

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

REPLY BRIEF OF
APPELLANT, CASSIDY CAMPBELL

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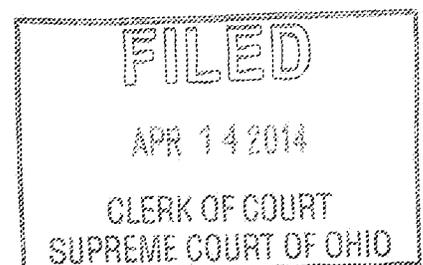


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STATEMENT OF THE CASE AND FACTS

Appellant, Cassidy Campbell, incorporates herein the Statement of Facts and Appendices contained in her Merit Brief filed on March 11, 2014.

REPLY TO APPELLEE'S PROPOSITION OF LAW I

In Appellee's first proposition of law, Appellee asks this Court to dismiss this appeal as moot, as B.C. was adopted prior to Mother moving for a delayed appeal. Appellant disagrees.

R.C. 3107.16(B) provides one year for the appeal of an adoption and said year has not yet expired. However, for Appellant to effectively appeal the adoption she must first be successful in her appeal of the juvenile court case which terminated her parental rights. Appellant was not a party to the adoption at the time the adoption was completed because the juvenile court case divested the natural parents of all parental rights and privileges and consent was unnecessary per R.C. 3107.07(D).

R.C. 2151.414(F) states, "The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section". "Logically, this provision can only be meant to operate prospectively, excluding the parents from future proceedings relating to the child, such as review hearings. It does not operate to divest the parent of his right to appeal the permanent custody decision, nor does it operate to prevent the parent from otherwise challenging the validity of the judgment rendered in the proceeding to

which he was a party.” *In re Phillips*, 12th Dist. Butler No, CA2003-03-062, 2003-Ohio-5107.

Even if this Court determines that the adoption of B.C. makes this appeal moot and that jurisdiction lies with the probate court through the adoption; Appellant asks this Court to find this appeal an exception to the mootness doctrine as this case raises a substantial constitutional question relating to due process, and involves matters of public and great general interest; “...Ohio recognizes an exception to the mootness doctrine for cases which present a debatable constitutional question or a matter of great public or general interest.” *Tschantz v: Ferguson*, 57 Ohio St.3d 131, 133 (1991).

REPLY TO APPELLEE’S PROPOSITION OF LAW II

Appellee’s second proposition of law sets forth a lengthy argument that parents whose parental rights were terminated are not entitled to a delayed appeal. A thorough review of Appellee’s arguments reveals the primary and obviously vital concern of allowing delayed appeals in termination cases is the welfare of the child or children involved.

Appellant understands the difficulties which may arise from the granting of delayed appeals in termination cases; however, “procedural correctness must be trumped by what is constitutionally required for due process in protecting parental rights.” *In Re Adoption of N.M.*, 2005-Ohio-2555, 04CA109, 05-LW-2186 (5th). “Appellant’s rights, both as a parent and as a litigant with an absolute right to an appeal, are constitutionally protected. We cannot cut corners on those rights, despite our concerns for the children’s undoubtedly vital interest in a speedy and

permanent placement.” *In Re the Matter of the Adoption of Minor Children: C.B.M. and C.R.M.*, No. 37S03-1303-AD-159, Indiana Supreme Court, August 16, 2013.

Adoption provides the most stable and legally binding relationship a child can have outside of the biological parental relationship and yet Ohio legislature provides parents a year in which to appeal an adoption. R.C. 3107.16(B) states:

“Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.”

One must question a set of principles that applies differently and more rigorously to one group of people or circumstances than to another when,

"[t]he legislature, in enacting R.C. 3107.16, would have been well aware of various instances where natural parents have attacked the finality of adoption decrees. The legislature would have been well aware of the devastating effect of such an attack, even an unsuccessful one, upon adoptive parents and adopted children. It would have been aware of the worry and chilling effect placed upon the developing parent/child relationship by the knowledge that the relationship could be completely severed if some legal error were made in the prior proceeding, and that the adoptive parent and child would be virtually helpless if such error were made. The legislature has not deprived appellant of constitutional rights. The legislature has struck a balance in enacting R.C. 3107.16(B) to give the natural parent a reasonable time to make either direct or collateral attack upon an adoption decree. After that reasonable time, one year, the adoptive parents and child should be allowed the certainty of their ongoing relationship." *In re Adoption of J.N.N.Z.*, 2012-Ohio-3544, citing *Wiley v. Rutter* (Oct. 12, 1983), Tuscarawas App. No. 1772.

Appellant acknowledges that the children's rights are equally important and must certainly be considered but Appellant contends that the rights of all children must be considered. Certainly not every parent will be successful in their delayed appeal requests as the circumstances would have to be extraordinary in order to prevail. But in those exceptional cases is it not as much the child's right to be raised by their natural parent that would be violated by a denial of a delayed appeal if said parent could provide a safe and loving home?

The Clark County Department of Job & Family Services website directs you to <http://www.adoptuskids.org/Child/ChildSearch.aspx> to find out about children available for adoption in the state of Ohio. As this information is provided by Appellee's own website it must be considered accurate. A click on the website provides one with the ability to search through 495 profiles, many of which are comprised of siblings currently in the foster care system. A review of the profiles provides us with a look at some of the unfortunate children in question.

Profile SZH777547 is for sibling sisters M. and M. who have been available for adoption since at least February 1, 2013, as their photo was last updated on that date. The girls profile was last updated on February 6, 2014, meaning that they are still awaiting adoption over a year later. M. and M. are both beautiful little girls aged twelve and thirteen who are seeking a two parent permanent family. M. and M. "are very close to their two older brothers and adult sister" and "[i]t is in their best interest to maintain an ongoing relationship with them." "The girls are also interested in maintaining contact with their birth mother."

Profile SZH767443 describes sibling brothers G. and N. ages sixteen and fourteen who both enjoy sports and are all around good children. The most disconcerting aspect of their profile is the date in which the photo was updated. The photo was last updated on December 3, 2012.

The boys profile was last updated on March 22, 2014. The brothers have been awaiting adoption, at the minimum, almost a year and a half.

