ORIGINAL

IN THE SUPREME COURT OF OHIO

In re: B.C.	)	**Case Nos. 2013-1932** **2014-0181**
	)	**On Appeal and On Certified Conflict from the Ohio Court of Appeals, Second Appellate District, Clark County**
	)	**Court of Appeals Case No. 2013-CA-0072**

MERIT BRIEF OF APPELLEE,
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STATEMENT OF THE FACTS

This matter arises from the Clark County Court of Appeals, Second Appellate District, which denied the motion of Appellant, Cassidy C. ("Mother") for a delayed appeal from an order terminating Mother's parental rights, and which certified a conflict.

B.C. was born on May 4, 2010, to Mother and Keath M.[1] B.C. tested positive for THC[2] at birth, and he was diagnosed with Pierre Robin Syndrome and an accompanying cleft palate. (Juv. Ct. Doc. No. 2, Complaint for Temporary Shelter Care Custody; Juv. Ct. Doc. No. 18, CASA/GAL Report filed Nov. 10, 2011.)

On October 26, 2011, Appellee Family and Children Services of Clark County ("Children Services") filed a complaint for temporary shelter care custody of B.C. in the Clark County Juvenile Court. (Juv. Ct. Doc. No. 2.) A hearing was held that day; Mother was appointed counsel. (Juv. Ct. Doc. No. 7, Order Appointing Counsel; Juv. Ct. Doc. No. 5, Order Granting Temporary Shelter Care Custody.) The juvenile court granted Children Services' motion for temporary shelter care custody after the hearing. (*Id.*) On December 16, 2011, the juvenile court placed B.C. in the temporary custody of Children Services. (Juv. Ct. Doc. No. 27, Order Granting Temporary Custody.)

On October 26, 2012, Children Services filed a motion and complaint to modify its temporary custody of B.C. to permanent custody. (Juv. Ct. Doc. No. 50.)

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[1] Keath M.'s participation in the proceedings was minimal; he did not appeal or otherwise contest the decision of the juvenile court.

[2] Tetrahydrocannabinol, the chemical responsible for most of the psychological effects of marijuana.

On December 21, 2012, Mother appeared with counsel before the juvenile court.[3] (Juv. Ct. Doc. No. 87, Judgment Entry.) At that hearing, Mother agreed that Children Services' motion for permanent custody should be granted and that permanent custody with Children Services was in the best interest of B.C. (*Id.*) The juvenile court found that Mother's statements were made knowingly and voluntarily, and set the motion for permanent custody for a dispositional hearing. (*Id.*)

The dispositional hearing was held on February 8, 2013. The juvenile court issued its judgment entry granting permanent custody of B.C. to Children Services on February 12, 2013. (Judgment Entry, Appellant's Appx., p. A-12.)

On August 23, 2013, the Clark County Probate Court entered a final order granting a petition to adopt B.C.

On August 27, 2013—four days after B.C.'s adoption became final—Mother filed a notice of appeal and a motion for delayed appeal under App.R. 5(A) in the Second District Court of Appeals. A motion for a stay was not filed with the juvenile court until September 13, 2013. (Juv. Ct. Doc. No. 108.) The juvenile court denied the motion on October 1, 2013. Mother moved for a stay in the Court of Appeals on October 10, 2013.

On October 24, 2013, the Court of Appeals issued a decision on Mother's pending motions. (Appellant's Appx., p. A-8.) The court found that the juvenile court had complied with Civ.R. 58(B), which meant that Mother's appeal was untimely and therefore barred. (*Id.* at p. A-9.) The court further held that Mother was not entitled to a delayed appeal, as termination of

[3] At the time of the December 21, 2013 hearing before the juvenile court, Mother had been released on bail from the Clark County Jail on pending criminal charges. Mother is currently serving a prison term on those charges, and may be released as early as September 2014.

parental rights cases are not within the types of cases governed by App.R. 5(A), and dismissed the appeal. (*Id.* at p. A-9 to A-10.) The motion for a stay was denied. (*Id.* at p. A-10.)

