

# Children's Law Center of Indiana



## Adoption

9/25/14

In **In Re Adoption of O.R.**, 16 N.E.3d 965 (Ind. 2014), the Court affirmed the trial court's conclusion that Father's consent to his child's adoption was not required and that Adoptive Parents' adoption was in the child's best interest. *Id.* at 975. The Court also concluded that, in light of Father's attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship, Father's otherwise forfeited appeal deserved a determination on its merits. *Id.* at 972. The child was born out of wedlock in August 2006, and she was placed in foster care with Adoptive Parents when she was four months old. The child lived with Adoptive Parents for most of her life except for a period of about one year around 2007, when she lived with biological parents. During that time Adoptive Parents exercised regular visitation with the child. In 2008, Father contacted Adoptive Parents and asked them to assume temporary guardianship of the child. Father later changed his mind, but the trial court awarded Adoptive Parents temporary guardianship in 2008 and permanent guardianship in June 2009. In 2009, Father was serving a seven and a half year sentence in the Indiana Department of Correction for domestic battery and an adjudication as an habitual offender. Father was apparently released from incarceration in August of 2014 and is currently on parole.

In July 2012, Adoptive Parents filed a petition to adopt the child, who was almost six years old. The trial court held a hearing, at which Adoptive Parents and Father appeared with counsel. On May 9, 2013, the trial court entered an order in favor of Adoptive Parents. Among other things, the trial court concluded that Father's consent to adoption was not required because of Father's failure to communicate with and provide support for the child. The deadline for filing a Notice of Appeal from the trial court's order was June 10, 2013. Asserting that he was acting on his trial counsel's advice, Father wrote a letter to the trial court clerk which the clerk filed on June 6, 2013, requesting the appointment of appellate counsel to appeal the decision. Father's trial counsel did not file a Notice of Appeal. On June 19, 2013, Father's trial counsel filed a motion to withdraw, and the trial court granted the motion on July 1, 2013. On July 3, 2013, twenty-three days after the deadline to appeal had passed, the trial court entered an order appointing appellate counsel for Father. Fifteen days later, on July 18, Father's appellate counsel filed in the Court of Appeals a petition to accept "Amended Notice of Appeal," which was tendered with the petition. Father's counsel argued that Father's June 6 *pro se* letter to the trial court clerk should be deemed a timely filed Notice of Appeal in substantial compliance with the appellate rules. On August 16, the motions panel of the Court of Appeals granted Father's petition to accept his Amended Notice of Appeal. After the issues were briefed on the merits, in a memorandum

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decision, the Court of Appeals *sua sponte* dismissed Father’s appeal on the grounds that it lacked subject matter jurisdiction because Father did not timely file a Notice of Appeal. The Indiana Supreme Court granted Father’s petition to transfer, thereby vacating the Court of Appeal dismissal of Father’s appeal.

**The Court opined that the untimely filing of a Notice of Appeal is not a jurisdictional defect depriving the Appellate Courts of the ability to entertain an appeal, abrogating prior case law.** *Id.* at 971. The Court provided an historical overview of the Indiana Appellate Rules on initiating an appeal. *Id.* at 968-69. The Court noted that the current Appellate Rule 9(A), effective in 2012, states that a party initiates an appeal by filing a Notice of Appeal with the Clerk within thirty days after the entry of a Final Judgment is noted in the Chronological Case Summary and, unless the Notice of Appeal is timely filed, *the right to appeal shall be forfeited* except as provided by Post Conviction Rule 2. *Id.* at 969 (emphasis in opinion). The Court said that, consistent throughout the various iterations of the Rules is the notion that forfeiture of an appeal is the price one pays for the untimely filing of the necessary papers to effect an appeal. *Id.* Quoting numerous cases, the Court observed that the Indiana Supreme Court has consistently held that a party’s failure to file the necessary papers deprived the Appellate Courts of jurisdiction to entertain the appeal. *Id.*

The Court said that, subsequent to the Court’s last pronouncement on this issue in *Davis v. State*, 771 N.E.2d 647, 649 (Ind. 2002), the Court has noted “a tendency to confuse jurisdiction deflects with legal errors,” quoting *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E. 2d 453, 457 (Ind. 2012). *O.R.* at 970. Quoting *K.S. v. State*, 849 N.E.2d 538, 541 (Ind. 2006), the Court noted that this “tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction” has been shared by the bench and bar alike and has not been limited to Indiana. *O.R.* at 970. Again quoting *K.S.*, 849 N.E.2d at 541-42, the Court observed that, “Real jurisdictional problems would be, say, a juvenile delinquency adjudication entered in a small claims court, or a judgment rendered without any sort of service of process... characterizing other sorts of procedural defects as “jurisdictional” *misapprehends* the concepts.” *O.R.* at 970 (emphasis in *K.S.* opinion). The Court opined that Indiana case authority characterizing as “jurisdictional” the timely filing of a Notice of Appeal is just such a misapprehension. *Id.* The Court explained that: (1) the language of current Rule 9(A) does not mention jurisdiction at all; (2) forfeiture and jurisdiction are not the same; (3) forfeiture is defined in part as “[t]he loss of a right, privilege, or property because of a ... breach of obligation or neglect of a duty,” quoting Black’s Law Dictionary 765 (10<sup>th</sup> ed. 2014); (4) jurisdiction on the other hand “speak[s] to the power of the court *rather than to the rights or obligations of the parties*,” quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010) (emphasis added). *O.R.* at 970-971. The Court opined that the timely filing of a Notice of Appeal is jurisdictional only in the sense that it is a Rule-required prerequisite to the initiation of an appeal in the Court of Appeals. *Id.* at 971.

