[Cite as *In re S.S.*, 2010-Ohio-6374.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

IN RE: S. S.	C. A. No. 10CA0010
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 09-0963-PCU

DECISION AND JOURNAL ENTRY

Dated: December 27, 2010

WHITMORE, Judge.

{¶1} Appellant, Lynn C.T., has appealed from a judgment of the Wayne County Court of Common Pleas, Juvenile Division, that terminated her parental rights to her minor child, S.S., and placed the child in the permanent custody of Wayne County Children Services Board ("CSB"). For the reasons that follow, this Court vacates the judgment of the trial court and remands the cause for further proceedings consistent with this opinion.

I

{¶2} Lynn C.T. ("Mother") is the mother of S.S., born May 9, 2000. The child's father is deceased. When this case began, S.S. was living with her legal guardian and paternal aunt, Beverly Hatfield, along with Ms. Hatfield's son and step-son. S.S. was removed from Ms. Hatfield's home on May 23, 2008 by the Wayne County Sheriff's Department pursuant to Juvenile Rule 6. Following the removal of the child, CSB apparently filed two complaints in juvenile court, and both were dismissed. Those filings and the related orders are not in the

record before this Court. Five months later, on October 23, 2008, CSB filed the complaint on which the ensuing court action was based. That document alleged that eight-year-old S.S. was an abused and dependent child, and it detailed allegations of physical and sexual abuse by Ms. Hatfield's son and step-son. The complaint also asserted that S.S. was afraid of being harmed by Ms. Hatfield. The agency sought temporary custody or, in the alternative, protective supervision, of the child.

{¶3} An adjudicatory hearing took place on January 6, 2009. Mother appeared with appointed counsel, Conrad Olson. Ms. Hatfield was also present with her own appointed counsel. Upon motion by the attorney for CSB, and over the objection of S.S.'s guardian ad litem, the complaint was amended to delete the allegations of abuse. Nonetheless, the guardian ad litem's final written report indicated that Ms. Hatfield's step-son was convicted of gross sexual imposition against S.S. The custody matter proceeded to disposition. At the conclusion of the hearing, the trial court entered a finding of dependency, granted temporary custody of the child to CSB, and adopted the case plan filed by the agency, which had as its goal the reunification of the child with either Mother or Ms. Hatfield. In October 2009, upon her own motion, Ms. Hatfield was removed as a party to the action, and the case planning goal became reunification with Mother.

{¶4} The case plan provided that S.S. should have counseling to address any emotional trauma she had suffered, and specified that CSB would provide case management services to reduce the risk of abuse, neglect, and/or dependency. Nevertheless, by December 2009, S.S. had to be removed from a foster placement due to being victimized and allegedly sexually abused in that home.

{¶5} On November 6, 2009, CSB moved for permanent custody. Following a brief hearing conducted in Mother's absence and also without legal counsel acting on her behalf, the trial court granted CSB's motion for permanent custody. Mother has appealed.

Anders Brief

{¶6} At the outset, we note that appointed counsel initially filed an *Anders* brief on Mother's behalf, claiming that there were no arguable issues to be asserted and that any appeal would be frivolous. See *Anders v. California* (1967), 386 U.S. 738. Upon review of the record, this Court determined that there were arguable issues to be raised and appointed new counsel to prepare a merit brief. Once again, we advise counsel to conscientiously review the record before filing an *Anders* brief. See, e.g., *In re J.M.*, 9th Dist. No. 24827, 2010-Ohio-1967, at ¶4. Counsel must balance the prohibition of presenting a frivolous appeal with the significant rights at issue in permanent custody cases.

II

{¶7} Because we conclude that the trial court failed to provide notice of the filing of the motion for permanent custody and notice of the permanent custody hearing to Mother, the court did not have personal jurisdiction of Mother. Accordingly, the judgment of the trial court is void.

Right to Notice

{¶8} "The right of a parent to the custody of his or her child is one of the oldest fundamental liberty interests recognized by American courts." *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, at ¶10, citing *Troxel v. Granville* (2000), 530 U.S. 57, 65-66. Therefore, where the state seeks to terminate a parent-child relationship, parents "'must be afforded every procedural and substantive protection the law allows.'" *In re Hayes* (1997), 79 Ohio St.3d 46,

48, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 16. Procedural due process requires that the government provide constitutionally adequate procedures before depriving individuals of a protected liberty interest. *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 541. As recognized by the Ohio Supreme Court: "Our courts have long recognized that due process requires both notice and an opportunity to be heard." *Thompkins*, 2007-Ohio-5238, at ¶13.

