[Cite as *In re K.J.*, 2015-Ohio-2244.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of:	:	
K.J.,	:	No. 15AP-21 (C.P.C. No. 12JU-2019)
(C.J.,	:	(ACCELERATED CALENDAR)
Appellant).	:	

D E C I S I O N

Rendered on June 9, 2015

Giorgianni Law LLC, and *Paul Giorgianni*, for appellant C.J.

Robert J. McClaren, for appellee Franklin County Children Services.

ON MOTION TO DISMISS

TYACK, J.

{¶ 1} The Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, has entered a decision and judgment granting permanent custody of a minor child, K.J., to Franklin County Children's Services ("FCCS"). The child's mother, appellant C.J., has filed a notice of appeal from that decision. Appellee FCCS moves to dismiss the appeal, asserting that the notice of appeal was not timely filed. Appellant opposes dismissal and argues that the untimely notice of appeal was the result of substandard representation by her appointed counsel in the trial court proceedings, and that as a matter of due process she cannot be denied her right to appeal under these circumstances. The matter is currently before us only for disposition of the motion to dismiss the appeal.

{¶ 2} Because the question before us is almost entirely procedural, only a brief review of the lower court proceedings in this case is necessary. The timing of the pertinent filings in this case is uncontested, and the merits of the underlying action are not yet at issue.

{¶ 3} Because the notice of appeal is untimely on its face, and at first blush we therefore lack jurisdiction to review the appeal, we proceed on the basis that a court always has sufficient jurisdiction to address the threshold question of whether a matter is properly before it: "[A]bsent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction." *State ex rel. White v. Junkin*, 80 Ohio St.3d 335 (1997).

{¶ 4} Furthermore, based upon the prior withdrawal of trial counsel, the importance of the underlying rights at stake in the case, and the clear right to representation granted by law in Ohio to parents facing permanent termination of parental rights, this court has appointed experienced appellate counsel for appellant to fully develop and present arguments relating to our jurisdiction over the appeal. The matter has been fully briefed on this issue.

{¶ 5} FCCS obtained temporary custody of the child by order dated May 14, 2012. The case plan implemented for appellant did not yield favorable results, and FCCS filed its motion for permanent custody on January 2, 2013, alleging that the child could not be placed with either parent within a reasonable period of time or should not be placed with the parents, and that permanent custody was in the best interest of the child. Appellant was represented by appointed trial counsel through the subsequent proceedings, which culminated in a decision and judgment entered on November 19, 2014 finding that an award of permanent custody to FCCS for purposes of placement for adoption was in the child's best interest.

{¶ 6} On January 13, 2015, some 55 days after the trial court's final order in the matter, appellant's appointed trial counsel filed a document that we have construed both as a notice of appeal and a motion to withdraw as counsel:

> NOW comes [C.J.], Mother of [K.J.] and files this Notice of Appeal of the decision of the Court. [C.J.] is indigent and requires the assistance of a Court appointed Attorney to represent her in pursuing the Appeal of this matter.

> Attorney Beverly J. Corner submits this Notice of Appeal on behalf of [C.J.], only to preserve her Appellate rights. Attorney Beverly J. Corner will not be representing [C.J.] on the Appeal.

{¶ 7} On January 23, 2015, FCCS filed the present motion to dismiss the appeal on the ground that the notice of appeal was filed outside the 30-day period provided in App.R. 4, and the failure to timely file deprived this court of jurisdiction. FCCS cites the basic principle that failure to file the requisite notice of appeal within the 30-day period deprives the court of jurisdiction to consider an appeal in a civil matter. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810; *State v. Monroe,* 10th Dist. No. 10AP-839, 2012-Ohio-239.

{¶ 8} As a preliminary and subordinate issue, we note that appellant's January 13, 2015 notice of appeal was timely filed as to the trial court's later December 22, 2014 entry approving a case plan for the child's eventual adoption. The notice of appeal is not effective, however, to institute an appeal on behalf of appellant from that later entry. When the trial court issued its November 19, 2014 judgment terminating appellant's parental rights, appellant was not longer a party to the case and was without standing to appeal the later judgment. *In re McBride,* 110 Ohio St.3d 19, 2006-Ohio-3454, ¶ 11; R.C. 2151.414(F).