Children waiting to be adopted sometimes spend year after year in foster care, being shuffled from one foster home to another. Such is the case in profile SZH127513, brothers C. and E., ages fifteen and fourteen who “have had multiple placements” while in the foster care system. C. and E. also have two brothers in foster care.

Some of the children have positive profiles like SZH098203, sisters D. and K., ages twelve and ten who have been fortunate to find a foster home that “has cared for both girls for almost 2 years”. “The foster family is planning to adopt” the sisters. What must be noted however is the time span that has passed.

Appellee contends that a delayed appeal would deny a child stability and permanency. Profile SZH187365, sisters T., T., and T., ages thirteen, eleven, and eleven. If T., T., and T. are adopted, they will be removed from a foster mom in which they are “very bonded”. The bond is so strong that they “would need continued contact with her as they transition into a new home”. Unfortunately, the bond and stability that the girls have found will be shattered upon adoption and regrettably, this is unavoidable.

Again, 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

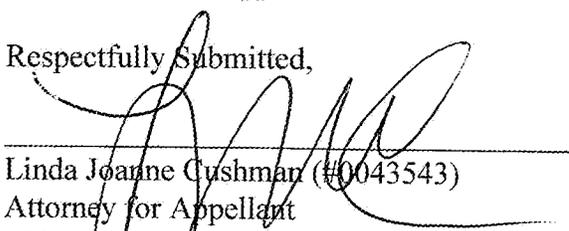
disallowed despite the circumstances because of a failure in our system to abide by the Constitution and our inherent rights.

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,

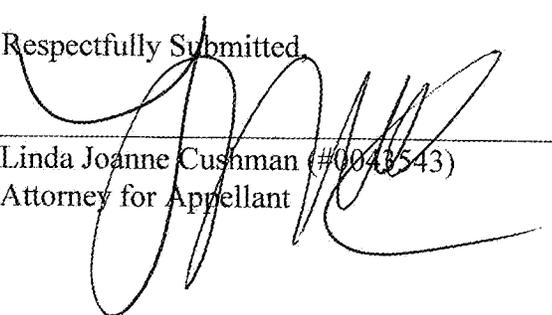


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CERTIFICATE OF SERVICE

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 14 day of April 2014.

Respectfully Submitted,



Linda Joanne Cushman (#0043543)
Attorney for Appellant

3107.16 Appeals.

(A) Appeals from the probate court are subject to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. Unless there is good cause for delay, appeals shall be heard on an expedited basis.

(B) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree cannot be questioned by any person, including the petitioner, in any manner or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor, or, in the case of the adoption of a minor by a stepparent, the adoption would not have been granted but for fraud perpetrated by the petitioner or the petitioner's spouse, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

Effective Date: 09-18-1996

3107.07 Consent unnecessary.

Consent to adoption is not required of any of the following:

(A) A parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

(B) The putative father of a minor if either of the following applies:

(1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth;

(2) The court finds, after proper service of notice and hearing, that any of the following are the case:

(a) The putative father is not the father of the minor;

(b) The putative father has willfully abandoned or failed to care for and support the minor;

(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

(C) Except as provided in section 3107.071 of the Revised Code, a parent who has entered into a voluntary permanent custody surrender agreement under division (B) of section 5103.15 of the Revised Code;

(D) A parent whose parental rights have been terminated by order of a juvenile court under Chapter 2151. of the Revised Code;

(E) A parent who is married to the petitioner and supports the adoption;

(F) The father, or putative father, of a minor if the minor is conceived as the result of the commission of rape by the father or putative father and the father or putative father is convicted of or pleads guilty to the commission of that offense. As used in this division, "rape" means a violation of section 2907.02 of the Revised Code or a similar law of another state.

(G) A legal guardian or guardian ad litem of a parent judicially declared incompetent in a separate court proceeding who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably;

(H) Any legal guardian or lawful custodian of the person to be adopted, other than a parent, who has failed to respond in writing to a request for consent, for a period of thirty days, or who, after examination of the written reasons for withholding consent, is found by the court to be withholding consent unreasonably;

(I) The spouse of the person to be adopted, if the failure of the spouse to consent to the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain the consent or refusal of the spouse;

(J) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101(b)(1)(F) of the "Immigration and Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101(b)(1)(F) , as amended or reenacted.

(K) Except as provided in divisions (G) and (H) of this section, a juvenile court, agency, or person given notice of the petition pursuant to division (A)(1) of section 3107.11 of the Revised Code that fails to file an objection to the petition within fourteen days after proof is filed pursuant to division (B) of that section that the notice was given;

(L) Any guardian, custodian, or other party who has temporary custody of the child.

Effective Date: 10-29-1999; 2008 HB7 04-07-2009

2151.414 Hearing on motion requesting permanent custody.

(A)

(1) Upon the filing of a motion pursuant to section 2151.413 of the Revised Code for permanent custody of a child, the court shall schedule a hearing and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action and to the child's guardian ad litem. The notice also shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights, a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and the name and telephone number of the court employee designated by the court pursuant to section 2151.314 of the Revised Code to arrange for the prompt appointment of counsel for indigent persons.

The court shall conduct a hearing in accordance with section 2151.35 of the Revised Code to determine if it is in the best interest of the child to permanently terminate parental rights and grant permanent custody to the agency that filed the motion. The adjudication that the child is an abused, neglected, or dependent child and any dispositional order that has been issued in the case under section 2151.353 of the Revised Code pursuant to the adjudication shall not be readjudicated at the hearing and shall not be affected by a denial of the motion for permanent custody.

(2) The court shall hold the hearing scheduled pursuant to division (A)(1) of this section not later than one hundred twenty days after the agency files the motion for permanent custody, except that, for good cause shown, the court may continue the hearing for a reasonable period of time beyond the one-hundred-twenty-day deadline. The court shall issue an order that grants, denies, or otherwise disposes of the motion for permanent custody, and journalize the order, not later than two hundred days after the agency files the motion.

If a motion is made under division (D)(2) of section 2151.413 of the Revised Code and no dispositional hearing has been held in the case, the court may hear the motion in the dispositional hearing required by division (B) of section 2151.35 of the Revised Code. If the court issues an order pursuant to section 2151.353 of the Revised Code granting permanent custody of the child to the agency, the court shall immediately dismiss the motion made under division (D)(2) of section 2151.413 of the Revised Code.