One judge of the Court of Appeals concurred, stating that although he would find that Mother could seek a delayed appeal, she had not shown good cause for the motion to be granted. (*Id.* at p. A-10 to A-11.) A majority of the court did not render any decision as to whether Mother had shown good cause to be granted a delayed appeal under App.R. 5(A). Mother appealed the decision of the Court of Appeals, and this Court accepted her appeal.

Mother moved to certify a conflict on November 25, 2013. The Court of Appeals granted the motion and certified a conflict on January 14, 2014. The Court of Appeals certified its decision as being in conflict with the Fifth District's decision *In re Westfall Children*, 5th Dist. Stark No. 2006-CA-00196, 2006-Ohio-6717. (Appellant's Appx., p. A-5.) One judge on the panel dissented:

> Given the lack of explanation in *In re Westfall Children*, 5th Dist. Stark No. 2006 CA 196, 2006-Ohio-6717, as to the circumstances under which "[a]ppellant filed a delayed appeal ***," or under which the appeal was considered, I am unable to conclude that our judgment is in conflict. *Id.* at ¶3.

(Alterations sic.) (Appellant's Appx., p. A-7.)[4]

This Court consolidated Mother's appeal and the certification of conflict.

[4] The portion of *In re Westfall Children* quoted by the dissenting judge constitutes the only statement by the Fifth District on the issue of a delayed appeal.

ARGUMENT

Appellee's Proposition of Law I: A final decree of adoption deprives a juvenile court of jurisdiction over a child who was placed in the permanent custody of a public children's services agency pursuant to an order terminating parental rights, and any appeal from such juvenile court order after the final adoption decree is rendered moot.

This Court should dismiss the appeals as moot, because B.C. was adopted prior to Mother moving for a delayed appeal.

"Ohio courts have long exercised judicial restraint in cases which are not actual controversies. No actual controversy exists where a case has been rendered moot by an outside event." (Citation omitted.) *Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133 (1991). "A cause will become moot only when it becomes impossible for a tribunal to grant meaningful relief, even if it were to rule in favor of the party seeking relief." *Joys v. Univ. of Toledo*, 10th Dist. Franklin No. 96APE08-1040, 1997 Ohio App. LEXIS 1765, at *7 (Apr. 29, 1997), citing *Miner v. Witt*, 82 Ohio St. 237, 238-239 (1910).

R.C. 2151.353(E)(1) states in relevant part:

> The [juvenile] court shall retain jurisdiction over any child for whom the court issues an order of disposition pursuant to division (A) of this section or pursuant to section 2151.414 or 2151.415 of the Revised Code until *** the child is adopted and a final decree of adoption is issued, except that the court may retain jurisdiction over the child and continue any order of disposition under division (A) of this section or under section 2151.414 or 2151.415 of the Revised Code for a specified period of time to enable the child to graduate from high school or vocational school. The court shall make an entry continuing its jurisdiction under this division in the journal.

If the juvenile court does not enter an order retaining jurisdiction, the juvenile court loses jurisdiction over the child once a final adoption decree is issued. *In re M.V.V.*, 10th Dist. Franklin No. 11AP-229, 2011-Ohio-4481, ¶7; *In re Phillips*, 12th Dist. Butler No. CA2003-03-062, 2003-Ohio-5107, ¶10. The finalization of the adoption renders any appeal moot. *In re*

Moran, 1st Dist. Hamilton Nos. C-920904, C-920944, C-920946, C-920947, C-920948, C-920949, and C-920950, 1994 Ohio App. LEXIS 1529, at *3 (Apr. 13, 1994).

In the case at bar, the Clark County Juvenile Court terminated Mother's parental rights pursuant to R.C. 2151.414. (Appellant's Appx., p. A-12.) The Clark County Probate Court issued a final adoption decree for B.C. on August 23, 2013. The record does not contain an entry issued pursuant to R.C. 2151.353(E)(1) retaining jurisdiction in the juvenile court. Therefore, because of the final adoption decree, the Clark County Juvenile Court lost jurisdiction before Mother even filed her notice of appeal and motion for a delayed appeal on August 27, 2013. No matter the outcome of any appeal by Mother, neither the Court of Appeals nor the juvenile court can award her relief, because the juvenile court lacks jurisdiction to take any action in the matter.

This Court should dismiss the appeals as moot.