{¶ 9} The sole question before us is whether an Ohio court of appeals may review a judgment that terminates the parental rights of a parent pursuant to R.C. 2151.414, when court-appointed counsel in the trial proceedings, despite the parent's presumed wish to appeal the judgment, failed to timely file the necessary notice of appeal. In deciding this question, we make two factual assumptions solely for purposes of framing the argument: first, that the client/parent in fact wished to appeal the trial court's judgment, and second, that trial counsel was presumptively ineffective for failure to timely file the requisite notice. The latter presumption obviates the need to undertake full analysis of counsel's conduct. "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. * * * [F]iling a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *Roe v. Flores-*

Ortega, 528 U.S. 470, 477. "[C]ounsel's alleged proficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. * * * [C]ounsel's deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether." (Emphasis sic.) *Id.* at 483.

{¶ 10} "The right to parent one's children is a fundamental right." *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, ¶ 28, citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000). This fundamental right is protected by the due process clause of the Fourteenth Amendment to the United States Constitution and by Section 16, Article I of the Ohio Constitution. *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶ 16. A parent's natural rights nonetheless are subject to balancing, and ultimately subordinated to, the ultimate welfare of the child. As a result, although a parent has a constitutionally protected right to raise his or her child, the right may be terminated when necessary for the best interest of the child. *In re S.W.*, 10th Dist. No. 05AP-1368, 2006-Ohio-2958, ¶ 7, citing *In re Cunningham*, 59 Ohio St.2d 100, 106 (1979). The state's right to thus act in the best interest of the child is defined under the pertinent sections of R.C. Chapter 2151. The due process rights extended on the basis of this fundamental right, however, do not (unlike proceedings carrying a risk of physical liberty) automatically mandate the appointment of counsel for an indigent litigant facing the loss of parental rights. *Lassiter v. Dept. of Social Servs. of Durham Cty. N. Carolina*, 452 U.S. 18, 24-25 (1981); *In re A.N.B.*, 12th Dist. No. CA2012-12-017, 2013-Ohio-2055. The procedural due process afforded to such a litigant, therefore, is assessed according to the facts and posture of the case of the established three-part standard set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): (1) the private interest at stake, (2) the government interest involved, and (3) the risk of error. *Angus v. Angus*, 10th Dist. No. 14AP-22, 2014-Ohio-4225, ¶ 18.

{¶ 11} Ohio's statutory framework governing such proceedings goes beyond the tentative right to counsel defined by the United States Supreme Court in *Lassiter*. Where the state is the initiating entity, as in the present case, R.C. 2151.352 provides an express right to counsel at all stages of the proceeding:

> A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code * * *.

(Emphasis added.) Juv.R. 4(A) parallels the statutory right to counsel but does not expand upon it. The right to counsel provided, pursuant to R.C. 2151.352, implies more than a mere right to representation, it establishes a right to *effective* assistance of counsel. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶ 93.

{¶ 12} We must determine whether this right to effective assistance of counsel in permanent commitment to custody ("PCC") cases overrides the jurisdictional limitations of App.R. 4, either through application of the delayed appeal provisions of App.R. 5 governing criminal appeals, or through invocation of constitutional due process concerns that would toll the time for appeal. Based on the only precedential decision rendered by the Supreme Court of Ohio, we conclude that it does not.

{¶ 13} In *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, syllabus, the Supreme Court of Ohio held that "due process does not require that a parent be afforded the right to file a delayed appeal from a judgment terminating parental rights." (Emphasis added.) That case involved a parent who had voluntarily relinquished her parental rights, but later regretted the decision and asserted that she had received ineffective assistance of counsel so that she did not understand the ramifications of her decision to relinquish her parental rights. When the mother attempted to invoke App.R. 5 and file a delayed appeal well outside of 30 days, the court of appeals dismissed the appeal and the Supreme Court of Ohio affirmed.

