Circuit Court for Anne Arundel County
Case No. C-02-JV-22-000136

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

Nos. 2022 & 454

September Term, 2022 & 2023

IN RE: G.W.

Arthur,
Reed,
Tang,
JJ.

Opinion by Reed, J.

Filed: December 4, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104 (a)(2)(B).

In the instant appeal, the Appellant, S.B. ("Mother") appeals from a denial of her Motion to Revise Judgment following the trial court's decision in her termination of parental rights ("TPR") case. The Appellant further requests that this Court reach the merits of her TPR case and reverse the trial court.

In bringing this appeal, Appellant presents two issues for appellate review, which we reorder and restate as follows:

I. Whether the trial court erred or abused its discretion in denying Mother's Motion to Revise Judgment when there was an irregularity in the service of the Order on trial counsel.

II. Alternatively, whether trial counsel for Mother provided ineffective assistance of counsel by failing to timely notice an appeal.

III. Whether the trial court erred or abused its discretion by granting the non-consensual Petition to Terminate Mother's parental rights.[1]

Appellee, the Anne Arundel Department of Social Services ("DSS" or "the Department") filed a Motion to Dismiss the instant appeal pursuant to Md. Rule 8-602(b). For the reasons outlined *infra*, we grant the Motion to Dismiss the appeal in No. 2022 for

[1] Appellant identifies the following two questions for appellate review in her brief:

I. Should the Court reach the merits of mother's TPR appeal notwithstanding the belated notice of appeal?
   a. Did the trial court err in denying mother's motion to revise?
   b. Alternatively, was mother's counsel ineffective in failing to timely notice an appeal and is allowing the belated appeal to proceed the proper remedy for counsel's errors?

II. Did insufficient evidence support the TPR?

the September Term of 2022. As to the second appeal in No. 454 of the September Term of 2023, we hold that there was a procedural irregularity in the service of the Order to trial counsel for Mother and remand the case to the trial court for a hearing on Mother's Motion to Revise Judgment. We decline to reach the merits of the TPR decision.

FACTUAL & PROCEDURAL BACKGROUND

By way of background, the minor child, G.W. was born prematurely on April 1, 2020. Mother gave birth to G.W. at home and without medical assistance. Mother was arrested in July 2020 and charged with second degree murder and possession of a dangerous weapon with intent to injure arising from the death of Mr. L.D. Mr. L.D. and Mother are the parents of six children together. However, Mr. L.D. is not the father of the minor child in the instant case. Following her criminal charges, Mother arranged for the minor child's biological father to take care of G.W., assisted by the child's godparent, A.C. The Department obtained custody of G.W. after A.C. took the child to Philadelphia and failed to take G.W. to various medical appointments.

By Order of the Circuit Court for Anne Arundel County, dated October 7, 2020, G.W. was adjudicated to be a child in need of assistance ("CINA") and the parents were ordered to participate in substance abuse assessments, psychological evaluations, parenting classes, anger management classes, and therapy. The court ordered that G.W. be placed in the custody of DSS and further ordered that Mother was awarded, at a minimum, monthly visitation with G.W. The court ordered that the visitation be conducted in-person if the facility allowed and allowed for virtual visitation if necessary. Appellant did not have visitation with the minor child from July 2020 until June 2022 "due to her incarceration

and restrictions at the facilities related to the COVID-19 pandemic." G.W.'s father remained involved in this matter until the time of his death on September 18, 2021.

After the court granted custody of G.W. to the Department, the minor child was placed in the care of his foster mother at approximately four months old in August 2020. G.W. has remained in his foster mother's care since that initial placement.

During the interim when visitation was not available, the Department sent various correspondences to Mother while she was incarcerated. On December 23, 2020, the Department informed mother that G.W. was doing well in his foster home and currently no programs were available due to the pandemic. A letter dated, February 9, 2021, reiterated that programming continued to be unavailable through the Detention Center. DSS sent another letter on May 18, 2021, that informed Mother of her obligations to complete programming once again.

On July 19, 2021, in Case No. C-02-CR-20-000865, Mother pled guilty to manslaughter and possession of a dangerous weapon with the intent to injure. On August 20, 2021, the Circuit Court for Anne Arundel County sentenced mother to ten (10) years with all but eight (8) years suspended with credit for her time served beginning on July 6, 2020.

The Department wrote another letter to Mother on September 8, 2021, that updated Mother on G.W.'s status, reminded her of her programming obligations, and informed her that DSS was exploring G.W.'s maternal grandmother as a "possible relative resource." DSS sent another correspondence on November 3, 2021, to Mother at her new institutional facility, Maryland Correctional Institute for Women and relayed that the DSS Agent was

unable to reach Mother's new case managers to inquire about available programming at the new facility.