Appellee's Proposition of Law II: A parent whose parental rights were terminated by order of a juvenile court in a permanent custody proceeding is not entitled to a delayed appeal pursuant to the Due Process Clauses of the United States and Ohio Constitutions.

Mother contends in her sole Proposition of Law that App.R. 5(A) extends to termination of parental rights cases. For the following reasons, her contentions are without merit and should be rejected.

A. THE DELAYED APPEAL IN OHIO

Before analyzing Mother's argument, it may be helpful to review briefly the history of the delayed appeal and the provisions of App.R. 5(A).

The delayed appeal, as it exists in Ohio, appears to have evolved from a historical accident. Before 1936, there was no time limit for filing a notice of appeal (then called a petition in error) from a criminal conviction. *See Boone v. State*, 109 Ohio St. 1, 7 (1923); *Nickel v.*

State, 6 Ohio C.C. 601, 602 (Warren Cir.1892); *Smith v. State*, 2 Ohio App. 334, 336-337 (6th Dist.1914).

In 1936, G.C. 13459-4 was enacted. The statute now placed a time limit on filing criminal appeals, and also codified an appeal beyond that time limit: "Such appeal, unless otherwise provided, may be filed as a matter of right within thirty days after sentence and judgment. After thirty days from such sentence and judgment such appeal may be filed only by leave of the court or two of the judges thereof." This language remained largely unchanged with the adoption of the Revised Code in 1953, then becoming R.C. 2953.05.

As was relevant to criminal appeals, R.C. 2953.05 was superseded in 1971 with the adoption of the Ohio Rules of Appellate Procedure. The time for filing an appeal remained at thirty days, in App.R. 4(A). The procedure for filing for what was now called a delayed appeal became part of App.R. 5(A). Under the rule, a defendant in a criminal case could appeal after the thirty day time limit only by motion to the court of appeals showing the reasons for not timely filing the appeal, accompanied by proposed errors and affidavits or portions of the record. The requirement of having to file proposed errors and accompanying record or affidavit material was removed in 1994.

After 1994, the delayed appeal remained substantively unchanged until 2003, when the rule was amended to permit delayed appeals from juvenile delinquency proceedings and serious youthful offender proceedings. The amendment was prompted by *In re Anderson*, 92 Ohio St.3d 63, syllabus (2001), which held that juvenile delinquency proceedings are civil cases, meaning that appeals from juvenile delinquency proceedings did not qualify for a delayed appeal. While the appellant in *In re Anderson* raised due process and equal protection arguments, those arguments were not addressed by the Court. *See id.* at 71-72 and fn. 3 (Cook, J., dissenting).

The 2003 amendment to App.R. 5(A) marked the first time that delayed appeals were extended to a civil case.

Delayed appeals having been extended to juvenile delinquency proceedings by rule amendment, Mother now asks the Court to extend the right to a delayed appeal to termination of parental rights cases.

B. Due Process Does Not Require a Delayed Appeal in Termination of Parental Rights Cases

Mother claims that the Due Process Clause of the Fourteenth Amendment to the United States Constitution[5] requires that a delayed appeal under App.R. 5(A) be available in termination of parental rights cases. For the reasons that follow, her contention is without merit and should be rejected.

1. The Matthews *Analysis Weighs Against a Delayed Appeal*

"Whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself." *McKane v. Durston*, 153 U.S. 684, 688 (1894). *Accord M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) ("[D]ue process does not independently require that the State provide a right to appeal."). Once an appellate process is created, the State's procedures must be in accord with constitutional due process. *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

"[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). As such, any proceeding that involves the termination of parental rights "must provide the parents

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[5] The "due course of law" provision in Section 16, Article I of the Ohio Constitution has been held the equivalent of the Due Process Clause of the United States Constitution. *Stetter v. R.J. Corman Derailment Svcs., L.L.C.*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶69.

with fundamentally fair procedures," *id.* at 754, i.e., procedures that are in accord with due process.