The failure of the court to comply with the time periods set forth in division

(A) (2) of this section does not affect the authority of the court to issue any order under this chapter and does not provide any basis for attacking the jurisdiction of the court or the validity of any order of the court.

(B)

(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, 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:

(a) The child is not abandoned or orphaned, 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, 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 if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, 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.

(b) The child is abandoned.

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

(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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state.

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 the removal of the child from home.

(2) With respect to a motion made pursuant to division (D)(2) of section 2151.413 of the Revised Code, the court shall grant permanent custody of the child to the movant if the court determines in accordance with division (E) of this section that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines in accordance with division (D) of this section that permanent custody is in the child's best interest.

(C) In making the determinations required by this section or division (A)(4) of section 2151.353 of the Revised Code, a court shall not consider the effect the granting of permanent custody to the agency would have upon any parent of the child. A written report of the guardian ad litem of the child shall be submitted to the court prior to or at the time of the hearing held pursuant to division (A) of this section or section 2151.35 of the Revised Code but shall not be submitted under oath.

If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding. The court shall not deny an agency's motion for permanent custody solely because the agency failed to implement any particular aspect of the child's case plan.

(D)

(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

- (b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;
- (c) The custodial history of the child, including whether 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, or 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 and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;
- (d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;
- (e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child.

For the purposes of division (D)(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 the removal of the child from home.

(2) If all of the following apply, permanent custody is in the best interest of the child and the court shall commit the child to the permanent custody of a public children services agency or private child placing agency:

(a) The court determines by clear and convincing evidence that one or more of the factors in division (E) of this section exist and the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent.

(b) The child has been in an agency's custody for two years or longer, and no longer qualifies for temporary custody pursuant to division (D) of section 2151.415 of the Revised Code.

(c) The child does not meet the requirements for a planned permanent living arrangement pursuant to division (A)(5) of section 2151.353 of the Revised Code.

(d) Prior to the dispositional hearing, no relative or other interested person has filed, or has been identified in, a motion for legal custody of the child.

(E) In determining at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In

determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section or for the purposes of division (A)(4) of section 2151.353 of the Revised Code;

(3) The parent committed any abuse as described in section 2151.031 of the Revised Code against the child, caused the child to suffer any neglect as described in section 2151.03 of the Revised Code, or allowed the child to suffer any neglect as described in section 2151.03 of the Revised Code between the date that the original complaint alleging abuse or neglect was filed and the date of the filing of the motion for permanent custody;

(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

(5) The parent is incarcerated for an offense committed against the child or a sibling of the child;

(6) The parent has been convicted of or pleaded guilty to an offense under division (A) or (C) of section 2919.22 or under section 2903.16 , 2903.21 , 2903.34 , 2905.01 , 2905.02 , 2905.03 , 2905.04 , 2905.05 , 2907.07 , 2907.08 , 2907.09 , 2907.12 , 2907.21 , 2907.22 , 2907.23 , 2907.25 , 2907.31 , 2907.32 , 2907.321 , 2907.322 , 2907.323 , 2911.01 , 2911.02 , 2911.11 , 2911.12 , 2919.12 , 2919.24 , 2919.25 , 2923.12 , 2923.13 , 2923.161 , 2925.02 , or 3716.11 of the Revised Code and the child or a sibling of the child was a victim of the offense or the parent has been convicted of or pleaded guilty to an offense under section 2903.04 of the Revised Code, a sibling of the child was the victim of the offense, and the parent who committed the offense poses an ongoing danger to the child or a sibling of the child.

(7) The parent has been convicted of or pleaded guilty to one of the following:

(a) An offense under section 2903.01 , 2903.02 , or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;

(b) An offense under section 2903.11 , 2903.12 , or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(c) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;

(d) An offense under section 2907.02 , 2907.03 , 2907.04 , 2907.05 , or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;

(e) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (E) (7)(a) or (d) of this section.

(8) The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

(9) The parent has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring treatment of the parent.

(10) The parent has abandoned the child.

(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

(12) The parent is incarcerated at the time of the filing of the motion for permanent custody or the dispositional hearing of the child and will not be available to care for the child for at least eighteen months after the filing of the motion for permanent custody or the dispositional hearing.

(13) The parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.

(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

(15) The parent has committed abuse as described in section 2151.031 of the Revised Code against the child or caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, and the court determines that the seriousness, nature, or likelihood of recurrence of the abuse or neglect makes the child's placement with the child's parent a threat to the child's safety.

(16) Any other factor the court considers relevant.

(F) The parents of a child for whom the court has issued an order granting permanent custody pursuant to this section, upon the issuance of the order, cease to be parties to the action. This division is not intended to eliminate or restrict any right of the parents to appeal the granting of permanent custody of their child to a movant pursuant to this section.

Effective Date: 10-05-2000; 2008 SB163 08-14-2008; 2008 HB7 04-07-2009

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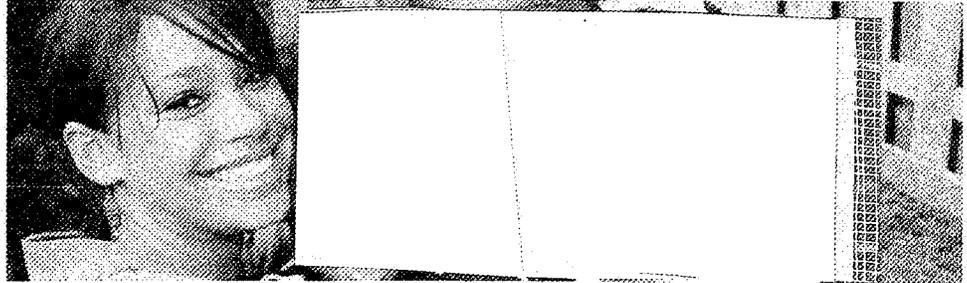
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To find children available through Children Services of Clark County click [here](#) or call our adoption inquiry line at (937) 327-1749. You may also find Ohio's available children online at <http://www.adoptuskids.org/Child/ChildSearch.aspx>.

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The amount of time it takes for a placement varies greatly. The more flexible you are regarding age, background and behavioral characteristics of an adoptive child, the sooner a placement may be made.

