself experienced this instability while in the care of the State as he was shuffled through four foster homes before permanent custody was granted. (Appendix A-19).

The majority of the population have absolutely no recall of their lives prior to the age of four or so; therefore, one can surmise that little or no harm would come to the child by a justifiable delay in permanency, and that the benefits in such a situation far outweigh the risks if it would mean the remainder of the child’s life could be spent in a safe and loving home with their biological parent. The same can be said for children that many consider “unadoptable” due to their age or circumstances. For many children in the care of the State, a permanent home and family is simply a fairy tale ending that they will never see.

Appellant asks this Court to recognize that the granting or denying of a delayed appeal in a permanent custody case is not a one size fits all scenario and that in some cases the benefits to

all parties outweigh any possible harm caused by the delay. Considering the substantial and lifelong impact on all involved, each delayed appeal should be heard with deference and scrutiny applied so that the decision is based on its merits, and not simply disallowed despite the circumstances because of a failure in our system to abide by the Constitution and our inherent rights.

In *In re L.S.*, 2007-Ohio-1583, No. 23523, Ninth District, Judge J. Carr noted the issue at hand and set forth a perfect example of when a delayed appeal should be granted in a permanent custody case, “What is disconcerting about this finding is the fact that appellant was not appointed counsel for three weeks after the withdrawal of her trial counsel. Then counsel is notified only of his appointment and the scheduling of a “sunset hearing” for the next month. Counsel would have no reason to know upon his appointment that a 60(B) motion had just been granted and that he had less than a week to perfect an appeal. In criminal, delinquency and serious youth offender proceedings the remedy would be to file a motion for a delayed appeal. See, App.R. 5. Unfortunately, there is no similar mechanism for a permanent custody proceeding. In the interim, serious concerns regarding due process issues are left unaddressed in the civil law equivalent of a death penalty case.”

The facts of the present case are disturbing in that Appellant was a nineteen year old girl at the time of her decision; completely alone and without the benefit of family support or guidance; and was receiving ineffective assistance of counsel. In the Judgment Entry dated December 21, 2012, the trial court stated that Appellant knowingly and voluntarily relinquished her parental rights and agreed to permanent custody; however, Appellant could not have knowingly and voluntarily surrendered her parental rights without first having been provided all

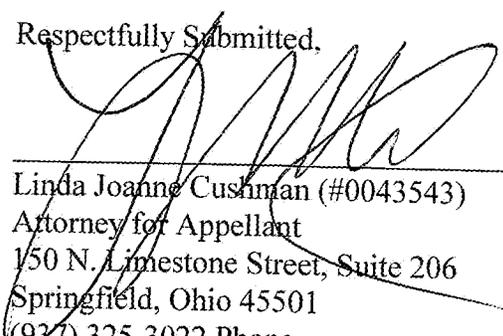
facts in the case. Appellant was simply informed by counsel for FCSCC at mediation on December 19, 2012, that an unknown family was attempting to take B.C. and Appellant was asked if she wanted that to happen. (Appendix A-21). Appellant was not advised of the legal differences in legal custody, which the Franko's sought, and permanent custody, which the State sought. Additionally, Appellant was denied the opportunity to hear the evidence presented by the Franko's and to discover the bond that they had formed with B.C. If Appellant had been properly advised she would have asked her appointed counsel to act accordingly on her behalf as B.C.'s need for a legally secure placement could have been achieved without a grant of permanent custody.

To promote the purposes and preserve the integrity of the legal system, and to assure due process to all parties in the termination of parental rights, the certified question must be answered in the affirmative to extend the delayed appeal provisions of App.R. 5 to cases involving the termination of parental rights and privileges.

CONCLUSION

For all of the foregoing reasons, the decisions of the Court of Appeals must be reversed.