The courts have held that due process mandates that certain procedural protections required in criminal and juvenile delinquency cases have application in termination of parental rights cases, even if on a more limited scale. *See Lassiter v. Dept. of Social Svcs. of Durham Cty.*, 452 U.S. 18 (1981) (natural parents entitled to appointed counsel on a case-by-case basis, rather than as a blanket rule); *Santosky* (clear and convincing evidence standard applies to termination of parental rights cases, rather than preponderance of the evidence or beyond a reasonable doubt). But not all such protections extend to termination of parental rights cases. *See, e.g., In re Grant*, 10th Dist. Franklin No. 00AP-431, 2001 Ohio App. LEXIS 440, at *17 - *18 (Feb. 8, 2001) (no right to jury trials in termination of parental rights proceedings); *In re Myers*, 3d Dist. Seneca No. 13-06-48, 2007-Ohio-1631, ¶32-33 (in termination of parental rights proceedings, Fifth Amendment protection against self-incrimination only applies as in other civil cases, not as in criminal cases).

"[T]he nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (Parallel citations omitted.) *Santosky* at 754.

Balancing these factors, due process does not require extending a delayed appeal in termination of parental rights cases. The second factor, the risk of error, will be considered first.

a. Risk of error

The risk of error factor weighs only slightly in favor of the natural parent. An appeal is the direct means of correcting error in termination of parental rights proceedings, and the inability to undertake an appeal may allow error in the juvenile court proceedings to go uncorrected. But, the natural parent is already given a thirty day window to appeal. This thirty day window conforms with the maximum time for appeal recommended by the National Council of Juvenile and Family Court Judges. *See* National Council of Juvenile & Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (2000) 40.

Some errors may go undetected in the absence of a delayed appeal in termination of parental rights cases. But the same is true for petitions for postconviction relief—delayed appeals are not available to correct any error in the denial of such petitions. *State v. Nichols*, 11 Ohio St.3d 40, paragraph one of the syllabus (1984). The thirty day window is a sufficient time for a natural parent to appeal a termination of parental rights decision of the juvenile court. At best, this factor weighs slightly in favor of the natural parent.

b. Private interests affected

The private interest of the natural parent is substantial. *Lassiter*, 452 U.S. at 27. The rights of the natural parent to the care and companionship of a child are forever terminated when permanent custody of the child is granted to a children's service agency. Thus, the natural parent has an interest in having the juvenile court decision reviewed to confirm that the decision is without prejudicial error.

However, the natural parent's interest is not the only private interest that must be weighed. At the appellate stage of the proceedings, two other interests emerge: that of the child, and that of the foster and/or prospective adoptive parents.

"At the factfinding, the State cannot presume that a child and his parent are adversaries." *Santosky*, 455 U.S. at 760. But "[a]fter the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge." (Emphasis sic.) *Id.* "Once the case reaches the disposition phase, the best interest of the child controls." *In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, ¶11. At the appellate stage, the child's interest weighs heavily in favor of finality and moving toward adoption.

> It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There 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.

Lehman v. Lycoming Cty. Children's Svcs. Agency, 458 U.S. 502, 513-514 (1982).

A delayed appeal is completely contrary to the best interests of the child. Under App.R. 5(A), "Ohio courts have the discretion to permit a delayed direct appeal, no matter how long [an appellant] has waited." *Ortiz v. Wolfe*, 466 Fed.Appx. 465, 467 (6th Cir.2012). A child who needs finality and stability cannot achieve these goals if a delayed appeal may be allowed months, or even years, after the juvenile court's order terminating parental rights. No adoption can be initiated, because there is no concrete time when the natural parent's appeal time has expired. The child is left in legal limbo indefinitely, and harmed irreparably. *See* Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 Cap.U.L.Rev. 121, 121 (1999).

The interest of foster parents and/or prospective adoptive parents is also significant. Once the juvenile court proceedings have reached the dispositional stage, foster parents have an interest in finality. *See Santosky* at 761. Prospective adoptive parents also have a substantial interest in finality—no one will seek to adopt a child, if the natural parent may appeal the juvenile court's order at any time, subject only to the discretion of the appellate panel.