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M■■■■, M■■■■

SZH777547

Status:	Available
Names:	M■■■■, M■■■■
Ages:	13, 12
Race:	African American/Black
Gender:	2 female
State:	Ohio
Case #:	SZH777547 Expand
Last Profile Update:	02/06/14
Photo Updated:	02/01/13

Photos

Siblings

About the Siblings

M■■■■ & M■■■■

Birthdate: May 2001 & July 2000

M■■■■ and M■■■■ are two sisters seeking a two parent permanent family. They would really like to experience the love and guidance of a mother and father. M■■■■ is the oldest of the two at age 12 and M■■■■ is 11. M■■■■ and M■■■■ are both beautiful girls with a pleasant personalities. The girls also share a good sense of humor and like to joke and tease. They also are active in their church. M■■■■ is very athletic. She enjoys gymnastics, basketball, and soccer. M■■■■ is also very creative. She is active in theater and dance. M■■■■ can be very talkative and upbeat. M■■■■ does require some additional supports academically especially in math. M■■■■ is a sweet and sometimes shy girl. She exhibits a lot of common sense in her approach to life. While M■■■■ enjoys sports she is more interested in arts and crafts as well as youth activities through her church. M■■■■ is diagnosed with asthma and takes medication as part of her treatment. M■■■■ and M■■■■ are very close to their two older brothers and adult sister. It is in their best interest to maintain an ongoing relationship with them. The girls are also interested in maintaining contact with their birth mother.

G■■■■■, N■■■■■

SZH767443

Status:	Available
Names:	G■■■■■, N■■■■■
Ages:	16, 14
Race:	African American/Black, White/Caucasian
Gender:	2 male
State:	Ohio
Case #:	SZH767443 Expand
Last Profile Update:	03/22/14
Photo Updated:	12/03/12

Photos

Siblings

About the Siblings

G■■■■■ is a talented athlete and an avid sports fan. He plays for his school's soccer and basketball teams. When G■■■■■ is not playing or cheering for his favorite teams, the Cavaliers and Bulls, he likes to workout, play video games, watch action movies or listen to music. He also enjoys outdoor activities such as camping, swimming, and fishing. G■■■■■ is proud of both his athletic and academic accomplishments, not to mention the fact that he can rip a phonebook in half! G■■■■■ is interested in learning a trade that will employ him beyond high school. He also has aspirations to join the Military someday.

N■■■■■ enjoys playing sports and has played for the school's baseball, football, and basketball teams. N■■■■■ loves to root for his favorite player of the Oklahoma City Thunder, Kevin Durant. N■■■■■ is proud of his work ethic and ability to dress well. His interest in the latest fashion trends has him considering designing his own line of tennis shoes and someday opening his own shoe store. He likes to stay busy with family activities such as camping, fishing, and especially bowling. When N■■■■■ is not busy with these activities, he enjoys watching T.V., playing the Wii, and listening to music.

Ready to Take the Next Step?

If you're a registered user of our website, [log in to make an inquiry about this child.](#)

A-12

If you're not a registered user and have a home study, [register to make an inquiry on this child.](#)

C██████████, E██████████

SZH127513

[Photos](#)

Status:	Available
Names:	C██████████, E██████████
Ages:	15, 14
Race:	African American/Black
Gender:	2 male
State:	Ohio
Case #:	SZH127513 Expand
Last Profile Update:	01/24/14
Photo Updated:	01/23/13

██████████ - Male, age 15

1 of 2

About the Siblings

E██████████ and C██████████ are very attractive young boys. They both have positive attitudes for the most part and are friendly young men. The boys enjoy playing video games together and spending time with their other siblings. C██████████ loves music and playing his drums. The boys can be very helpful around the house and typically follow directions. E██████████ handles his emotions in appropriate ways but sometimes needs time to calm down. E██████████ is not afraid to talk about his feelings or express his needs. C██████████ will hold his feelings and needs to be encouraged to discuss things. E██████████ and C██████████ are currently on a IEP for behavior. E██████████ grades are excellent and he is currently on the honor roll and has had perfect attendance. C██████████ struggles somewhat in school and sometimes will not have to motivation to apply himself to his school work. C██████████ is a typical teen that does not want to work for things and believes that things should be handed to him. C██████████ and E██████████ have had multiple placements and need to maintain contact with their two brothers that are also in foster care.

Ready to Take the Next Step?

If you're a registered user of our website, [log in to make an inquiry about this child](#).

A-13

If you're not a registered user and have a home study, [register to make an inquiry on this child](#).

D [REDACTED], K [REDACTED]

SZH098203

Status:	Available
Names:	D [REDACTED], K [REDACTED]
Ages:	12, 10
Race:	White/Caucasian
Gender:	2 female
State:	Ohio
Case #:	SZH098203 Expand
Last Profile Update:	03/03/14
Photo Updated:	03/03/14

Photos

Siblings

About the Siblings

Meet K [REDACTED] and D [REDACTED]. They are only two years apart and are have a close relationship. They get along well with each other and have a typical sister relationship that includes some up and downs. They enjoy the youth group at their church and spend a lot of time focused on their relationships with their peers. The current foster home has cared for both girls for almost 2 years. The family and the K [REDACTED] and D [REDACTED] both share a connection. The foster family is planning to adopt and is working through the process with the agency.

Ready to Take the Next Step?

If you're a registered user of our website, [log in to make an inquiry about this child.](#)

If you're not a registered user and have a home study, [register to make an inquiry on this child.](#)

If you're just starting the process to adopt, [find out more about how to get started.](#)

T [REDACTED], T [REDACTED], T [REDACTED]

SZH187365

Photos

Status:	Available
Names:	T [REDACTED], T [REDACTED], T [REDACTED]
Ages:	13, 11, 11
Race:	African American/Black
Gender:	3 female
State:	Ohio
Case #:	SZH187365 Expand
Last Profile Update:	01/16/14
Photo Updated:	11/22/13

T [REDACTED] - Female, age 13

1 of 3

About the Siblings

These siblings are a joy to be around, care for each other and are bonded well with each other. The girls get along very well with each other and others, and have their own individual personalities, strengths and needs. They are all very bonded with their current foster mom, and would need continued contact with her as they transition into a new home. These girls are part of a large sibling group, and also have three younger brothers. Our hope would be that any family considering these young ladies would also support and encourage a relationship with their brothers.