The parties appeared before the Circuit Court for Anne Arundel County for a trial on DSS's Petition to Terminate Parental Rights on November 29 and 30, 2022. The trial court heard testimony from Sabrina Stevens, a DSS worker assigned to the case from August 2020 through July 2022, and Safiyyaa Abdul-Bari, another DSS worker that handled the case starting in July 2022. The court also heard from G.W.'s foster mother and Sheila Smith-Perdomo, a family friend. Appellant took the stand and testified as to her desire to maintain her parental rights concerning G.W.

On the second day of trial, Appellant requested to withdraw her objection to the termination of her parental rights and be excused from further participation in the hearing. The trial court declined to grant her request to withdraw her objection but excused her attendance for the rest of the trial. After hearing closing arguments from counsel, the court below announced its decision:

> …I have considered all of the factors set forth in 5-203[.] [T]he Court does believe and does find that there is clear and convincing evidence presented to the Court, both through the written evidence, as well as the testimonial evidence that terminating the parental rights of both [G.W.'s father] and of [GW's mother] is an appropriate determination.

The court found that Mother was both unfit and exceptional circumstances existed due to "her incarceration and lack of progress as a whole in her dealing with the Department of Social Services." The court concluded that due to these circumstances "a continuation of the relationship [would be] detrimental to baby [G.W.]."

The trial court issued a written order memorializing its decision and granting the

Department's Petition for TPR and guardianship on December 20, 2022. Mother filed a notice of appeal on January 23, 2023. Subsequently, DSS filed a Motion to Dismiss on January 31, 2023. Counsel for the minor child filed a Motion to Dismiss on February 2, 2023. On February 6, 2023, Counsel for Mother filed an Opposition to Motion to Dismiss and a Request to Re-issue Decision, which was stricken from the case as deficient under Rule 20-203(d).[2] On February 14, 2023, the trial court ruled that it had no authority to dismiss the Notice of Appeal and directed that this Court had jurisdiction over the issue. Next, Mother filed a Motion to Revise Judgment under Md. Code Ann., Cts. & Jud. Proc. § 6-408 ("CJP") and Md. Rule 2-535(b) on March 15, 2023. DSS filed an Opposition to Mother's Revisory Motion shortly thereafter.

The trial court held a hearing on the Motion to Revise Judgment on May 1, 2023. At that hearing, the court heard testimony on the issue of whether trial counsel was properly served the Order granting the TPR. The parties stipulated as to the testimony of the clerk who was responsible for disseminating the signed Order. The parties stipulated that the trial court signed the Order on December 7, 2022. The Order was docketed into the MDEC (Maryland Electronic Courts) system on December 20, 2022. Following the signature, a gold sealed copy of the Order was sent through regular mail to all parties on December 21, 2022. The Order was sent through regular mail as a result of a policy of the Clerk's Office of Anne Arundel County at that time. As a result of the litigation in this case, the Clerk's Office reviewed the applicable Rules and concluded that the Order should have been served

[2] Mother never corrected or re-filed the deficient filing, titled "Opposition to Motion to Dismiss and Request to Re-issue Decision."

via MDEC in addition to being sent through regular mail.

Mother's trial counsel was from the Office of the Public Defender. He filed an Affidavit in Support of Mother's Motion to Revise Judgment under CJP § 6-408 and Md. Rule 2-535(b). At the hearing on the Motion to Revise and relying on the Affidavit, Mother's counsel argued that he never received a physical copy of the Order that had been sent through regular mail. Trial counsel continued that he believed that the Order would come through MDEC service. On January 23, 2023, trial counsel went on to MDEC to check on the status of the Order and realized that the Order had been docketed on December 20, 2022. Based on this realization, Mother's counsel filed a Notice of Appeal on the same day that he discovered the Order.

At the hearing on the motion, counsel for DSS argued that no irregularity occurred in this case under Rule 2-535(b). Counsel for the Department continued that Mother's counsel failed to act with ordinary diligence. DSS argues that the trial court's Order Granting the TPR was available on MDEC beginning on December 20 and Mother's counsel failed to stay apprised of the electronic case file. Additionally, Mother's counsel argued in the alternative that Mother should not be held responsible for any errors of counsel. In support of this argument, Mother cited *Rosales v. State*, 463 Md. 552 (2019).

After hearing argument from all parties on the Motion to Revise Judgment, the trial court proceeded to deny the motion. The trial court reasoned that "while I agree that there is some irregularity, I don't believe that it is the irregularity that is interpreted into 535." The court continued by ruling:

[I]in reviewing the rules and in reviewing the request for a revisory motion

> for the sole purpose of correcting the timeliness or lack of timeliness on the filing on the appeal, I can find no case, and I can find no basis of law that would suggest that the failure to serve by MDEC when the Court file reflected that service was made in accordance with the process at the time that the clerk sent the notices, at the time in the process which they were required, that the MDEC note and notices and information contained in the file were available as early as…December 20th with the 45 day time frame from the decision being January 14. None of that supports the Court having the authority to execute… a new order. And so for those reasons, the Court has to deny the request to reissue it with a new date.

