

MEMORANDUM DECISION

Pursuant to [Ind. Appellate Rule 65\(D\)](#), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

R.G.,
Appellant-Respondent,

v.

G.S.,
Appellee-Petitioner.

September 28, 2022

Court of Appeals Case No.
22A-AD-793

Appeal from the Randolph Circuit
Court

The Honorable Jay L. Toney,
Judge

Trial Court Cause No.
68C01-2106-AD-69

Mathias, Judge.

- [1] Nearly five months after the Randolph Circuit Court entered a decree of adoption terminating R.G.'s parental rights over his minor child, R.G. filed his notice of appeal. We hold that R.G. has failed to demonstrate extraordinary circumstances to justify our review of this untimely appeal, and we dismiss.

Facts and Procedural History

- [2] On June 22, 2021, G.S. filed a petition for step-parent adoption of K.B.J., R.G.'s biological child. In October, the trial court held an evidentiary hearing on the adoption petition. R.G. attended that hearing in person and by counsel. On November 16, the trial court granted G.S.'s petition for adoption and entered its decree of adoption accordingly. The November decree of adoption is noted accurately in the Chronological Case Summary ("CCS"), though the trial court's CCS entries do not include a record of service.
- [3] On March 11, 2022, R.G.'s trial counsel filed a motion for the appointment of pauper appellate counsel on R.G.'s behalf. In that motion, R.G.'s trial counsel argued that R.G. did not receive the decree of adoption until March 11, 2022, at which time R.G. presented it to his trial counsel, which was when counsel also first learned of the decree. Appellant's App. Vol. 2, p. 51. Asserting a lack of proper service, R.G.'s counsel asked that appellate counsel be appointed for R.G. so that he could pursue an appeal. The trial court appointed appellate counsel for R.G., and this appeal ensued.

Discussion and Decision

- [4] The dispositive issue in this appeal is whether R.G. has timely appealed the decree of adoption. [Indiana Appellate Rule 9\(A\)\(1\)](#) requires a party to initiate an appeal "by filing a Notice of Appeal . . . within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary." Here, the final judgment was noted in the Chronological Case Summary on

November 16, 2021. Thus, R.G.’s notice of appeal was required to be filed no later than December 16, 2021. But R.G. did not timely file his notice of appeal and instead filed his notice of appeal several months later, on April 11, 2022. Generally, “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited . . . “ [Ind. Appellate Rule 9\(A\)\(5\)](#). Thus, R.G. has forfeited his right to appeal. *Id.*

[5] Our Supreme Court has recognized a limited exception to the forfeiture of an untimely appeal when “there are extraordinarily compelling reasons why this forfeited right should be restored.” [In re O.R.](#), 16 N.E.3d 965, 971 (Ind. 2014). For example, in [In re O.R.](#), the Indiana Supreme Court held that extraordinarily compelling reasons to restore a forfeited adoption appeal existed when, “four days before the Notice of Appeal was due, Father,” who was incarcerated, “sought appointment of appellate counsel,” but the trial court did not appoint that counsel until “long after the deadline for the timely filing of his Notice of Appeal.” *Id.* at 972. “Father’s attempt to perfect a timely appeal, and the constitutional dimensions of the parent-child relationship,” showed “that Father’s otherwise forfeited appeal deserve[d] a determination on the merits.” *Id.*

[6] R.G. asserts that extraordinarily compelling reasons exist to restore his forfeited appeal because he was not properly served with the decree of adoption. But there is no evidence in the record to support R.G.’s assertion. His attorney argued to the trial court in the March 2022 motion to appoint pauper appellate counsel that neither he nor R.G. saw the decree of adoption until March 2022,

but “[i]t is well established that statements made by . . . attorneys . . . are not evidence.” *Bradford v. State*, 675 N.E.2d 296, 301 (Ind. 1996) (emphasis removed). The assertions of R.G.’s counsel are not supported by a representation that the assertions were made under penalty of perjury, they are not supported by an accompanying affidavit, and they are not supported by testimony to the trial court. Thus, unlike in *O.R.*, here there is no evidence of extraordinarily compelling reasons by R.G. to excuse the forfeiture of his right to appeal.