T [REDACTED] is described as being mature and a leader. She enjoys reading, shopping, painting and making jewelry. She is great at helping with her younger siblings and shows a significant bond to them. She is doing very well in school and shows a lot of promise for her future.

T [REDACTED] is described as being caring and loving, and is a good helper with her younger siblings. She is involved in a dance group and enjoys it. She is doing well in school. T [REDACTED] loves being with her sisters, doing new things and being active. She seems to look up to her older sister.

T [REDACTED] is described as being loving and having a smile that can light up a room. She loves interacting and playing with her siblings. T [REDACTED] competes in the Special Olympics. T [REDACTED] strives not to let her disabilities stop her from being a normal kid, and does her best to do anything any other child can.

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.

(B) Motion to reopen appellate proceedings. If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

(C) Motion by prosecution for leave to appeal. When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. 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 file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

(D)(1) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C). When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to R.C. 2953.08(C), a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. 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 file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

(D)(2) Leave to appeal consecutive sentences incorporated into appeal as of right. When a criminal defendant has filed a notice of appeal pursuant to App.R. 4, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to R.C. 2953.08(C), and this assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to R.C. 2953.08(C).

(E) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(F) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.
[Effective: July 1, 1971; amended effective July 1, 1988; July 1, 1992; July 1, 1994; July 1, 1996; July 1, 2003.]

Staff Note (July 1, 2003 Amendment)

Rule 5 Appeals by Leave of Court

The title of this rule was changed from Appeals by Leave of Court in Criminal Cases to Appeals by Leave of Court as a consequence of the amendment to division (A) described below.

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992 N.E.2d 687 (Ind. 2013)

In re the Matter of the ADOPTION OF Minor
Children C.B.M. and C.R.M.

C.A.B., Appellant/Natural Mother,

v.

J.D.M. and K.L.M., Appellees/Adoptive Parents.

No. 37S03-1303-AD-159.

Supreme Court of Indiana.

August 16, 2013

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[Copyrighted Material Omitted]

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Mark L. Callaway, Rensselaer, IN, Attorney for
Appellant.

Charles P. Rice, South Bend, IN, Attorney for
Appellees.

Gregory F. Zoeller, Attorney General of Indiana,
Frances Barrow, Deputy Attorney General, Indianapolis,
IN, Attorneys for the State of Indiana.

Barry A. Chambers, Carey Haley Wong,
Indianapolis, IN, Attorneys for Amicus Curiae Child
Advocates, Inc.

ON PETITION TO TRANSFER FROM THE
INDIANA COURT OF APPEALS, NO. 37 A 03-1204-
AD-149.

RUSH, Justice.

The foster parents of C.B.M. and C.R.M. adopted them while their natural mother's termination of parental rights (TPR) appeal was still pending. Our statutes specifically allow those competing processes to overlap. But choosing to do so creates the devastating possibility of jeopardizing a finalized adoption if the underlying TPR judgment is later reversed on appeal.

That is exactly what happened here, and we cannot unscramble that egg. [1] Either the adoptive family prevails in violation of the natural mother's constitutional rights, or the natural mother prevails at the risk of pulling the children away from the only family they know. But the natural mother's rights, both as a parent and as a litigant with an absolute right to an appeal, are

constitutionally protected. We cannot cut corners on those rights, despite our concerns for the children's undoubtedly vital interest in a speedy and permanent placement.

We therefore conclude that the trial court should have set aside the adoption.

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because the prior TPR " judgment upon which it is based has been reversed or otherwise vacated" — making the adoption voidable under Indiana Trial Rule 60(B)(7). And since a dilemma like this ill-serves the interests of everyone involved, we also offer guidance for mitigating the harsh result in this case, and in any future cases of this type.

Facts and Procedural History

C.A.B. is the natural mother of fraternal twins C.B.M. and C.R.M. (" Twins"), born in June 2004. Paternity has never been established, and their father's identity is not known. In January 2006, the Twins were determined to be children in need of services (CHINS) and removed from Natural Mother's home. TPR proceedings began against Natural Mother in July 2007, and TPR was granted in January 2008 over the strong objections of the Twins' guardian *ad litem*. Natural Mother promptly appealed the TPR judgment.

In early summer 2008, the Twins' foster parents J.D.M. and K.L.M. (" Adoptive Parents" [2]) petitioned to adopt them. DCS gave its consent to the adoption, which was granted about ten weeks later. None of the parties to the adoption notified Natural Mother of the proceedings, because notice is not required to a parent whose rights have been terminated. Ind.Code § 31-19-2.5-4(4). Nor did Mother make any effort to file a stay of the trial court's TPR judgment; and DCS made no effort to notify the Court of Appeals that the adoption was pending or that it had consented to the adoption. Mother's TPR appeal was still pending at the time the adoption was finalized.

Just two months later, in September 2008, the Court of Appeals reversed the TPR judgment against Natural Mother. The court held that in view of recent positive changes in Natural Mother's life, DCS had failed to carry its burden of establishing by clear and convincing evidence that the conditions leading to the Twins' removal would not be remedied and that continuing the parent-child relationship would threaten the Twins' well-being. *Moore v. Jasper Cnty. Dep't of Child Servs.*, 894 N.E.2d 218, 228-29 (Ind.Ct.App.2008). Based on that decision, Natural Mother petitioned the adoption court in January 2009 to set aside the adoption decree. The Adoptive Parents promptly objected.

Ultimately, Natural Mother's petition to set aside the adoption was not resolved until three years later. In July 2009, she moved for summary judgment, arguing that because she was never notified of the adoption, the adoption decree was void for lack of personal jurisdiction; and that the statutes allowing the adoption to proceed during her TPR appeal unconstitutionally deprived her of Due Process. The trial court heard the motion in August 2010, and denied the motion in December 2011. Its ruling agreed with the Adoptive Parents that Natural Mother's constitutional rights were not violated, and that her remedy was to seek a stay of the TPR judgment pending appeal under Indiana Trial Rule 62, which she did not do. The trial court therefore refused to declare the statutes unconstitutional, denied the petition to set aside the adoption, and denied summary judgment. Natural Mother's motion to correct error was also denied, and she appealed.