Mother timely filed an appeal to the trial court's order denial of her Motion to Revise Judgment. These two appeals have been consolidated into the case *sub judice*.

DISCUSSION

I. Appellee's Motion to Dismiss

As a preliminary matter, we must resolve the Department's Motion to Dismiss before turning to the issues raised on appeal. DSS moves to dismiss the appeal in No. 2022, Sept. Term 2022. First, we hold that the mandatory strictures of dismissal prescribed by Md. Rule 8-602(b) require dismissal of the first appeal. Next, we conclude that Mother did not acquiesce to the non-consensual TPR. Therefore, and for the reasons outlined *infra*, the Court grants the Department's Motion to Dismiss the appeal in No. 2022, Sept. Term 2022.

A. Trial court compliance with the requirements for service of an Order under the Rules.

DSS argues that Mother's appeal of the final judgment should be dismissed as untimely. Mother's Notice of Appeal was filed on January 23, 2023, thirty-four days after the trial court entered its final order. The Department contends that because the Notice of Appeal was not filed within thirty days of the entry of the judgment this Court must dismiss

the appeal pursuant to Md. Rule 8-602(b)(2). DSS concludes their argument by saying if their Motion to Dismiss is granted as to the first appeal, the second filed appeal, docketed as No. 454, Sept. Term 2023 should be dismissed as moot. The Department points this Court to *Rosales v. State*, 463 Md. 552 (2019) and moves to dismiss the Appellant's appeal as untimely.

Mother summarily responds to this argument by asserting that the appeal should not be dismissed because Mother did not acquiesce to the Order. Furthermore, Mother contends that the appeal should not be dismissed due to the occurrence of a procedural irregularity or, alternatively, ineffective assistance of counsel.

Timeliness of the Appeal

Md. Rule 8-602 governs when an appeal should be dismissed. Whereas Rule 8-202(a) contains the general principle that a notice of appeal "shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Md. Rule 8-602(b) provides that: "[t]he court **shall** dismiss an appeal if: (1) the appeal is not allowed by these Rules or other law; or (2) the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202." (emphasis added). Appellant concedes that the appeal filed thirty-four days after the deadline was not timely filed. The Appellant then moved for the juvenile court to reissue its December 20, 2022 Order that it had appealed in an untimely manner.

Application of the Guardianship Rules

Because this is a guardianship proceeding we examine the Maryland Rules governing guardianships. In a guardianship proceeding, Md. Rule 11-315 governs the

contents of an order following a determination by the trial court. Of particular importance in this matter, Rule 11-315(d) covers the dissemination of that order to the parties. It reads:

> The court shall send a copy of each order to **(1) each party or, if represented, to the attorney for the party**; (2) each of the child's living parents who has not waived the right to notice; (3) each living parent's last attorney of record in the CINA case; and (4) the child's last attorney of record in the CINA case.

Rule 11-315(d) (emphasis added). Rule 11-107 instructs that all papers in a juvenile action "shall be served in the manner provided by Rule 20-205 in MDEC counties." Md. Rule 11-107(b). Rule 20-205 details that "[o]n the effective date of filing, the MDEC system shall electronically serve on registered users entitled to service all other submissions filed electronically." Md. Rule 20-205(d)(1). In this case, the trial court did not consider Rule 20-205 at the hearing on the Motion to Revise. Instead, the trial court focused on Rule 20-106(c). Rule 20-106 (c) covers MDEC submissions by registered users. The Rule makes an exception that items that have unique physical characteristics do not need to be filed electronically. The court continued that because the Order was sent out with a gold seal by the clerk's office, it would not be sent electronically through MDEC.

Appellant relies on Rule 20-205 to support her contention that the appeal was not untimely. Anne Arundel County is an MDEC county. It is clear on the record that if Anne Arundel County had disseminated it through MDEC Mother would have received the filing and timely noted an appeal.

In *Rosales v. State*, the Supreme Court of Maryland ultimately ruled on the admissibility of certain evidence in a criminal jury trial after addressing the State's

opposition to appellate jurisdiction of the case.[3] 463 Md. 552, 557 (2019). On appeal, the State argued that the Court did not have jurisdiction to hear the appeal. *Id.* at 561-62. The Court clarified that Rule 8-202(a) operates as a claims processing rule not as a jurisdictional bar to appellate review. *Id.* at 568. The reframing of the operation of Rule 8-202(a) reflects the change in the statutory scheme in Maryland when the 1957 Code was adopted.[4] *See id.* at 562-68. Accordingly, the operation of Rule 8-602 is "less rigid" as a claims-processing rule. *Id.* at 568. The Court clarified that a reviewing court must analyze the claim for adherence to the Maryland Rules and whether the doctrines of waiver or forfeiture apply. *Id.*

