

## IN THE SUPREME COURT OF OHIO

In the Matter of:

: Case Nos. 2013-1932  
2014-181

B.C.

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

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AMICUS BRIEF OF PUBLIC CHILDREN SERVICES ASSOCIATION OF OHIO URGING  
AFFIRMANCE OF THE DECISION OF THE CLARK COUNTY COURT OF APPEALS,  
SECOND APPELLATE DISTRICT

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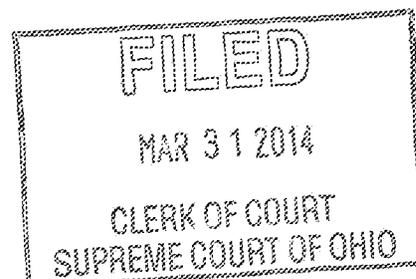


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## INTEREST OF THE AMICUS CURIAE

PCSAO is a private, non-profit, group of Public Children Services Agencies that promote the sound public policy and program excellence for safe children, stable families, and supportive communities. In the pursuit of its vision for children, families and communities, PCSAO advocates on behalf of Children Services Agencies, conducts research, training, and consultation as well as provide technical assistance to its member agencies.

PCSAO as part of its mission advocates for positive results for children whose permanent placement is still to be determined in the judicial system. PCSAO promotes the resolution of cases before the courts of Ohio involving dependent, neglected, and abused children being serviced by or in the custody of our member agencies. PCSAO believes that the cases involving these children should be resolved in an expeditious manner promoting permanent homes for children rather than extended stays in foster care. Those permanent homes for children can include: a return to the home where the children were removed from after the parents or former caregivers have resolved the conditions leading to the removal of the children; permanent placement with a relative or kinship provider; or permanent custody leading to the adoption of the children into a permanent home.

PCSAO is concerned that children in foster or substitute care whose cases are pending in the judicial systems of Ohio are having extended stays in foster or substitute care. The extended stays these children experience, waiting for a permanent resolution of their placement situation, are not in the best interests of those children. The process of resolving the child's placement situation needs to be faster in order to lessen a child's stay in temporary foster or substitute care. Allowing for delayed appeals by parents or others in the judicial system will extend that child's stay in temporary or substitute care unnecessarily, could cause instability in a child's permanent

placement without providing any significant benefit to the appealing parent that the parent hasn't already had an opportunity to pursue.

For purposes of this brief, the Public Children Services Association of Ohio (hereinafter "PCSAO") incorporates, in the entirety, the statement of facts set forth by Appellee Family and Children Services of Clark County (hereinafter "FCSCC").

## ARGUMENT

PCSAO urges the court to affirm the judgment of the Second Appellate District and to hold that: The delayed appeal provisions of App. R. 5 do not extend to cases involving the termination of parental rights.

### A. Amicus Curiae PCSAO Questions Whether a Conflict Exists.

This case is certified as a conflict case from the Second Appellate District. The Second Appellate found that their judgment was in direct conflict with the judgment pronounced in the Fifth District case of *In re Westfall Children*, 5<sup>th</sup> Dist. No. 2006-CA-196, 2006-Ohio-6717. However, in *Westfall* the Fifth District only indicated that: "Appellant filed a delayed appeal and sets forth the following assignments of error of our consideration". *In re Westfall Children*, Supra. at ¶3. The Fifth District proceeded to hear the Appellant in the *Westfall* case without making a ruling, judgment or finding concerning whether a delayed appeal exists in a permanent custody case under Appellate Rule 5. For this reasons, Amicus Curiae PCSAO respectfully questions whether a conflict actually exists in the case at bar.

### B. The Plain Language of App. R. 5 does not provide for delayed appeal in cases involving termination of parental rights.

The plain language of Appellate Rule 5 does not provide for a delayed appeal in cases involving a termination of parental rights case. Appellate Rule 5 provides that:

#### **"RULE 5. Appeals by Leave of Court in Criminal Cases**

##### **(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.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App. R. 3 and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney”.