[7] Further, R.G. was represented by counsel at the time the court issued the November 2021 decree of adoption. Counsel has “a general duty to regularly check the court records and monitor the progress of pending cases.” *Slay v. Marion Cnty. Sheriff’s Dep’t*, 603 N.E.2d 877, 883 (Ind. Ct. App. 1992), *trans. denied*. And R.G. does not assert that he or his counsel affirmatively relied upon a mistaken notification of the trial court clerk. *See id.* Instead, R.G. sat by for nearly four months after the adoption had been decided, and then, without any supporting evidence, baldly asserted that he never received service of the decree of adoption.

[8] We acknowledge that the CCS entries do not include a record of service. [Indiana Trial Rule 72\(D\)](#) requires the clerk of the court to note in the CCS a ruling on a motion, an order, or a judgment; to serve a copy of the entry on each party; and to make a record of such service. But even if we consider the incomplete CCS entries as evidence to support R.G.’s assertion that he was not properly served with the decree of adoption, [Trial Rule 72\(E\)](#) required R.G. to

request “an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge,” which motion the trial court “may grant” “for good cause shown.” R.G. did not follow this procedure, and thus dismissal is appropriate.

[9] We conclude that R.G. has not met his burden on appeal to show why his forfeited right to appeal should be restored. We therefore dismiss R.G.’s appeal.

[10] Dismissed.

Bailey, J., concurs.

Robb, J., concurs in result with opinion.

I N T H E
C O U R T O F A P P E A L S O F I N D I A N A

R.G.,
Appellant-Respondent,

v.

G.S.,
Appellee-Petitioner,

September 28, 2022

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Appeal from the Randolph
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Robb, Judge, concurring in result.

[11] Upon receiving notice of G.S.’s petition for adoption, R.G. filed an objection. At the October 2021 hearing, the trial court heard evidence about both G.S.’s petition and R.G.’s objection. On November 16, 2021, the trial court issued two orders: one finding that R.G.’s consent to the adoption was not necessary and one granting G.S.’s petition for adoption and terminating R.G.’s rights.¹ The order regarding consent shows it was distributed to the attorneys for G.S. and R.G. The decree of adoption shows it was distributed only to G.S.’s attorney. Although counsel may have a general duty to monitor their cases, slip op. at ¶ 7, “they are entitled to rely upon notification by the clerk pursuant to

¹ R.G. is not K.B.J.’s biological father and K.B.J. was not born during R.G.’s marriage to K.B.J.’s mother. But R.G. did sign K.B.J.’s birth certificate at her mother’s request and was referred to as her “legal father” during these proceedings.

T.R. 72(D)[,]” *Slay*, 603 N.E.2d at 883. Both orders are noted in the CCS, but neither entry reflects that the trial court clerk served the orders. *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116, 117 (Ind. 2014) (“Trial Rule 72(D) imposes two duties on clerks of court. First, [they] must mail a copy of the entry to each of the parties. Second, the clerk must make a record of such mailing. The [CCS] constitutes that record.”).

[12] I therefore believe the record supports R.G.’s assertion that he was without actual knowledge of the adoption decree because the record does not show that he was served with a copy of the decree. And it is the entry of the decree of adoption, as the final judgment in this case, that triggered the timeline for appeal notwithstanding R.G.’s receipt of the separate order regarding consent. *See In re Adoption of S.J.*, 967 N.E.2d 1063, 1065 (Ind. Ct. App. 2012) (holding an order concluding father’s consent to adoption was not required is not a final judgment because it did not answer the question of whether the adoption petition should be granted). Under these circumstances, I would not fault R.G. or his attorney for missing the deadline for filing an appeal following entry of the adoption decree.

[13] I would, however, agree with the majority that R.G. did not take the appropriate steps to remedy his failure to timely initiate an appeal due to lack notice. Trial Rule 72(E) provides an avenue for relief when a party alleges untimeliness was caused by a lack of notice. Although R.G. acted immediately upon learning of the adoption decree, he unquestionably did not follow this

procedure. I therefore agree with the majority that R.G. has forfeited his right to appeal, and this appeal should be dismissed.