Pursuant to *Rosales*, we review the pending claim for adherence to the Maryland Rules. After the trial court signed the Order granting the TPR, the clerk's office physically mailed the Order to the attorneys in the case in compliance with Rule 11-315(d). However, the court failed to abide by the conjunction of Rule 11-107(b) and 20-205(d)(1). The Order in this case was not served electronically despite Anne Arundel County using the MDEC system. Instead, the Clerk's Office mailed a gold seal copy of the Order out through the

[3] After ruling on the appealability of the claim under Rule 8-202, the Supreme Court moved to the merits of the criminal appeal. At that stage, the Court ruled that a witness' prior convictions were admissible at trial for impeachment purposes. However, the Court concluded that the exclusion of the prior convictions at trial was harmless error.

[4] As discussed by the Supreme Court in *Rosales*, before 1957, the thirty-day limitation to file a notice of appeal was both statutorily conferred and contained within the Maryland Rules. However, in 1957, the General Assembly removed the thirty-day limitation to file an appeal from Maryland's statutory scheme. This shift concerning the time to file an appeal remained unaddressed until the Supreme Court of Maryland clarified the issue. *Rosales,* 463 Md. at 562-68.

mail pursuant to the courthouse policy at the time of this case. Mother's trial counsel was a registered user on MDEC and was entitled to receive electronic service of the Order by the Clerk's Office.[5] The record indicates that Mother's trial counsel believed that the Order would be served electronically. At the hearing on the Motion to Revise, Mother's counsel also argued that orders occasionally take "a very long time" to be generated. After he did not receive any such filing, counsel navigated to the case on MDEC on January 23, 2023, and realized that the Court's Order had been entered.[6] Trial counsel promptly filed a Notice of Appeal the very same day.

Doctrine of Waiver

Next, we turn to address whether the doctrines of waiver or forfeiture apply in this matter. *Rosales*, 463 Md. at 568. The Department argues that Mother has waived both her right to appeal the final Order or to file a revisory motion by acquiescing to the TPR. As we discuss *infra*, we decline to apply the acquiescence doctrine given the facts below. *See* Section I.B. Waiver is "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 531 (1964). Furthermore, waiver occurs when the parties enter into an express agreement or when the circumstances demonstrate. *Id.* When a person causes a delay, they cannot then complain of the actions of others. *State v. Musgrove*, 241

[5] Anecdotally, the Record indicates that the Clerk's Office for Anne Arundel County has changed their policy concerning the service of Orders. Following this case, the Clerk's Office reviewed the rules and concluded that Orders needed to be served via MDEC.

[6] Counsel did concede that "if I had to do it over again I would have been monitoring the case a lot more often than I did."

Md. 521, 532 (1966). We conclude that Mother was not the primary cause of delay in this case, but instead, the irregularities in the service of the Order. Mother did not relinquish her right to appeal and therefore has not waived it.

Accordingly, the doctrines of waiver and forfeiture are not applicable in this action. Following Mother's belated notice of appeal, the other parties to the action moved to dismiss the appeal as untimely. Mother opposed these motions and ultimately filed her Motion to Revise Judgment to pursue a remedy to her belated notice of appeal. Mother did not forfeit or waive any challenge in this action.

Despite the issues that arose in the service of the Order, we must return to the mandatory nature of Rule 8-602(b)(2). At the risk of repetition, the Rule says the Court "shall" dismiss the appeal if "the notice of appeal was not filed with the lower court within the time prescribed by Rule 8-202." In the instant case. Mother concedes that her notice of appeal was untimely. Following the expiration of the thirty-day deadline, both the Department and G.W. moved to dismiss the appeal. As the Supreme Court of Maryland said, "Maryland Rule 8-202(a) remains a binding rule on appellants, and this Court will continue to enforce the Rule." Because Appellant failed to file a notice of appeal within thirty days as required by Rule 8-202(a), we are required to dismiss the appeal in No. 2022, Sept. 2022 pursuant to Rule 8-602(b)(2).

The Department argues that if Mother's first appeal is dismissed as untimely then her second appeal is rendered moot. We disagree. Although the irregularity in the service of the Order does not excuse the untimely appeal, it does form the basis for a Motion to Revise. Therefore, we proceed to consider the appeal to the denial of Mother's Motion to

Revise *infra*.

B. Acquiescence to the non-consensual termination of parental rights.

The Department asserts that Mother acquiesced to the non-consensual TPR. In support of this proposition, DSS cites to *In re M.H.*, 252 Md. App. 29 (2021), wherein this Court held that a father in a CINA proceeding did not acquiesce to his motion to dismiss being denied when he agreed to a continuance. *Id.* at 46. In this case, the Department alleges that Mother withdrew her objection to the TPR at the trial court level and also failed to challenge any of the bases for the circuit court's ruling. DSS asks this Court to find that Mother acquiesced to the granting of the petition and therefore should be estopped from raising the issue on appeal.