{¶ 14} Appellant argues that the syllabus language in *In re B.C.* stands only for the proposition that due process does not "require" an absolute right to delayed appeal – i.e., that a court of appeals may deny the delayed appeal without offending basic notions of due process. The reciprocal possibility expressed by this language, appellant argues, is that the court of appeals has discretion to *grant* the delayed appeal without offending the appellate rules. Appellant points out that the Supreme Court in *In re B.C.* engaged in a

full *Mathews* due-process analysis of the facts of the case before reaching its ultimate conclusion, rather than simply invoking the appellate rules and applying them to bar the appeal. Appellant asserts that by this, the Supreme Court implied that if *Mathews* were applied to different facts, the inquiry might yield a different result and require delayed appellate review in order to fulfill due process requirements.

{¶ 15} It is true that the use of the phrase "does not require" in the syllabus of *In re B.C.*, at least colorably, leaves open the possibility that while a delayed appeal is not mandatory in such cases, it might yet be permissible. The opening paragraph of *In re B.C.*, however, is far less ambivalent:

> The issue in this appeal is whether due process requires that a parent whose parental rights have been terminated be afforded the right to a delayed appeal from the judgment of termination, comparable to the delayed appeal afforded to certain [criminal] defendants by App.R. 5(A). We hold that due process does not entitle the parent in such a case to file a delayed appeal.

In re B.C. at ¶ 1. Based on that language, we can only conclude that a delayed appeal is not available in the present case.

{¶ 16} Counsel for appellant points to one Ohio appellate case that did allow delayed appeal in a PCC case: *In re S.U.*, 12th Dist. No. CA2014-07-055, 2014-Ohio-5748. The initial grant of delayed appeal in that case, however, predated *In re B.C.*, even if the 12th District rendered its final decision (without reference to *In re B.C.*) some two months after the Supreme Court spoke on the issue. In contrast, the only comparable ruling from our court also predates *In re B.C.*, but anticipates the Supreme Court's ruling: *In re T.V.*, 10th Dist. No. 05AP-223 (Mar. 25, 2005) (Judgment Entry), reconsideration denied, *In re T.V.*, 10th Dist. No. 05AP-223 (June 2, 2005) (memorandum decision). In addition we note one additional case discovered by counsel, *In re Bryant*, 8th Dist. No. 58483, 91-LW-3844 (May 9, 1991), in which the Eighth District granted a delayed appeal to a parent initially, then reversed itself and noted that App.R. 5(A) applies only to criminal cases.

{¶ 17} In accordance with the foregoing, we find that the binding precedent issued by the Supreme Court of Ohio compels us to conclude that a right to a delayed appeal

pursuant to App.R. 5(A) or on any other basis does not apply in an appeal from a termination of parental rights, regardless of whether the failure to appeal results from patently ineffective assistance of trial counsel in failing to timely perfect the appeal. We therefore dismiss this appeal.

Motion to dismiss granted; Appeal dismissed.

BROWN, P.J., concurs.
DORRIAN, J., concurs in judgment only.

DORRIAN, J., concurring in judgment only.

{¶ 1} I concur with the majority's interpretation that *In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, holds that parental termination cases are not the types of cases for which delayed appeals are permitted under App.R. 5(A). *Id.* at ¶ 15.

{¶ 2} I concur in judgment only, however, with the majority's interpretation of *In re B.C.* regarding whether procedural due process applies in this parental termination case.

{¶ 3} The majority interprets *In re B.C.* as standing for the proposition that due process does not entitle a parent, in *any* parental termination case, to file a delayed appeal. The majority points to the opening paragraph, which states:

> The issue in this appeal is whether due process requires that a parent whose parental rights have been terminated be afforded the right to a delayed appeal from the judgment of termination, comparable to the delayed appeal afforded to certain [criminal] defendants by App. R. 5(A). We hold that due process does not entitle the parent in such a case to file a delayed appeal.

(Emphasis added.) *Id.* at ¶ 1.

{¶ 4} The Supreme Court of Ohio in *In re B.C.* applied the three-part test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine specific dictates of due process. The following reasons support my conclusion that it is necessary to apply the *Mathews* test on a case-by-case basis to determine whether procedural due process affords a right to a delayed appeal.

{¶ 5} First, in *Mathews*, immediately preceding the outline of the test, the Supreme Court of the United States stated that " ' "(d)ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' " *Id.* at 334, quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

{¶ 6} Second, the Supreme Court of Ohio in *In re B.C.*, in applying the three-part *Mathews* test, considered not only the general interests and procedures applicable in every parental termination case but also carefully and thoroughly considered the particular facts in the case.