Respectfully Submitted,

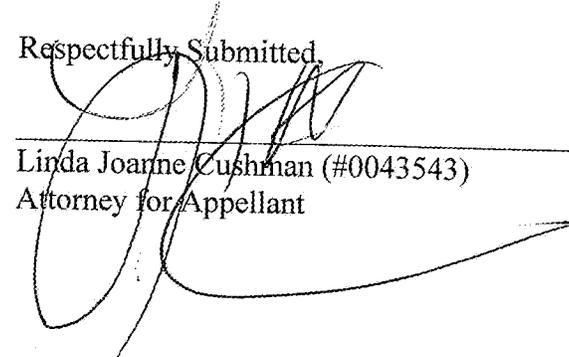


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon the Andrew Pickering, 50 E. Columbia Street, Springfield, Ohio 45501, by regular U.S. mail on this 10 day of March 2014.

Respectfully Submitted,



Linda Joanne Cushman (#0043543)
Attorney for Appellant

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

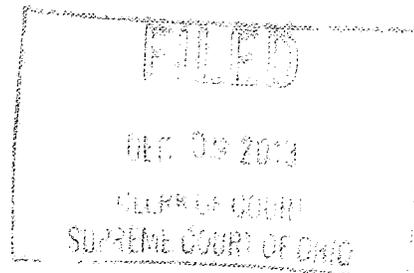
CAMPBELL, BRAYDEN

: Case No. 13-193
: On Appeal from the Clark County
: Court of Appeals, Second Appellate
: District
: Court of Appeals
: Case No. 13-CA-0072
:

NOTICE OF APPEAL

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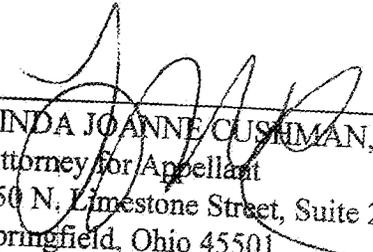
A-1

Notice of Appeal of Appellant, Cassidy Campbell

Appellant, Cassidy Campbell hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Clark County Court of Appeals, Second Appellate District, entered in the Court of Appeals Case No. 13-CA-0072 on October 24, 2013.

This case raises a substantial constitutional question, is of public or great general interest and involves the termination of parental rights of minor children.

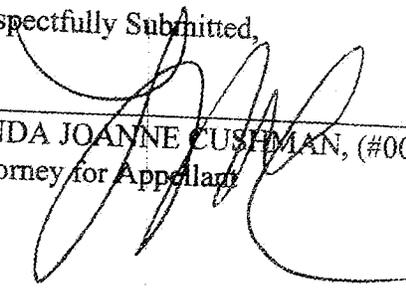
Respectfully Submitted,


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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 9 day of December 2013.

Respectfully Submitted,


LINDA JOANNE CUSHMAN, (#0043543)
Attorney for Appellant

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

B.C.

: Case No. 14-0181
: 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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SUPREME COURT OF OHIO

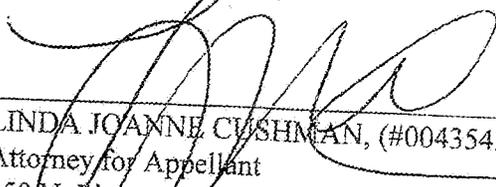
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SUPREME COURT OF OHIO

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,

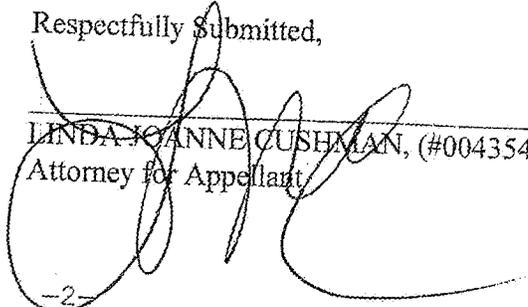


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CERTIFICATE OF SERVICE

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

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?

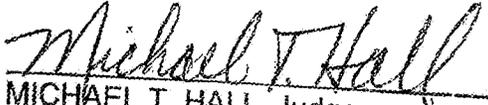
SO ORDERED.


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

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CAS/JN

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.

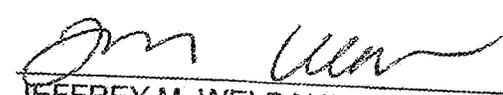
Because Appellant has failed to timely file her notice of appeal, this Court lacks subject matter jurisdiction to proceed. The above-captioned appeal is DISMISSED.

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

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CA3/JN

ATTACHMENT NOT SCANNED