In response, Mother points to the record below that reflects that the trial court expressly found that Mother could not withdraw her objection to the petition on the second day of trial. Mother continues that the acquiescence doctrine has been narrowly construed by Maryland courts and is inapposite in this matter. Mother contends that she never consented to the TPR and fundamental fairness dictates that her appeal should proceed.

The rule of acquiescence states that a party "is not entitled to appeal from a judgment or order if that party consented to or acquiesced in that judgment or order." *In re Nicole B.*, 410 Md. 33, 64 (2009). This Court briefly examined the acquiescence rule in *M.H.*, 252 Md. App. at 46-47. In *M.H.*, the minor child's father strongly opposed DSS's CINA petition and filed a motion to dismiss that alleged that the petition failed to sufficiently allege that minor child was a CINA. *Id.* at 37. With the agreement of all parties, the trial court continued the case so that DSS could screen father's relatives for a potential

placement of the minor child. *Id.* at 38. When the case reconvened, the trial court denied the father's motion to dismiss and ultimately ruled that the child was a CINA. *Id.* at 48. On appeal, the Court of Special Appeals ruled that father did not acquiesce to the denial of his motion to dismiss by agreeing to the continuance and that the issue was properly preserved for appeal. *Id.* at 47.

The Supreme Court of Maryland addressed the preliminary issue of the acquiescence rule in a CINA case concerning the application of the Indian Child Welfare Act. *In re Nicole B.*, 410 Md. 33 (2009). In *Nicole B.*, the father of various children that had been adjudicated CINA appealed the decision of the trial court to close the ongoing CINA case. *Id.* at 57. While at the trial court, the father admitted that he could not care for the children and recommended that the children be placed with their mother or a relative. *Id.* at 64-65. On appeal, the Court found that the father did have standing to appeal the circuit court's decision to close the case despite his acquiescence that he could not care for the children. *Id.* at 65.

As Mother argued, the trial court in this matter expressly found that Mother could not withdraw her objection to the Petition and proceeded with a non-consensual TPR case. As the trial court noted, "[T]o withdraw your objection at the conclusion of a trial because you believe that the wind isn't blowing in your way is not a circumstance contemplated by the Court." Furthermore, the court later added, "…but with the full acknowledgement that there is not a consent on behalf of the mother." Therefore, the Court does not find the argument that Mother acquiesced to the TPR finding to be persuasive. Accordingly, pursuant to prior decisions within Maryland jurisprudence and for the reasons stated above,

the Court does not grant the Department's Motion to Dismiss on this basis.

II. Mother's Motion to Revise Judgment

A. Parties' Contentions

Mother argues that the trial court abused its discretion by denying her Motion to Revise Judgment under CJP § 6-408 and Md. Rule 2-535(b). Mother contends that an irregularity arose when counsel was not notified of the trial court's TPR order through electronic service on MDEC. Mother argues that trial counsel acted with ordinary diligence upon discovering that the Order granting the TPR had been entered by the trial court. For these reasons, Mother asks that we conclude that the trial court erred in denying her Motion to Revise.

The Department responds that the trial court properly exercised its discretion to deny Mother's Motion to Revise Judgment. DSS argues that Mother fails to meet the "narrow circumstances" where the court may revise a judgment outside of thirty days of the issuance of the Order. *See Facey v. Facey*, 249 Md. App. 584, 604-05 (2021) (reviewing the tests that a reviewing court must employ after a motion to revise is filed that alleges jurisdictional mistake or fraud in the judgment). Notably, the Department does not affirmatively assert that there was no irregularity in this case.[7] Instead, they proceed to argue that Mother's trial counsel did not act with ordinary diligence. DSS contends that trial counsel's fifty-one (51) day delay in filing the Motion to Revise is strong evidence of

[7] At oral argument on October 3, 2023, counsel for the Department conceded that the failure to serve the Order on Mother's trial counsel via MDEC was a procedural irregularity.

dilatory behavior.

Counsel for the minor child no longer opposes Mother's notice of appeal as untimely but still asks this Court to affirm the judgment of the trial court.

B. Standard of Review

Where fraud, mistake, or irregularity are determined to exist, we normally review the circuit court's decision whether to grant a motion to revise a judgment pursuant to Maryland Rule 2-535(b) under an abuse of discretion standard. *See Peay v. Barnett*, 236 Md. App. 306, 315 (2018); *see also Wells v. Wells*, 168 Md. App. 382, 394 (2006). The existence of "a factual predicate of fraud, mistake, or irregularity necessary to support vacating a judgment under Rule 2-535(b)," is a question of law. *Wells*, 168 Md. App. at 394 (quoting *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475-76 n.5 (1997)). "The burden of proof in establishing fraud, mistake, or irregularity is clear and convincing evidence." *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008).