Given all of the private interests involved—natural parent, child, and foster/prospective adoptive parents—with the best interest of the child being foremost, this factor must be weighed in favor of finality and against a delayed appeal for the natural parent.

c. The governmental interest

The government interest weighs heavily against the natural parent. The government has a *parens patriae* interest in the welfare of children. *Santosky* at 766. While the government's interest must be aligned with a natural parent's interest at the factfinding stage, *id.* at 766-767, the interest of the natural parent and the State diverge after the final disposition of the juvenile court terminating parental rights. *Id.* at 767, fn. 17. The government has an interest in protecting children from natural parents who have already been adjudicated to be unfit by clear and convincing evidence.

The government has a significant interest in finality in termination of parental rights cases. "The State's interest in finality is unusually strong in child-custody disputes." *Lehman*, 458 U.S. at 513. The open-ended nature of a delayed appeal under App.R. 5(A) undermines the interest of finality. The current time limit of thirty days set by App.R. 4(A), on the other hand, gives needed finality to the juvenile court proceeding.

The government also has a strong interest in seeing that these children are adopted and not lost in "foster care drift." The federal and Ohio legislatures, through the Adoption and Safe

Families Act, Pub.L. No. 105-89, 111 Stat. 2115, and Am.Sub.H.B. No. 484, 147 Ohio Laws, Part II, 4189, have declared that the public policy of the United States and of the State of Ohio is to "shorten the length of time children spend in foster care and find permanent homes for foster children more quickly." *In re A.B.*, 110 Ohio St.3d 230, 2006-Ohio-4359, ¶18. The adoption of a child in the permanent custody of a public children's service agency cannot go forward until the appeal time from the juvenile court order has run or all appeals have been exhausted. The possibility of a delayed appeal increases the chance that the child will be left in foster care, without any progress toward a permanent home. "In the best of circumstances, the birth family will be the permanent family [for a child], but when it cannot, we owe it to these children to give them their best opportunity to be adopted into a loving, safe family." *In re C.B.*, 129 Ohio St.3d 231, 2011-Ohio-2899, ¶24 (McGee Brown, J., concurring).

The governmental interest weighs heavily against due process requiring a delayed appeal for a natural parent.

d. Balancing the factors

The risk of error factor weighs, at best, slightly in the favor of the natural parent being granted a delayed appeal. The private interests of parties concerned—the natural parent, the child, and the foster and/or prospective adoptive parents—considered together, weigh heavily against a delayed appeal. Likewise, the governmental interest weighs heavily against the natural parent being able to seek a delayed appeal. Balancing these factors, due process does not require that a natural parent whose parental rights have been terminated is entitled to a delayed appeal under App.R. 5(A).

2. The Oregon Court of Appeals Agrees with the Mathews *Analysis*

The Oregon Court of Appeals recently rejected an argument similar to that of Mother in *Dept. of Human Svcs. v. W.S.C.*, 248 Or.App. 374, 273 P.3d 313 (2012). In *W.S.C.*, the father's parental rights had been terminated. His appeal was filed outside the time set by statute. Father argued that due process required that he should be allowed to file an appeal outside that time.

The Oregon Court of Appeals analyzed the due process argument using the *Mathews* factors. *Id.* at 385. As to the private interest factor, the court found that "significant procedural safeguards" were required, because of the important interests at stake for the father. *Id.* at 386. The second factor—risk of error—was found to be "slight." *Id.* The court found that the governmental interest factor also weighed against the father, given the strong interest in finality in custody disputes and that "a never-ending appellate process is sharply at odds with that interest." *Id.*

The *W.S.C.* court's analysis easily applies to this case. This Court should find that analysis persuasive and hold that a delayed appeal under App.R. 5(A) does not extend to termination of parental rights cases.

This Court should affirm the judgment of the Court of Appeals.

CONCLUSION

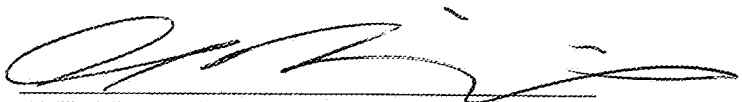
Before Mother even filed her notice of appeal, B.C.'s adoption was finalized in the Clark County Probate Court. As a result, the Clark County Juvenile Court lost jurisdiction over B.C., and Mother cannot receive any relief if the judgment of the juvenile court is reversed. The appeals are moot and should be dismissed.