The Court of Appeals reversed, though it divided on the reasons for doing so. The majority concluded that even though

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Natural Mother was not entitled by statute to notice of the adoption because her rights had been terminated. DCS nevertheless acted "arbitrarily and capriciously" by failing to provide such notice, and by consenting to the adoption without having done so. *In re Adoption of C.B.M. and C.R.M.*, 979 N.E.2d 174, 185 (Ind.Ct.App.2012). Judge Vaidik separately concurred, believing the issue was better resolved by construing the adoption statutes to require final *appellate* resolution of TPR cases before dispensing with notice to or consent of the natural parents. *Id.*, 979 N.E.2d at 186. We granted transfer, 984 N.E.2d 221 (Ind.2013) (table), thereby vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A).

We now reach the same result as the Court of Appeals, but for a different reason— that because the adoption was based on the TPR judgment, Natural Mother became entitled to set aside the adoption under Trial Rule 60(B)(7) when she prevailed in her TPR appeal.

Standard of Review

Relief from judgment under Trial Rule 60 is an equitable remedy within the trial court's discretion. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind.2006). Accordingly, we generally review a trial court's Rule 60 ruling only for abuse of discretion. *Id.* But when "the trial court rules on a paper record without conducting an evidentiary hearing," as happened here, we are "in as good a position as the trial court ... to determine the force and effect of the evidence." *GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind.2001) (quoting *Farner v. Farner*, 480 N.E.2d 251, 257

(Ind.Ct.App.1985)). Under those circumstances, our review is *de novo*. See *id.* (applying *de novo* review to a motion to dismiss, where trial court resolved disputed facts from a paper record). See also *Williams v. Tharp*, 934 N.E.2d 1203, 1215 (Ind.Ct.App.2010), *trans. denied* (reviewing *de novo* denial of relief under T.R. 60(B)(8) when decision was made on a paper record).

Analysis

The parties' dispute centers around two basic issues. First, they disagree about whether the adoption mooted Natural Mother's TPR appeal because of her failure to seek a stay of the TPR judgment pending appeal. Second, they dispute whether letting the Twins be adopted without Natural Mother's notice or consent violated her Due Process rights—which determines whether the adoption was *void* or merely *voidable*, and therefore whether Natural Mother was required to plead and prove a "meritorious defense" to set aside the adoption under Indiana Trial Rule 60(B).

We agree with Natural Mother that her right to set aside the adoption did not depend on staying the TPR. But while the parties' Trial Rule 60(B) arguments take aim at sub-paragraphs (6) and (8), we find the bullseye in between: Under sub-paragraph (7), the adoption was only voidable, but for a reason that does not require Natural Mother to show a meritorious defense (and does not require us to address the constitutional question her "voidness" argument implicates).

I. Undue Delay in Cases Involving Children's Rights.

Before addressing the parties' issues, we pause to address an issue they have not raised—the three-year delay in resolving Natural Mother's petition to set aside the adoption at the trial level. We are gravely troubled by that lengthy delay. Time is of the essence in matters involving children, as the Twins illustrate particularly vividly. They became CHINS at age 1 1/2, their parent-child relationship with Natural Mother

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was severed at age 4 1/2, and their adoption was challenged at age 5 1/2. They are now age 10, with this dispute still unresolved.

In our Appellate Rules, we have strictly limited the parties' ability to seek extensions of time in cases involving children's rights, and have required ourselves to give them priority consideration. Ind. Appellate Rules 21(A), 35(C)-(D). We applaud the Court of Appeals for its promptness in resolving the previous level of this appeal—and express our firm expectation that parties and courts will do likewise at the trial level, even without being expressly compelled to do so by a comparable Trial Rule.

II. Staying TPR Judgments Pending Appeal.

At the outset, the Adoptive Parents and Attorney General argue that Natural Mother's TPR appeal was rendered moot when the adoption was granted—and; and that if she wished to preserve her rights, she should have asked the TPR court to stay its judgment pending her appeal. Without such a request, they reason, the Twins' need for a speedy and permanent placement trumps Natural Mother's rights. In view of the two separate constitutional rights that are implicated by this argument, we cannot agree.

Foremost, despite Natural Mother's struggles, her parental rights are precious and protected by our Federal and State constitutions. Our Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), and that "[t]he 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." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Accordingly, "the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (internal quotation and substitution omitted).

Even apart from the importance of Natural Mother's substantive parental rights, Indiana is particularly solicitous of the right to appeal. Article 7, Section 6 of the Indiana Constitution guarantees "in all cases"—including TPR—and; "an absolute right to one appeal." But her appellate right would mean little if it could be short-circuited by an adoption judgment being issued before her appeal is complete. It would offend her rights as both a mother and an appellate litigant to let her parent-child relationship with the Twins become contingent upon a race to the courthouse, hinging on whether the adoption could be finalized before the TPR appeal was complete.[3]

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The Adoptive Parents and Attorney General say it was Natural Mother's sole responsibility to avoid such a "race" by seeking a stay of the TPR judgment pending her appeal. But Court of Appeals precedent suggests otherwise. In *Cunningham v. Hiles*, 182 Ind.App. 511, 395 N.E.2d 851, 853 (1979), modified on reh'g, 402 N.E.2d 17 (Ind.Ct.App.1980), the trial court had refused to enjoin construction of a music store on a residential lot, but the Court of Appeals reversed. The store owner then sought rehearing, arguing the appeal was moot

because he had built the store in reliance on the trial court's judgment while the appeal was pending—and; the first time the Court of Appeals had been made aware of that important fact. 402 N.E.2d at 20. The Court's opinion on rehearing made clear that "the parties should have informed this Court of the fact that the music store had been constructed," suggesting that the "duty to place such matters before this Court by proper petitions, motions, or challenges by verified pleadings" is shared. 402 N.E.2d at 20 (emphasis added; internal citations, quotations, and substitutions omitted). In so holding, the Court rejected the store owner's claim that the fault lay entirely with the appellants for failing "to seek an appeal bond or otherwise stay enforcement of the denial of the injunction pending the outcome of their appeal," *id.* at 21 n. 4. In sum, despite prevailing at trial, the owner "built the music store at his own peril" while the appeal was pending. *Id.*

We see this case in a similar light. Natural Mother certainly could have sought a stay of the TPR in hopes of avoiding the dilemma this case presents. Yet DCS was also a party to that appeal—and; and unlike Natural Mother, DCS also participated in the adoption, through the power to consent (or not) to the Twins' adoption while the TPR appeal was pending. If anything, then, DCS was in a better position than Natural Mother to make the Court of Appeals aware of "post-judgment events which may affect the outcome of a pending appeal," *id.* at 20, such as its intent to consent to the adoption. DCS had every right to rely on the trial court's TPR judgment and consent to the adoption while the appeal was still pending, I.C. § 31-19-11-6—and; but as in *Cunningham*, such bold reliance came at its own (and thus, the Twins') peril. 402 N.E.2d at 21 n. 4.