C. Analysis

Md. Rule 2-535 and CJP § 6-408 govern the trial court's authority to alter or revise a judgment. Md. Rule 2-535 provides:

> (a) **Generally**. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534. A motion filed after the announcement or signing by the trial court of a judgment or the return of a verdict but before entry of the judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.
> (b) **Fraud, Mistake, Irregularity**. On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.
> (c) **Newly-Discovered Evidence**. On motion of any party filed within 30

> days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2-533.
> (d) **Clerical Mistakes**. Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court.

Md. Rule 2-535. Whereas CJP § 6-408 says:

> For a period of 30 days after the entry of a judgment, or thereafter pursuant to motion filed within that period, the court has revisory power and control over the judgment. After the expiration of that period the court has revisory power and control over the judgment only in case of fraud, mistake, irregularity, or failure of an employee of the court or of the clerk's office to perform a duty required by statute or rule.

CJP § 6-408. The court may only revise an enrolled judgment beyond the initial 30-day period in narrow circumstances. *LVNV Funding LLC v. Finch*, 463 Md. 586, 607 (2019). One narrow circumstance is a showing of fraud, mistake, or irregularity by clear and convincing evidence. *Jones v. Rosenberg*, 178 Md. App. 54, 72 (2008). After a finding of fraud, mistake, or irregularity, the court proceeds to analyze whether "the person seeking the revision acts with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Platt v. Platt*, 302 Md. 9, 13 (1984).

In support of their proposition that the trial court should have exercised its revisory power, Mother cites to *Gov't Employees Ins. Co. v. Ropka*, 74 Md. App. 249, 255 (1988) and *Barrett v. Barrett*, 240 Md. App. 581, 590 (2019).

In *Ropka*, the trial court conducted a trial on a declaratory judgment action and ruled in favor of the Plaintiff. *Ropka*, 74 Md. App. at 253. Following the trial, the defendant,

GEICO did not file a notice of appeal within the prescribed 30-day period. *Id.* Following the expiration of the time to file, GEICO filed a Motion to Revise, arguing that they had not received a copy of the Order. *Id.* The trial court granted the Motion to Revise and reissued the Order. *Id.* GEICO noted an appeal to the substance of the trial court's declaratory judgment decision. *Id.* at 253-54. On appeal, the Court ruled that the trial court did not abuse its discretion by granting GEICO's Motion to Revise Judgment because the defendant was not on notice that their time to file an appeal had begun. *Id.* at 256-57.

In *Barrett*, this Court decided the timeliness of an appeal in an MDEC county. 240 Md. App. at 583-84. Following a divorce hearing, a magistrate issued their Report with a decision. *Id.* at 584. The Report and a notice regarding filing exceptions was placed in the parties' courthouse mailbox instead of being served via MDEC. *Id.* at 585. Husband's counsel in the underlying divorce action did not receive a copy of the Report and therefore missed the window to file exceptions. *Id.* Once Father received the Magistrate's Report, he filed a Motion for Leave to File Exceptions, Exceptions, and a Motion to Alter, Amend, or Revise Judgment. *Id.* The trial court denied the motions and ruled that the period to file exceptions had passed. *Id.* at 586. On appeal, this Court vacated the trial court's order and remanded the case for the trial court to determine whether service by a courthouse mailbox in lieu of electronic service was proper. *Id.* at 591. This Court also ruled if the trial court determines that the underlying service was proper, the court should issue an Order explaining how service by a courthouse mailbox complies with the requirements of service in MDEC counties contained in Title 20 of the Maryland Rules. *Id.*

As we have previously noted, the term procedural irregularity is narrowly construed

within Rule 2-535(b). *Thacker v. Hale*, 146 Md. App. 203, 219 (2002). "[I]rregularity, in the contemplation of the Rule, usually means irregularity of process or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged." *Id.* (quoting *Weitz v. MacKenzie*, 273 Md. 628, 631 (1975)). The *Thacker* Court further explained:

> Irregularities warranting the exercise of revisory powers most often involve a judgment that resulted from a failure of process or procedure by the clerk of a court, including, for example, failures to send notice of a default judgment, to send notice of an order dismissing an action, to mail a notice to the proper address, and to provide for required publication.

Id. at 219–20 (citations omitted). Specifically, this Court has held that "the failure of an employee of the court or of the clerk's office to perform a duty required by statute or a Rule" constitutes an irregularity. *J.T. Masonry Co., Inc. v. Oxford Constr. Services, Inc.*, 74 Md. App. 598, 607 (1988), *aff'd*, 314 Md. 498 (1989). As discussed *supra*, the trial court failed to serve Mother's trial counsel with the Order granting the TPR by electronic service. This was in direct contravention of Rule 20-205. The failure to serve the Order in this case is akin to the illustrative examples of procedural irregularities as we observed in *Thacker*. Therefore, we conclude that the failure to serve the Order via MDEC was a procedural irregularity.