{¶ 7} Third, *In re B.C.* states that "[due process] is 'flexible and calls for such procedural protections as the particular situation demands.' " *Id.* at ¶ 17, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).[1]

{¶ 8} Fourth, *In re B.C.* states that "[a] consideration of the record leads us to conclude that risk of error in *this* case was minimal under existing procedures and that delayed appeal is not necessary to protect against an erroneous deprivation of appellant's interest." (Emphasis added.) *Id.* at ¶ 22.

{¶ 9} Fifth, *In re B.C.* states that "[a]lthough appellant has a significant private interest, the second and third *Mathews* factors weigh against providing a delayed appeal to appellant in *this* case." (Emphasis added.) *Id.* at ¶ 25.

{¶ 10} Sixth, *In re B.C.* states that "Ohio's current procedures comport with due process and that a delayed appeal is not constitutionally *required* to reflect the parent's interest." (Emphasis added.) *Id.* at ¶ 27. (Contrast *required* with *entitled* in first paragraph.)

{¶ 11} Seventh, *In re B.C.* states that "[d]ue process does not *require* that a parent be afforded the right to file a delayed appeal from a judgment terminating parental rights." (Emphasis added.) *Id.* at syllabus. (Contrast *required* with *entitled* in first paragraph.)

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[1] Consistent with this, in *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), the Supreme Court of the United States examined the question of what process is due an inmate whom Ohio seeks to place in the Ohio State Penitentiary. The court noted that, "[b]ecause the requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands,' we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures." (Citations omitted.)

{¶ 12} With this in mind, I believe it is necessary to apply the *Mathews* test to the facts of this particular case to determine whether procedural due process affords the right to a delayed appeal to appellant.

{¶ 13} As noted by the majority, *Mathews* requires the court to look at the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

{¶ 14} The general interests and procedures outlined and considered in *In re B.C.* apply as well in this case. *Id.* at ¶ 19-26. As the Supreme Court of Ohio very thoroughly and carefully analyzed those interests and procedures, I will not reiterate the same here but, rather, will focus my discussion on the particular facts of this case.

{¶ 15} Relevant to the first and third *Mathews* factors, the record in this case reveals that adoption and permanency was the goal for K.J. and that progress was being made toward that goal. Indeed, the trial court stated that K.J. "is in a loving foster to adopt home where all her needs are met and where she is happy. She has been in this same home since she was barely over a month old. Her foster mother wishes to adopt her." (Nov. 19, 2014 Decision, 10.)

{¶ 16} In discussing the first *Mathews* factor, in *In re B.C.*, the Supreme Court of Ohio noted that " '[t]here is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.' " *Id.* at ¶ 20, quoting *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982). In discussing the third *Mathews* factor, the Supreme Court in *In re B.C.* considered the state's role as parens patriae in promoting the welfare of the child. *Id.* at ¶ 23. The Supreme Court noted "[t]o allow delayed appeals for a parent whose parental rights have been terminated would inject further uncertainty into the process of placing

the child in a permanent home and postpone resolution of custody, contrary to the child's best interest." *Id.* at ¶ 24.

{¶ 17} In *In re B.C.*, the adoption of B.C. by his foster family had been finalized four days prior to when the appellant filed her notice of appeal and motion for delayed appeal. *Id.* at ¶ 9. In the case before us, although no information was provided as to whether the adoption of K.J. had been finalized,[2] the record reveals, as noted above, that the relationship of parent and child was already developing. The Supreme Court further noted that "[t]hree witnesses testified that a true mother and child bond exists between foster mother and [K.J.]." (Nov. 19, 2014 Decision, 6.) R.C. 3107.15 states in relevant part that the effect of adoption is "[t]o create the relationship of parent and child between petitioner and the adopted person." R.C. 3107.15(A)(2). In *In re B.C.*, both B.C. and his adoptive parents had overwhelming private interests in maintaining their parent-child relationship. Such significant interests are present in this case as well.