Accordingly, we decline to hold that Natural Mother was required to file a stay in order to preserve a meaningful appellate remedy for her parental rights, and proceed to the merits of her petition to set aside the adoption.

III. Setting Aside Adoptions When the Prior TPR Is Reversed.

Reversal of the TPR judgment is significant because consent is ordinarily a vital part of an adoption. "[A] trial court deciding an adoption petition must find that 'proper consent, if consent is necessary, to the adoption has been given.'" *In re Adoption of N.W.R.*, 971 N.E.2d 110, 113 (Ind.Ct.App.2012) (quoting I.C. § 31-19-11-1(a)(7)). In most cases, that entails notifying the natural parents of the adoption, I.C. § 31-19-2.5-3(a)(1), and obtaining their written consent to it, I.C. § 31-19-9-1(a)(1)-(2). When consent is required, a defect in consent will render the adoption decree invalid, and require the adoption to be reversed and remanded. See *N.W.R.*, 971 N.E.2d at 117 (DCS's consent was required because child was ward of the State; trial court abused its discretion in granting adoption after DCS had sought to

withdraw its consent).

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But even though notice and consent are generally required, there are two classes of exceptions. One category permits adoption without the natural parent's consent, if the court finds that the parent has abandoned, deserted, or failed to support or communicate with the child, I.C. § 31-19-9-8(a)(1)-(2); or that the parent is legally incompetent or unfit, I.C. § 31-19-9-8(a)(9), (11). In these cases, the natural parent is still entitled to notice, I.C. § 31-19-4.5-2, so they can appear and defend against the allegations.

In the other category, though, the natural parent is not even entitled to notice. I.C. § 31-19-2.5-4. Generally, this category is based on a prior judicial finding of parental misconduct—; for example, Natural Mother's TPR judgment, I.C. § 31-19-9-8(a)(8); or conviction and incarceration for certain crimes against the child or the child's other parent or sibling. I.C. §§ 31-19-9-9, -10. In these cases, notice is deemed unnecessary because the parent had opportunity to contest the allegation in a prior proceeding—; in essence, treating the prior decision as conclusive of the issue.

But what happens when that "conclusive" prior decision is reversed? Even though finality of judgments is a vital policy, it is not absolute, and sometimes yields to broader interests of justice. Trial Rule 60(B) contemplates such situations, providing in relevant part:

On motion and upon such terms as are just the court may relieve a party ... from a judgment ... for the following reasons: * * *

(6) the judgment is void;

(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

.... A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

(Emphasis added.) The parties dispute whether the adoption is void under sub-paragraph (6), or merely voidable under sub-paragraph (8), with the latter provision requiring Natural Mother to show a "meritorious defense" to the adoption before she could have it set aside. But we find the answer in the provision in between—; that the adoption was merely voidable, but for a reason specifically contemplated by sub-paragraph (7), which requires no meritorious

defense.

Under the second clause of Trial Rule 60(B)(7), a judgment may be set aside when "a prior judgment upon which it is based has been reversed or otherwise vacated." That provision "applies only to related judgments where the second judgment is based upon the first judgment, and the first has been reversed or otherwise vacated." *Dempsey v. Belanger*, 959 N.E.2d 861, 868 (Ind.Ct.App.2011), *trans. denied* (quoting 22A Stephen E. Arthur, *Indiana Practice: Civil Trial Practice* § 37.14 (2d ed. 2007)). Put another way, it applies only when the first judgment "has claim or issue preclusion effects on the second," or provides "a necessary element of the [subsequent] decision." See *Kaler v. Bala (In re Racing Servs., Inc.)*, 571 F.3d 729, 732 (8th Cir.2009) (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.46 [1] (3d Ed. 2009) and *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 650 (1st Cir.1972)) (all construing Fed.R.Civ.P. 60(B)(5)'s similar provision).

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Here, the adoption "is based upon" the TPR judgment in the sense *Dempsey* and *Kaler* contemplate. If not for the preclusive effect of the prior TPR judgment, the Twins' adoption would have required notice to Natural Mother, I.C. § 31-19-2.5-3(a)(1). Then, if she refused to consent, the adoption would have required proof of an additional element—; abandonment, unfitness, or one of the other statutory grounds for dispensing with consent, I.C. § 31-19-9-8(a). Because the TPR let the Adoptive Parents finalize the adoption without either obtaining Natural Mother's consent or proving it was unnecessary, we conclude that the adoption was "based on" the prior TPR judgment. Accordingly, Natural Mother became entitled to relief from the adoption when the TPR was "reversed or otherwise vacated" on appeal.

And since Natural Mother's petition is within 60(B)(7)'s specific provisions, she need not show a "meritorious defense" as sub-paragraph (8) would require. Sub-paragraphs (5) through (7) of Trial Rule 60(B) are expressly exempted from that requirement—; seemingly recognizing that those circumstances inherently jeopardize confidence in the integrity of the judicial process, even if the outcome was unaffected. Adoptive Parents' reliance on the 60(B)(8) "catch-all," and its meritorious defense requirement, is therefore misplaced; Trial Rule 60(B)(7)'s more specific provision is controlling. *Rumpfelt v. Himes*, 438 N.E.2d 980, 983-84 (Ind.1982) ("[A]s with statutes, a specific rule controls over a general one on the same subject matter."). [4]

We therefore conclude that the trial court abused its discretion by refusing to set aside the Twins' adoption. We understand the trial court's concern for a speedy, permanent placement for the Twins. But a fit parent's rights are fundamental and constitutionally protected, *In*

re Visitation of M.L.B., 983 N.E.2d 583, 586 (Ind.2013) (citing *Troxel v. Granville*, 530 U.S. 57, 64, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)), and even a matter as important as the Twins' best interests does not necessarily override that right. *Id.* Since the only judicial determination that Natural Mother is unfit to retain her parental rights has been overturned on appeal, letting the adoption stand would be an overreach of State power into family integrity. The adoption must be set aside.