The requirements of ordinary diligence charge a party to promptly assert any bases to vacate or modify a judgment once they become aware of it. *J.T. Masonry Co., Inc.*, 314 Md. at 506-07. The parties cite a litany of opposing case law where appellate courts have

reviewed the factual determination of whether parties exercised ordinary diligence.[8] However, in some instances, the factual question of whether a party exercised ordinary diligence is outside of appellate review. *Estime v. King*, 196 Md. App. 296, 308-09 (2010).

At the hearing on the Motion to Revise Judgment, the Department argued that no procedural irregularity occurred in this case. Counsel for DSS continued that Mother's trial counsel did not exercise ordinary diligence by waiting fifty-one (51) days after notification of the Order to file a Motion to Revise. The Department attempted to distinguish both

[8] Maryland appellate courts have resolved the issue of ordinary diligence differently depending on the underlying factual scenario. *Compare Ropka*, 74 Md. App. at 257 (affirming the trial court's determination that counsel acted with ordinary diligence despite a delay of 10 months from the issuance of the order), *and Davis v. Attorney General*, 187 Md. App. 110, 130 (2009) (holding that the trial court must have concluded that there was ordinary diligence when the court vacated an order after an approximately 4 month delay following service issues), *and Estime v. King*, 196 Md. App. 296, 308-09 (2010) (remanding the case for the trial court to consider whether counsel exercised ordinary diligence after waiting 3 months to file a revisory motion after holding that the failure of the clerk to properly serve the dismissal order on all parties was an irregularity), *with Owl Club, Inc. v. Gotham Hotels, Ltd.*, 270 Md. 94, 101 (1973) (holding that defendant failed to exercise ordinary diligence and good faith after a 50 day delay to file a motion to set aside judgment), *and Hughes v. Beltway Homes, Inc.*, 276 Md. 382, 389 (1975) (holding that there was no procedural irregularity and appellee failed to exercise ordinary diligence when a period of six months elapsed before it moved to set aside the order), *and Weitz v. MacKenzie*, 273 Md. 628, 631 (1975) (holding that trial court misapplied the doctrine of irregularity and there was no showing of ordinary diligence in a delay of over 70 days), *and Platt v. Platt*, 302 Md. 9, 16 (1984) (affirming judgment when there was no clerical error and husband failed to act with ordinary diligence by waiting 5 years to challenge a judgment of divorce), *and J.T. Masonry Co., Inc.*, 314 Md. at 507 (holding that party did not exercise ordinary diligence when it waited 45 days to challenge a dismissal after having actual knowledge of the order), *and Thacker*, 146 Md. App. at 230 (noting that husband was "precluded" from a finding of ordinary diligence when he waited 12 years to challenge an acceleration clause that he was aware of at the time the judgment was enrolled). A review of this case law reveals that the trial court's determination of ordinary diligence rests largely on the underlying facts and circumstances of the case.

Barrett and *Ropka*. The trial court denied the Motion to Revise and made express findings that there was no procedural irregularity in the service of the Order. Therefore, the court below did not reach the subsequent question of whether Mother's trial counsel acted with ordinary diligence.

After reviewing the trial court's finding that there was no irregularity in this case, we hold that the failure to electronically serve the Order was an irregularity. However, the trial court did not reach the factual determination of whether Mother's trial counsel acted "with ordinary diligence and in good faith upon a meritorious cause of action or defense." *Platt*, 302 Md. at 13. That determination is "outside the scope of our review" and reserved to the sound discretion of the trial court. *Estime*, 196 Md. App. at 308-09. We see similarities in the instant case to the scenario that we reviewed in *Estime*.[9] In that case, the court did not send an order for further documentation to counsel for the appellant after he had included a new address in the certificate of compliance attached to a pleading. *Id.* at 305. On appeal, we held that the clerk's failure to send the court order to counsel's new address constituted a procedural irregularity under Rule 2-535. *Id.* at 308. Following this determination, the Court remanded the case to the trial court for a finding whether counsel exercised ordinary diligence and acted with good faith.[10] *Id.* at 309.

[9] Although the procedural vehicle in *Estime* was the denial of the appellant's motion to reinstate the complaint to foreclose the right of redemption, the Court proceeded with an analysis under Rule 2-535. The Court also dealt with additional preliminary issues regarding the appellant's change of address. However, the Court's reasoning under Rule 2-535 is instructive in this matter.