The plain language of App. R. 5 does not contain any language allowing delayed appeals in termination of parental rights proceedings. The Eighth District Court of Appeals has also held that App. R. 5 does not apply to a termination of parental rights case. *In re Johnathan Bryant*, 8<sup>th</sup> Dist. No. 58483, 1991 Ohio App. LEXIS 2176, unreported. Also see *In re Coone*, 5<sup>th</sup> Dist. No. 2007-COA-016, 2008-Ohio-6 at ¶53-59, holding that the Court of Appeals has no jurisdiction to hear an appeal of a permanent custody case not timely filed.

C. The rights of children in the care of a public children services agency are not served by the finding the existence of a delayed appeal in App. R. 5.

The rights of parents are not absolute. Parental rights are balanced against the rights of the children in termination of parental rights proceedings. The children’s best interest remains the polestar of custody determinations. *In re Cunningham Children*, 4<sup>th</sup> Dist. No. 03CA26, 2004-Ohio-787. This Court held in *in re Cunningham*, 59 Ohio St.2d 100, 106 (1979):

“it is plain that the natural rights of a parent are not absolute, but are always subject to the ultimate welfare of the child, which is the polestar or controlling principle to be observed”.

Also, in a permanent custody case the rights of parents are subject to limitations placed on them by the State because the parents have been determined to be unfit by virtue of the prior

abuse, neglect, or dependency finding at the start of the case. *In re C.R.*, 108 Ohio St. 3d 369, 373; 2006-Ohio-1191 at ¶¶21-22, 843 N.E.2d 1188, 1192 (2006). Even a removal for dependency demonstrates the parent's unfitness to care for a child. *In re Trowbridge*, (5/25/04, 10<sup>th</sup> Dist.), Case Nos. 03AP-405 and 03AP-406, 2004-Ohio-2645, ¶¶13-14. "After the State has established parental unfitness at that initial proceeding, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge". *Santosky v. Kramer*, 455 U.S. 755, 760, 102 S. Ct. 1388, 1398, 71 L. Ed. 2d 599 (1982).

This Court has recognized that time spent in foster care by children waiting for their permanent placement to be determined is not in the best interests of children. This Court highlighted the problem of children languishing in temporary foster care in *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-230, 852 N.E.2d 1187.

In *A.B.* this Court held that

"Allowing children to languish in foster care rather than establishing permanent homes for them has become so pervasive that a term has been coined to describe it: "foster care drift." "Drift occurs when children in placement lose contact with their natural parents and fail to form any significant relationship with a parental substitute." Garrison, *Why Terminate Parental Rights?* (1983), 35 Stan.L.Rev. 423, 426. In response to foster care drift, legislatures at both the national and state levels enacted new laws designed to shorten the length of time children spend in foster care and find permanent homes for foster children more quickly.

"The passage of the 1997 Adoption and Safe Families Act ("ASFA"), Pub.L. No. 105-89, Sections 673b, 679b, and 678, Title 42, U.S. Code, marked a shift toward focusing on a child's need for safety and permanency. 65 F.R. 4020-01. "The impetus for the ASFA was a general dissatisfaction with the performance of State[s]' child welfare systems in achieving these goals for children and families. The ASFA seeks to strengthen the child welfare system's response to a child's need for safety and permanency at every point along the continuum of care. In part, the law places safety as the paramount concern in the delivery of child welfare services and decision-making, clarifies when efforts to prevent removal or to reunify a child with his or her family are not required, and requires criminal record checks of prospective foster and adoptive parents. To promote permanency, ASFA shortens the time frames for conducting permanency hearings, creates a new requirement for States to make reasonable efforts to finalize a permanent placement, and establishes time frames for filing petitions to terminate the

parental rights for certain children in foster care." Id.

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**[\*\*P22]** In accordance with the intent of the Adoption and Safe Families Act, the average length of stay has shortened for a significant number of children. <sup>HAN3</sup> Ohio's own attempt to ensure that children would not stay in foster care indefinitely began in 1988 with the enactment of Am.Sub.S.B. No. 89 ("SB. 89"), 142 Ohio Laws, Part I, 198. "These provisions were enacted in response to the problem of 'foster care drift.' They are aimed at preventing a child from foundering in foster care under a temporary custody order." *In re Watson*, 11<sup>th</sup> Dist No. CA93-06-114, 1994 Ohio App. LEXIS 2327, unreported ; *A.B. Supra*, at ¶18-22.