IV. Avoiding a Repeat of This Situation.

We are all too aware of the harsh effects this decision may have on the Twins, and future children who may find themselves similarly situated through no fault of their own. We therefore offer guidance for mitigating those harsh effects in this case, and potentially avoiding them completely in future cases.

Foremost, this case illustrates the wisdom of doing more than " just the bare minimum." Due Process notice requirements are just that—a bare minimum that parties always may, and sometimes ought to, exceed. While the Adoptive Parents were not required to serve notice on Natural Mother, I.C. § 31-19-2.5-4(2)(F), doing so voluntarily may well have saved the adoption from reversal. If Natural Mother had been served, the Adoptive Parents could then have requested a contested adoption hearing for litigating an *alternative* basis for dispensing with consent

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under Indiana Code section 31-19-9-8(a). Natural Mother would then have been offered a " day in court" independent of the TPR, giving this Court an alternative basis to affirm the adoption—because either she would have appeared and been heard, or else failed to appear and been properly defaulted. We emphasize that such notice is not *required*, and adoptive parents have the statutory right to rely solely on a trial-level TPR judgment and seek adoption pending the TPR appeal. We merely caution that such reliance comes at the adoptive parents' peril. See *Cunningham*, 402 N.E.2d at 21 n. 4.

Second, some of the uncertainty for the Twins could have been avoided if DCS had left the underlying CHINS case open until Mother's TPR appeal was complete. As this case shows, children may have a particularly great " need of services" when a TPR judgment is reversed on appeal. By then, they will have been removed from the parents' home for a substantial time, and will be bonding into a new home—especially when, as here, the foster parents plan to adopt. And the natural parent, even if not unfit, may also be in need of services before the children could appropriately return to their original home. Yet without a CHINS case, there is no ready means to provide the support all the parties here will require while reexamining the Twins' status in light of the TPR reversal. (Indiana Code section 31-9-2-13 could authorize the Adoptive Parents to seek

temporary custody of the Twins while the adoption is pending—which may very well be beneficial to the Twins, but falls far short of the services a CHINS case would permit.) We strongly suggest that in the future, DCS's best practice would be to leave underlying CHINS cases open until any related TPR appeal is complete.[5]

Finally, we reiterate that granting an adoption pending TPR appeal is a *discretionary* decision of the trial court. Our Legislature has authorized the practice, and there are surely cases in which it will be entirely appropriate to expedite the adoption. Yet it is only permitted, not required. In view of the potentially devastating consequences of having an adoption invalidated by a TPR appeal, we encourage courts to exercise that authority with an abundance of caution. Speedy permanency for children is vitally important. But balanced against the risk that materialized in this case, a few months' additional delay in granting an adoption may often be preferable.

Conclusion

There are no winners in some cases, and this is one of them. Ruling in favor of the Adoptive Parents would violate the Natural Mother's constitutional rights, while the opposite ruling would risk pulling the Twins away from the family they have lived with for most of their lives, and the only stable family they have ever known. But despite the Twins' need for permanency, natural parents' consent is a vital condition precedent to most adoptions—and we must take a narrow view of the exceptions to that principle, out of due regard for the limitations of judicial power into family life, even for very imperfect families. Thus, when the TPR judgment in this case was reversed, we must conclude that the no-consent adoption that followed on its heels became voidable under Trial Rule 60(B)(7). The trial court

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therefore abused its discretion in failing to set aside the adoption.

Accordingly, we reverse the trial court's judgment, and remand with instructions to vacate the adoption decree within seven days of this Court's opinion being certified, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on Natural Mother. Pending that hearing, the trial court could exercise its authority to entertain motions regarding temporary custody of the Twins under Indiana Code section 31-19-2-13, until final judgment is entered.

DICKSON, C.J., and RUCKER, DAVID, and MASSA, JJ., concur.

Notes:

[1] See generally Kate M. Heideman, Comment, *Avoiding the Need to "Unscramble the Egg": A Proposal for the Automatic Stay of Subsequent Adoption Proceedings When Parents Appeal a Judgment Terminating Their Parental Rights*, 24 St. Louis U. Pub.L.Rev. 445 (2005) (discussing Illinois, Michigan, and Missouri cases involving TPRs being reversed on appeal after an adoption had already been granted, and proposing that TPR judgments should be automatically stayed pending appeal to avoid such dilemmas).

[2] In July 2012, while this case was pending before the Court of Appeals, that Court received notice that J.D.M., the adoptive father, was killed in a traffic accident in May 2011. Like the Court of Appeals, we will continue to refer to the Adoptive Parents in the plural, for the sake of consistency with prior proceedings.

[3] We acknowledge the Attorney General's citation to *In re Tekela*, 202 Ill.2d 282, 269 Ill.Dec. 119, 780 N.E.2d 304, 309 (2002), which held that a TPR appeal does become moot when the children are adopted. But we have found no other case that reaches such a conclusion. Moreover, Illinois has abrogated *Tekela* by a rule blocking adoptions while a TPR appeal is pending. Ill. Sup.Ct. R. 305(e). A similar statute has avoided these consequences in Michigan as well, *In re JK*, 468 Mich. 202, 661 N.W.2d 216, 224 (2003) and Missouri has established a common-law rule that it is always an abuse of discretion to grant an adoption while a TPR appeal is pending, *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo.2004). We agree with *Tekela*'s recognition of a compelling interest in speedy placement and permanency for the children, but we will not advance that policy goal at a natural parent's constitutional expense.

[4] Resting our conclusion on Trial Rule 60(B)(7) also lets us avoid the constitutional question inherent in Natural Mother's 60(B)(6) argument that the adoption is void on Due Process grounds. We "traditionally forswear deciding a constitutional question unless no non-constitutional grounds present themselves for resolving the case under consideration." *Citizens Nat. Bank of Evansville v. Foster*, 668 N.E.2d 1236, 1241 (Ind.1996).

[5] We express no opinion about whether DCS may be entitled to reopen the CHINS case under these circumstances.