**The Court concluded that, in light of Appellate Rule 1, Father’s attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship, Father’s otherwise forfeited appeal deserved a determination on the merits.** *Id.* at 972. The Court said

that even though the right to appeal had been forfeited, there were extraordinary compelling reasons why this forfeited right should be restored. *Id.* at 971. The Court looked to *In Re Adoption of T.L.*, 4 N.E.3d 658, 661 (Ind. 2014), and observed that our appellate rules exist to facilitate the orderly presentation and disposition of appeals, and our procedural rules are merely means for achieving the ultimate end of orderly and speedy justice. *O.R.* at 971-72. The Court also noted that this policy has been incorporated into our Rules of Appellate Procedure. *Id.* at 972. The Court quoted App. R.1, which provides in part that: “The Court may, upon the motion of a party or the Court’s own motion, permit deviation from these Rules.” *Id.* The Court said that the Rules themselves provide a mechanism allowing the Court to resurrect an otherwise forfeited appeal. *Id.* The Court further observed: (1) Father sought the appointment of appellate counsel for the express purpose of appealing the decision; (2) counsel was ultimately appointed, but long after the deadline for the timely filing of his Notice of Appeal; (3) appellate counsel filed an Amended Notice of Appeal, which the motions panel of the Court of Appeals accepted as being sufficient; (4) perhaps most important, the Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and raise their children. *Id.* The Court opined that it is this unique confluence of a fundamental liberty interest along with “one of the most valued relationships in our culture” that has often influenced this Court as well as our Court of Appeals to decide cases on their merits, rather than dismissing them on procedural grounds (multiple citations omitted). *Id.*

**The Court found there was clear and convincing evidence that Father’s consent to the child’s adoption was not required because, while the child was in the custody of another person for at least one year, Father failed without justifiable cause to communicate significantly with the child when able to do so.** *Id.* at 974. The Court noted that, pursuant to I.C. 31-19-9-1(a)(2), a trial court may only grant a petition to adopt a child born out of wedlock if both the mother of the child and the father of the child whose paternity has been established consent to the adoption. *Id.* at 973. The Court then looked to IC 31-19-9-8(a)(2)(A), which provides circumstances under which consent is not required, and includes “[a] parent of a child in the custody of another person if for a period of a least one (1) year the parent... fails without justifiable cause to communicate significantly with the child when able to do so...” *Id.* at 973. Although the trial court found that several other statutory provisions also applied to Father, the Court observed that the statute is written in the disjunctive such that the existence of any one of the circumstances provides sufficient ground to dispense with consent. *Id.* Because the Court concluded that the trial court properly relied on the statutory ground that, for a period of at least one (1) year, Father failed without justifiable cause to communicate significantly with the child although he was able to do so, the Court did not address other provisions on which the trial court might also have relied. *Id.* The Court noted the following evidence in support of the trial court’s finding: (1) Father did not dispute that the child was in the custody of another person for a period of at least one (1) year; (2) Father admitted that the only communication he had with the child in over a six year period of time was a phone call in 2011; (3) Father admitted that, while incarcerated over the last several years, he had never attempted to write a letter to the child or to communicate with her in any other way; (4) Father’s claim that the judge had ordered Adoptive Parents to bring the child to visit him in prison was contradicted by the record; (5) although he blamed his failure to investigate a means of obtaining the child’s address by communicating with

Adoptive Parents' counsel or the court, Father's claim of unfamiliarity with the court system was undermined by his adjudication as an habitual offender. Id. at 973-74.

**The Court found that the record supported the trial court's conclusion that Adoptive Parents' adoption of the child was in the child's best interest.** Id. at 975. In support of the trial court's conclusion, the Court noted the following findings: (1) Adoptive Parents have provided a loving safe, and stable home for the child during her formative years; (2) Adoptive Parents desired to continue raising the child; (3) the child had known no home other than the home of Adoptive Parents for six of the nearly eight years of her life; (4) the child was a part of Adoptive Parents' family; (5) Father was incarcerated for a domestic battery conviction. Id. at 974-75. Father claimed that he was due to be released from incarceration in August 2014 and cited case law in which the Court had reversed the termination of parental rights where incarcerated parents were soon to be released from prison, namely In Re G.Y., 904 N.E.2d 1257 (Ind. 2009) and In Re J.M., 908 N.E.2d 191 (Ind. 2009). O.R. at 975. The Court found that these cases were readily distinguishable from Father's situation in that: (1) the parents had an established relationship with the children prior to incarceration or maintained significant communication with them while in prison; (2) the child in the O.R. case had no existing relationship with Father. Id. at 975.