{¶ 18} Relevant to the second *Mathews* factor, two facts merit consideration. First, in this case, the motion for delayed appeal was filed less than two months after permanent custody was awarded to the children services agency;[3] whereas, in *In re B.C.*, the motion for delayed appeal was filed more than six months after permanent custody was awarded to the children services agency.[4] Second, in this case, the court noted that it has "no doubt that mother, [C.J.], loves her daughter and wants to regain her custody." (Nov. 19, 2014 Decision, 8.) Appellant's appointed appellate counsel noted in his brief

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[2] On December 18, 2014, a month after the court's termination of appellant's right, the children services agency filed a case plan indicating that "[a] flyer will be developed and distributed to appropriate adoption agencies for recruitment purposes. The child will be involved with recruitment activities as appropriate for his/her/their special needs. The Social Worker will follow up with families who express interest in adoption as outlined in the agency adoption handbook and the OAC." (Dec. 18, 2014 Case Plan, 2, 8.) While this case plan prompts some question regarding progress towards the goal of adoption and permanency, the record in this case would not necessarily reveal detailed information given the confidentiality accorded the same. Furthermore, review of such case plan is not scheduled for annual review until November 19, 2015. (Nov. 19, 2014 Decision, 15.) In *In re B.C.*, the court rejected the appellant's suggestion that the court permit filing for delayed appeal to one year after the judgment terminating parental rights. The court noted that "even a one-year extension is inconsistent with Ohio's adoption laws. The expedited appeal process was designed to promote permanency and to alleviate the pervasive limbo of the foster-care system." *Id.* at ¶ 24. As the Supreme Court concluded in *In re B.C.*, I am not persuaded that due process should require delay until the annual review.

[3] The decision awarding permanent custody was journalized on November 19, 2014; the notice of appeal was filed on January 13, 2015.

[4] In *In re B.C.*, permanent custody was awarded February 12, 2013; the notice of appeal and a motion for leave to file a delayed appeal was filed on August 27, 2013. *Id.* at ¶ 8-9.

that appellant's guardian ad litem informed him that appellant "adamantly opposed terminating parental rights." (Appellant's Memorandum, 3.) Counsel further noted that the sole reason for the untimeliness of the notice of appeal was the negligence of appellant's former counsel. In contrast, in *In re B.C.*, the appellant knowingly and voluntarily surrendered her parental rights and agreed that it was in B.C.'s best interest that the motion for permanent custody be granted.

{¶ 19} The second *Mathews* factor requires balancing the risk of an erroneous deprivation of the private interest involved through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. While the difference in the timing of the motion for delayed appeal warrants some additional weight, the procedural safeguards already existing in parental-termination cases, as outlined in *In re B.C.*, as well as a review of the record in this case, leads to the conclusion that risk of error was minimal, and delayed appeal is not necessary to protect against an erroneous deprivation of appellant's interest. *See In re B.C.* at ¶ 25-26.

{¶ 20} Appellant's allegation of ineffective assistance of counsel as the reason for failure to file a timely appeal is troubling; nevertheless, I note there is no allegation of ineffective assistance of counsel during the proceedings before the trial court. Even if there were, the court in *In re B.C.* dismissed the notion that existing procedural safeguards were insufficient to guard against prejudice resulting from the allegations of ineffective assistance of counsel before the trial court in that case. *Id.* at ¶ 21, 22, 23, 25, 26. Likewise, in this case, the November 19, 2014 decision reveals very thorough consideration by the trial court and adherence to the procedures outlined in *In re B.C.* No allegations of procedural error have been suggested by appellant. Finally, as noted in *In re B.C.*, "[t]he fundamental requisites of due process of law in any proceeding are notice and the opportunity to be heard." *Id.* at ¶ 17. The trial court noted that appellant and her attorney were present at the November 10, 2014 hearing on the motion for permanent custody. The court further noted that appellant presented four witnesses, including herself, and two exhibits for the court's consideration. Appellant had both notice and an opportunity to be heard before the trial court. I also have no doubt that appellant was heard by the trial court, as evidenced by the court's acknowledgement of appellant's wanting to regain custody of the child.

{¶ 21} Accordingly, taking all these factors into consideration, I concur with the judgment of the majority that, in this particular case, due process does not require a delayed appeal to protect appellant's interest.

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