If delayed appeals were found to exist in termination of parental rights cases under Ohio law, children would remain in foster care further delaying when their permanent placement would occur. Indeed, the threat of a possible delayed appeal in any case could cause a public children services agency to further delay a child's permanency while waiting to see if a late appeal is going to be filed. Thus, if delayed appeals were found to exist in termination of parental rights cases, children would be at risk of further foster care drift and could continue to remain in foster care awaiting their permanent placement. Children need less time in foster care, not more.

Allowing delayed appeals could also cause instability in a child's adoptive placement when a child is adopted. Once permanent custody is granted to a public children services agency and no appeal is filed, it is reasonably assumed that there is no further barrier to adoption by the public children services agency and the adoptive parents. The adoption then goes forward according to the probate laws and the regulations covering adoption. Once a child is adopted the child has new parents and a new living situation. Ohio Revised Code Section 3107.15 describes the effect of a final decree or interlocutory order of adoption. R.C. 3107.15 provides that:

“(A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, or a decree issued by a jurisdiction outside this state as recognized pursuant to section 3107.18 of the Revised Code,

shall have the following effects as to all matters within the jurisdiction or before a court of this state, whether issued before or after May 30, 1996:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship;

(2) To create the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, and whether executed or created before or after May 30, 1996, which do not expressly exclude an adopted person from their operation or effect”.

However, if a delayed appeal is allowed after an adoption has occurred; a child's adoptive placement and new home is threatened with instability by the new litigation. PCSAO would also further submit however that there may be no jurisdiction in the Court of Appeals and the Juvenile Court over the termination of parental rights order once the adoption is granted by the probate court.

“R.C. 2151.353(E)(1) provides that:

“The Court shall retain jurisdiction over any child for whom the court issues an order of disposition pursuant to division (A) of this section or pursuant to section 2151.414 or 2151.415 of the Revised Code *until* the child attains the age of eighteen years if the child is not mentally retarded, developmentally disabled, or physically impaired, or *the child is adopted and a final decree of adoption is issued...*

A number of cases have held that the Juvenile Court loses jurisdiction to rule after a child has been adopted. *In re Phillips*, Butler Co. App. No. CA2003-03-062, 2003-Ohio-5107, holding that a court has no jurisdiction to hear a motion to vacate or relief after judgment pursuant to Civil Rule 60(B) after a child was adopted. *In the Matter of Shampail Hitchcock*, (1996) 120

Ohio App. 3d 88, 98, 696 N.E.2d 1090, 1096, holding that the juvenile court only retains jurisdiction over the child until that child reaches the age of majority or is adopted. Also see *In re M.V.V.*, 10<sup>th</sup> Dist. No. 11AP-229, 2011-Ohio-4481 at ¶7-8.

It is not known how the Courts of Appeals and the Juvenile Courts would apply the jurisdiction laws to a delayed appeal in a termination of parental rights case when a child has already been adopted in Probate Court. Thus, a child's placement would be subject to the instability and uncertainty of further appeals if a delayed appeal is allowed to proceed after an adoption occurs.

For all of the above reasons, allowing delayed appeals in termination of parental rights cases would not be in the best interests of children.

### **CONCLUSION**

For the reasons in the brief herein, Amicus Curiae PCSAO urges this Honorable Court to affirm the judgment of the Clark County Court of Appeals Second Appellate District. The plain language of Appellate Rule 5 does not provide for delayed appeal in a termination of parental rights case. Allowing delayed appeals could cause children to have extended stays in temporary foster or substitute care and would further delay permanency for the children. Also, if a delayed appeal is filed or allowed by a Court of Appeal, a child's placement situation could become unstable after an adoption is granted. For all of the above reasons, the law does not and should not allow for delayed appeals in termination of parental rights cases.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing brief of Amicus Curiae

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