On the merits, due process does not entitle Mother to a delayed appeal under App.R. 5(A). Balancing all of the *Mathews* factors, the interests weigh heavily against allowing delayed appeals in termination of parental rights cases. This result is confirmed by the analysis of the Oregon Court of Appeals in *Dept. of Human Svcs. v. W.S.C.*

For the foregoing reasons, the Supreme Court of Ohio should (1) dismiss the appeals as moot or as improvidently allowed and improvidently certified, or (2) affirm the judgment of the Court of Appeals.

Should this Court determine that Mother is entitled to a delayed appeal, Appellee requests that this matter be remanded, so that the Court of Appeals may determine in the first instance whether Mother has sufficiently demonstrated good cause for granting a delayed appeal.

Respectfully submitted,



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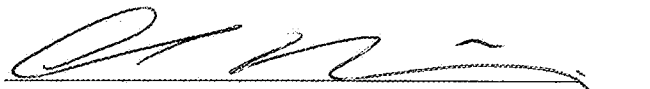
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellee was served by regular U.S. mail upon Linda J. Cushman, Attorney for Appellant, 150 North Limestone Street, Suite 206, Springfield, OH 45501, on this 31st day of March, 2014.



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SEC. **13459-4.** Appeal filed, when. Such appeal, unless otherwise provided, may be filed as a matter of right within thirty days after sentence and judgment. After thirty days from such sentence and judgment such appeal may be filed only by leave of the court or two of the judges thereof.

HISTORY.—113 v. 123 (212), ch. 38, § 4; 116 v. 104 (117), § 2. Eff. 1-1-36.

Sec. 2953.05 (13459-4). **Appeal filed.** Appeal under section 2953.04 of the Revised Code, may be filed as a matter of right within thirty days after sentence and judgment. After thirty days from sentence and judgment, such appeal may be filed only by leave of the court or two of the judges thereof.

2151.353 Orders of disposition of abused, neglected or dependent child.

(A) If a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(1) Place the child in protective supervision;

(2) Commit the child to the temporary custody of a public children services agency, a private child placing agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home, or in any other home approved by the court;

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings. A person identified in a complaint or motion filed by a party to the proceedings as a proposed legal custodian shall be awarded legal custody of the child only if the person identified signs a statement of understanding for legal custody that contains at least the following provisions:

(a) That it is the intent of the person to become the legal custodian of the child and the person is able to assume legal responsibility for the care and supervision of the child;

(b) That the person understands that legal custody of the child in question is intended to be permanent in nature and that the person will be responsible as the custodian for the child until the child reaches the age of majority. Responsibility as custodian for the child shall continue beyond the age of majority if, at the time the child reaches the age of majority, the child is pursuing a diploma granted by the board of education or other governing authority, successful completion of the curriculum of any high school, successful completion of an individualized education program developed for the student by any high school, or an age and schooling certificate. Responsibility beyond the age of majority shall terminate when the child ceases to continuously pursue such an education, completes such an education, or is excused from such an education under standards adopted by the state board of education, whichever occurs first.

(c) That the parents of the child have residual parental rights, privileges, and responsibilities, including, but not limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support;

(d) That the person understands that the person must be present in court for the dispositional hearing in order to affirm the person's intention to become legal custodian, to affirm that the person understands the effect of the custodianship before

the court, and to answer any questions that the court or any parties to the case may have.

(4) Commit the child to the permanent custody of a public children services agency or private child placing agency, if the court determines in accordance with division (E) of section 2151.414 of the Revised Code 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)(1) of section 2151.414 of the Revised Code that the permanent commitment is in the best interest of the child. If the court grants permanent custody 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.

(5) Place the child in a planned permanent living arrangement with a public children services agency or private child placing agency, if a public children services agency or private child placing agency requests the court to place the child in a planned permanent living arrangement and if the court finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child and that one of the following exists:

(a) The child, because of physical, mental, or psychological problems or needs, is unable to function in a family-like setting and must remain in residential or institutional care now and for the foreseeable future beyond the date of the dispositional hearing held pursuant to section 2151.35 of the Revised Code.

(b) The parents of the child have significant physical, mental, or psychological problems and are unable to care for the child because of those problems, adoption is not in the best interest of the child, as determined in accordance with division (D)(1) of section 2151.414 of the Revised Code, and the child retains a significant and positive relationship with a parent or relative.