[10] When the Court remanded the case, it noted that the time lapse of 3 months before the motion to reconsider was filed "seem[s] to have less impact on a party's assertions of

This case presents a similar situation to *Estime*. Therefore, we find our reasoning in that case as highly persuasive. In this case, the trial court did not reach the question of ordinary diligence to consider the effect of the delay caused by Mother's counsel discovering the Court Order on January 23, 2023, and then filing the Motion to Revise on March 15, 2023. Therefore, we vacate the trial court's denial of Mother's Motion to Revise Judgment and remand for further proceedings consistent with this opinion. On remand, the trial court should hold a hearing to determine whether Mother's trial counsel acted with ordinary diligence.[11] If the court determines that counsel did act with ordinary diligence, then the court can proceed to rule on the Motion to Revise.

III. Ineffective Assistance of Counsel

A. Parties' Contentions

In the alternative, Mother argues that her trial counsel was ineffective by not discovering the Court order and/or timely filing a notice of appeal. In support of this position, Mother cites a line of case law that establishes that parents are entitled to effective assistance of counsel in TPR cases. *See In re Adoption/Guardianship of Chaden M. (Chaden I)*, 189 Md. App. 411 (2009). Mother further contends that the failure to timely notice an appeal is ineffective assistance by comparing parents in a TPR case to a criminal

good faith and due diligence" than the two and a half year time lapse in a prior case. *Estime*, 196 Md. App. at 308 (citing to *Gruss v. Gruss*, 123 Md. App. 311 (1998)). Nevertheless, the Court reserved the ultimate determination of ordinary diligence to the trial court on remand.

[11] The trial court noted that "I'm fully expecting the Appellate Court to – regardless of what I do here, going to give us a very clear understanding."

defendant. Finally, Mother directs the Court to out-of-state case law, specifically in Iowa and California, where other courts have considered the question directly and found ineffective assistance in TPR cases where counsel failed to timely notice an appeal. In those cases, the various courts allowed belated appeals to proceed.

The Department responds that Mother's claim that her trial counsel was ineffective was not raised before the juvenile court and was not preserved for appellate review. Alternatively, DSS argues that Mother acquiesced to the TPR. Finally, the Department contends that Mother cannot prove under the *Strickland* test that her counsel's performance was deficient and that the deficiency prejudiced her. Counsel for the minor child did not address Mother's ineffective assistance argument in its brief.

B. Analysis

Because we conclude that there was a procedural irregularity in the service of the Order to Mother's trial counsel and remand on that issue, we decline to reach the alternative argument that trial counsel was ineffective. Additionally, it would be antithetical to consider whether trial counsel was ineffective when we hold that the trial court failed to abide by the Maryland Rules in disseminating the TPR Order.

IV. Merits Review of the TPR

A. Parties' Contentions

As to the merits of the contested hearing, Mother argues that the trial court erred by terminating her parental rights. She posits that the trial court incorrectly concluded that Mother was unfit. Furthermore, she asserts that the trial court was incorrect that exceptional circumstances existed due to Mother's incarceration and lack of progress. Mother urges

that this Court reach the merits of the TPR trial. In support, Mother posits that if this matter is remanded to the trial court, the minor child will experience further delays to his permanency interest.

The Department argues that the court properly considered all of the relevant factors under FL § 5-323(d). DSS recounts the factual bases of the trial court's ruling as: (1) the Department provided services to Mother before her incarceration and attempted to find programs for her following her arrest; (2) Mother failed to enable the minor child to return to her care; (3) Mother's neglect of G.W. at the time of his birth served as an aggravating circumstance; and (4) the minor child did not have a significant relationship with Mother, whereas, he has established significant bonds with his foster mother.

G.W. recounts the factors required for a trial court to consider under FL § 5-323(d) before ordering a non-consensual TPR. Counsel for GW asks this Court to affirm the trial court's conclusion that Mother was "unfit and that exceptional circumstances existed that made continuation of the parental relationship detrimental to G.W.'s best interests."

B. Analysis

Based on our ruling on Mother's Motion to Revise Judgment, we are unable to reach the merits of the TPR trial. We recognize the importance of the guiding principle that children have a strong interest in obtaining permanency in these kinds of cases. *See In re Adoption of Jayden G.*, 433 Md. 50, 82 (2013) ("A critical factor in determining what is in the best interest of a child is the desire for permanency in the child's life.") We will note that the record reflects that the minor child has been in the care of his foster mother since he was approximately four months old and has formed a strong attachment to her.

CONCLUSION

Accordingly, we grant the Department's Motion to Dismiss the appeal in No. 2022, Sept. 2022. As to the appeal in No. 454, Sept. Term 2023, we vacate the trial court's denial of Mother's Motion to Revise Judgment and remand to the trial court for further proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IN CASE NO. 2022 DISMISSED. AND IN CASE NO. 2023 THE JUDGMENT IS VACATED AND REMANDED FOR FURTHER PROCEEDINGS; COSTS TO BE SPLIT BY APPELLANT AND APPELLEE