

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re B.L.

14-0410

* Supreme Court Case No.

* Court of Appeals Case No. L 13-1258

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NOTICE OF CERTIFIED CONFLICT

Now comes Appellant B.L., by and through his appointed attorney, James J. Popil, pursuant to S.Ct.Prac.R.8.01 (A), and hereby files a Notice of Certified Conflict. Pursuant to S.Ct.Prac.R.8.01 (B), Appellant has attached to this notice copies of: 1) the Decision And Judgment of the Sixth District Court of Appeals, Lucas County filed on March 3, 2014; and 2) the conflicting Fifth District Court of Appeals decision captioned In the Matter of Westfall Children, 2006-Ohio-6717.

Respectfully submitted,

James J. Popil

James J. Popil, Esq. (0037427)
Attorney for Appellant B.L.

FILED
MAR 17 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
MAR 17 2014
CLERK OF COURT
SUPREME COURT OF OHIO

CERTIFICATION

A copy of the foregoing Notice of Certified Conflict was mailed this 13th day of March, 2014 to Jill E. Wolff, Esq., LCCSB Staff Attorney, 701 Adams, Toledo, OH 43604.



James J. Popil
Attorney for Appellant B.L.

FILED
COURT OF APPEALS

2014 MAR -3 P 3:22

COMMON PLEAS COURT
BERNICE GUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In re B.L.

Court of Appeals No. L-13-1258

Trial Court No. JC 13232301

DECISION AND JUDGMENT

Decided: **MAR 03 2014**

This case is before the court sua sponte. Upon review it has come to the court's attention that on January 29, 2014, this court issued an order of errata to correct a clerical error made in our decision dated December 27, 2013. Our December 27, 2013 decision, as quoted below states:

This matter is before the court on the motion of appellant father, B.L., for leave to appeal, which we construe as a motion for leave to file a delayed appeal pursuant to App.R. 5(A). Appellant seeks to appeal the August 14, 2013 judgment of the Lucas County Court of Common Pleas, Juvenile Division, terminating his parental rights and privileges with

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respect to his minor child, B.L. On November 15, 2013, appellant, acting pro se, filed a notice of appeal from the August 14, 2013 judgment. Appellate counsel was thereafter appointed on November 19, 2013, and the instant motion for leave to appeal was filed on November 21, 2013. Appellee has not filed a response to appellant's motion within the time provided by App.R. 15.

Initially, we find that appellant's appeal was untimely pursuant to App.R. 4(A), which states,

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.* (Emphasis added.)

Appellant states that he did not receive a copy of the August 14, 2013 judgment until November 4, 2013. In this case, the judgment appellant seeks to appeal was journalized on August 14, 2013, and service to appellant and his trial counsel was noted on the docket the same day. Therefore, any appeal from the August 14, 2013 judgment was required to be filed by September 13, 2013.

Turning to the motion for leave to file a delayed appeal, appellant seeks to file an appeal outside of the time period proscribed in App.R. 4(A). A motion for delayed appeal is governed by App.R. 5(A), which states:

App.R. 5 provides:

(A) Motion by defendant for delayed appeal.

(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.

The delayed appeal provisions of App.R. 5(A) do not apply to final judgments involving the termination of parental rights. *In re T.M.*, 6th Dist. Lucas App. Nos. L-10-1245, L-10-1246, 2010-Ohio-5506, ¶ 14.

Accordingly, appellant's motion for delayed appeal is found not well-taken and denied. Appellant's appeal is dismissed. Costs assessed to appellant pursuant to App.R. 24.

Article IV, Section 3(B)(4) of the Ohio Constitution states:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the

same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

In today's decision we once again hold that the delayed appeal provisions of App.R. 5(A) do not apply to final judgments involving the termination of parental rights. See *In re T.M.* at ¶ 18, appeal dismissed, 128 Ohio St.3d 1452, 2011-Ohio-1712, 944 N.E.2d 1177. We find this holding is in conflict with *In re Westfallen Children*, 5th Dist. No. 2006 CA 00196, 2006-Ohio-6717.

Given this actual conflict between our district and the Fifth Appellate District, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question: Do the delayed appeal provisions of App.R. 5 extend to cases involving the termination of parental rights and privileges?

The parties are directed to S.Ct.Prac.R. 8.01 for guidance in how to proceed. It is so ordered.

The order of errata, dated January 29, 2014, corrected the case citation of a decision from the Fifth District Court of Appeals which conflicted with our holding in our December 27, 2013 judgment. The citation was changed from *In re Westfallen Children* to *In re Westfall Children*.

Furthermore, this court did not appoint counsel for purposes of instituting a certified conflict until January 27, 2014, the day any proceedings needed to be initiated in the Supreme Court. Because our order of errata was not issued until after the appointment of counsel, this court recertifies the following conflict to the Supreme Court of Ohio.

In this decision we once again hold that the delayed appeal provisions of App.R. 5(A) do not apply to final judgments involving the termination of parental rights. See *In re T.M.* at ¶ 18, appeal dismissed, 128 Ohio St.3d 1452, 2011-Ohio-1712, 944 N.E.2d 1177. We find this holding is in conflict with *In re Westfall Children*, 5th Dist. No. 2006 CA 00196, 2006-Ohio-6717.

Given this actual conflict between our district and the Fifth Appellate District, we hereby certify the record of this case to the Supreme Court of Ohio for review and final determination on the following question: Do the delayed appeal provisions of App.R. 5 extend to cases involving the termination of parental rights and privileges?

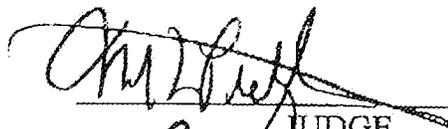
This court hereby appoints attorney James J. Popil, 6452 Scarsdale Road, Maumee, Ohio 43537, to represent appellant, Bry.L., to institute a certified conflict pursuant to this judgment.

In re B.L.
C.A. No. L-13-1258

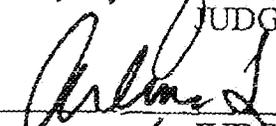
Mark L. Pietrykowski, J.

Arlene Singer, J.

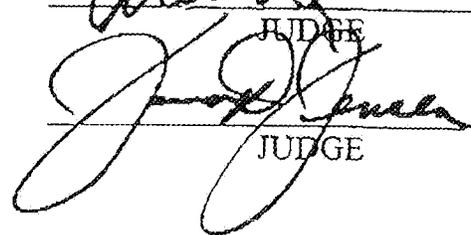
James D. Jensen, J.
CONCUR.



JUDGE



JUDGE



JUDGE

2006-Ohio-6717

IN THE MATTER OF: WESTFALL CHILDREN A Minor Child

No. 2006 CA 00196

Court of Appeals of Ohio, Fifth District, Stark

December 18, 2006

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

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

For Plaintiff-Appellant Crystal Westfall ALLYSON J. BLAKE.

For Defendant-Appellee SCDJFS JERRY A. COLEMAN Stark County.

OPINION

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, SCDJFS 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."

{¶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.

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{¶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.

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.