(c) The child is sixteen years of age or older, has been counseled on the permanent placement options available to the child, is unwilling to accept or unable to adapt to a permanent placement, and is in an agency program preparing the child for independent living.

(6) Order the removal from the child's home until further order of the court of the person who committed abuse as described in section 2151.031 of the Revised Code against the child, who caused or allowed the child to suffer neglect as described in section 2151.03 of the Revised Code, or who is the parent, guardian, or custodian of a child who is adjudicated a dependent child and order any person not to have contact with the child or the child's siblings.

(B) No order for permanent custody or temporary custody of a child or the placement of a child in a planned permanent living arrangement shall be made pursuant to this section unless the complaint alleging the abuse, neglect, or dependency contains a

prayer requesting permanent custody, temporary custody, or the placement of the child in a planned permanent living arrangement as desired, the summons served on the parents of the child contains as is appropriate a full explanation that the granting of an order for permanent custody permanently divests them of their parental rights, a full explanation that an adjudication that the child is an abused, neglected, or dependent child may result in an order of temporary custody that will cause the removal of the child from their legal custody until the court terminates the order of temporary custody or permanently divests the parents of their parental rights, or a full explanation that the granting of an order for a planned permanent living arrangement will result in the removal of the child from their legal custody if any of the conditions listed in divisions (A)(5)(a) to (c) of this section are found to exist, and the summons served on the parents contains 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.

If after making disposition as authorized by division (A)(2) of this section, a motion is filed that requests permanent custody of the child, the court may grant permanent custody of the child to the movant in accordance with section 2151.414 of the Revised Code.

(C) If the court issues an order for protective supervision pursuant to division (A)(1) of this section, the court may place any reasonable restrictions upon the child, the child's parents, guardian, or custodian, or any other person, including, but not limited to, any of the following:

(1) Order a party, within forty-eight hours after the issuance of the order, to vacate the child's home indefinitely or for a specified period of time;

(2) Order a party, a parent of the child, or a physical custodian of the child to prevent any particular person from having contact with the child;

(3) Issue an order restraining or otherwise controlling the conduct of any person which conduct would not be in the best interest of the child.

(D) As part of its dispositional order, the court shall journalize a case plan for the child. The journalized case plan shall not be changed except as provided in section 2151.412 of the Revised Code.

(E)

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

decree of adoption is issued, except that the court may retain jurisdiction over the child and continue any order of disposition under division (A) of this section or under section 2151.414 or 2151.415 of the Revised Code for a specified period of time to enable the child to graduate from high school or vocational school. The court shall make an entry continuing its jurisdiction under this division in the journal.

(2) Any public children services agency, any private child placing agency, the department of job and family services, or any party, other than any parent whose parental rights with respect to the child have been terminated pursuant to an order issued under division (A)(4) of this section, by filing a motion with the court, may at any time request the court to modify or terminate any order of disposition issued pursuant to division (A) of this section or section 2151.414 or 2151.415 of the Revised Code. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties to the action and the guardian ad litem notice of the hearing pursuant to the Juvenile Rules. If applicable, the court shall comply with section 2151.42 of the Revised Code.

(F) Any temporary custody order issued pursuant to division (A) of this section shall terminate one year after the earlier of the date on which the complaint in the case was filed or the child was first placed into shelter care, except that, upon the filing of a motion pursuant to section 2151.415 of the Revised Code, the temporary custody order shall continue and not terminate until the court issues a dispositional order under that section. In resolving the motion, the court shall not order an existing temporary custody order to continue beyond two years after the date on which the complaint was filed or the child was first placed into shelter care, whichever date is earlier, regardless of whether any extensions have been previously ordered pursuant to division (D) of section 2151.415 of the Revised Code.

(G)

(1) No later than one year after the earlier of the date the complaint in the case was filed or the child was first placed in shelter care, a party may ask the court to extend an order for protective supervision for six months or to terminate the order. A party requesting extension or termination of the order shall file a written request for the extension or termination with the court and give notice of the proposed extension or termination in writing before the end of the day after the day of filing it to all parties and the child's guardian ad litem. If a public children services agency or private child placing agency requests termination of the order, the agency shall file a written status report setting out the facts supporting termination of the order at the time it files the request with the court. If no party requests extension or termination of the order, the court shall notify the parties that the court will extend the order for six months or terminate it and that it may do so without a hearing unless one of the parties requests a hearing. All parties and the guardian ad litem shall have seven days from the date a notice is sent pursuant to this division to object to and request a hearing on the proposed extension or termination.

(a) If it receives a timely request for a hearing, the court shall schedule a hearing to be held no later than thirty days after the request is received by the court. The court shall give notice of the date, time, and location of the hearing to all parties and the guardian ad litem. At the hearing, the court shall determine whether extension or termination of the order is in the child's best interest. If termination is in the child's best interest, the court shall terminate the order. If extension is in the child's best interest, the court shall extend the order for six months.

(b) If it does not receive a timely request for a hearing, the court may extend the order for six months or terminate it without a hearing and shall journalize the order of extension or termination not later than fourteen days after receiving the request for extension or termination or after the date the court notifies the parties that it will extend or terminate the order. If the court does not extend or terminate the order, it shall schedule a hearing to be held no later than thirty days after the expiration of the applicable fourteen-day time period and give notice of the date, time, and location of the hearing to all parties and the child's guardian ad litem. At the hearing, the court shall determine whether extension or termination of the order is in the child's best interest. If termination is in the child's best interest, the court shall terminate the order. If extension is in the child's best interest, the court shall issue an order extending the order for protective supervision six months.

(2) If the court grants an extension of the order for protective supervision pursuant to division (G)(1) of this section, a party may, prior to termination of the extension, file with the court a request for an additional extension of six months or for termination of the order. The court and the parties shall comply with division (G)(1) of this section with respect to extending or terminating the order.

(3) If a court grants an extension pursuant to division (G)(2) of this section, the court shall terminate the order for protective supervision at the end of the extension.

(H) The court shall not issue a dispositional order pursuant to division (A) of this section that removes a child from the child's home unless the court complies with section 2151.419 of the Revised Code and includes in the dispositional order the findings of fact required by that section.

(I) If a motion or application for an order described in division (A)(6) of this section is made, the court shall not issue the order unless, prior to the issuance of the order, it provides to the person all of the following:

(1) Notice and a copy of the motion or application;

(2) The grounds for the motion or application;

(3) An opportunity to present evidence and witnesses at a hearing regarding the motion or application;

(4) An opportunity to be represented by counsel at the hearing.

(J) The jurisdiction of the court shall terminate one year after the date of the award or, if the court takes any further action in the matter subsequent to the award, the date of the latest further action subsequent to the award, if the court awards legal custody of a child to either of the following:

(1) A legal custodian who, at the time of the award of legal custody, resides in a county of this state other than the county in which the court is located;

(2) A legal custodian who resides in the county in which the court is located at the time of the award of legal custody, but moves to a different county of this state prior to one year after the date of the award or, if the court takes any further action in the matter subsequent to the award, one year after the date of the latest further action subsequent to the award.

The court in the county in which the legal custodian resides then shall have jurisdiction in the matter.

Effective Date: 01-01-2001; 04-11-2005; 09-21-2006; 2008 HB7 04-07-2009

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4(B) for the filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave to appeal shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such 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 Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) 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.

(C) 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 thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion for leave to appeal is overruled 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. In the event that 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.

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.

Rule 5(A) Motion by defendant for delayed appeal.

The amendment to division (A) effective July 1, 2003, was in response to the Supreme Court's decision in *In re Anderson* (2001), 92 Ohio St. 3d 63, which held that adjudications of delinquency are not judgments to which App. R. 5(A) applies. The amendment made App. R. 5(A) apply to delinquency and serious youthful offender proceedings.

Rule 5(B) Motion to reopen appellate proceedings.

The addition of a new division (B) was to address state appellate proceedings following a federal court's granting of a conditional writ of habeas corpus that allows the prisoner to be freed if the state appellate court does not reopen appellate proceedings to address constitutional issues in the case. As a result of the addition of this new division (B), divisions (B) – (E) of the previous rule were relettered (C) – (F) respectively.