{¶9} The *Thompkins* court has provided a standard to be used in determining whether service of process comports with due process. That court concluded that, in order to accord finality to a proceeding, due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Thompkins*, at ¶13. The court further explained that due process does not require "heroic efforts" to ensure the notice's delivery, but does require "reasonable diligence" in attempting to notify a parent that his parental rights are subject to termination. Id. at ¶14-15.

Notice of permanent custody motion and permanent custody hearing

{¶10} In the context of permanent custody cases in Ohio, notice of the filing of a motion for permanent custody and notice of the hearing are governed by a number of procedural rules and statutes. *Thompkins*, 2007-Ohio-5238, at ¶16. See, also, *In re Lee P.*, 6th Dist. No. L-03-1266, 2004-Ohio-1976, at ¶8. Chapter 2151 of the Ohio Revised Code addresses the means by which notice of the filing of a motion for permanent custody and notice of the hearing on such motion must be given to a parent. R.C. 2151.414(A)(1) provides:

> "Upon the filing of a motion *** for permanent custody of a child, the court shall schedule a hearing *and give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code*, to all parties to the action and to the child's guardian ad litem. (Emphasis added.)

The same section requires that such notice shall include an explanation of the right to counsel. It provides:

> "The notice also shall contain *** 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 ***. R.C. 2151.414(A)(1).

{¶11} The importance of such notice regarding the right to counsel is particularly significant in this case, as will be demonstrated below, because Mother did not have legal counsel from the time of the filing of the motion for permanent custody through the conclusion of the permanent custody hearing.

{¶12} R.C. 2151.414(A)(1) requires conformance with R.C. 2151.29, which explains the manner by which "notice of the filing of the motion and of the hearing" shall be served on parties. In regard to parties residing within the state, that section provides:

> "Service of summons, notices and subpoenas *** shall be made by *delivering a copy* to the person summoned, notified, or subpoenaed, *or by leaving a copy at the person's usual place of residence*. If the juvenile judge is satisfied that such service is impracticable, the juvenile judge may order service *by registered or certified mail*. (Emphasis added.) R.C. 2151.29.

{¶13} The section also explains the circumstances, not applicable here, under which service by publication may be utilized. Id.

{¶14} "Delivering a copy" means having a process server hand the notice to the person. See *GZK, Inc. v. Schumaker Ltd. Partnership*, 168 Ohio App.3d 106, 2006-Ohio-3744, at ¶25 (delivery contemplates that a process server actually presents the document personally to the individual to be served). See, also, *Thompkins*, 2007-Ohio-5238, at ¶35 (O'Connor, J. concurring in part and dissenting in part) (stating that "the most reliable method of notification is to have a process server hand the notice to the person"). "Leaving a copy at the person's usual place of residence" means "to personally serve the notice at the residence of the individual by

leaving it with a competent adult." Id. at ¶36. If neither of these two options is practical, the statute provides for service by either registered or certified mail.

{¶15} R.C. 2151.28(I) similarly explains that a parent shall be notified of a permanent custody hearing by service of summons.

> "Before any temporary commitment is made permanent, *the court shall fix a time for hearing* in accordance with section 2151.414 of the Revised Code *and shall cause notice by summons to be served upon the parent* or guardian of the child and the guardian ad litem of the child *** (Emphasis added.)

{¶16} The same paragraph requires that such notice shall include an explanation of the import of the granting of permanent custody. It states:

> "The summons shall contain an explanation that the granting of permanent custody permanently divests the parents of their parental rights and privileges. R.C. 2151.28(I).

{¶17} Juv.R. 16(A) states that, unless otherwise provided, "summons shall be served as provided in Civil Rules 4(A), (C), and (D), 4.1, 4.2, 4.3, 4.5 and 4.6." Civ.R. 4.1 describes the methods of service within the state, except for service by publication, and provides that service shall be made by certified or express mail,[1] or, if requested, by personal or residence service.

{¶18} Thus, "[f]or proper service, the parents must be notified of the permanent custody motion and the initial permanent custody hearing by one of three methods: personal service, service by certified or registered mail (if the parent's whereabouts cannot be discerned after reasonable diligence), or – if both of those methods fail – by publication." *In re Lee P.*, 6th Dist. No. L-03-1266, 2004-Ohio-1976, at ¶8. In addition, the notification of the hearing must include an explanation of the import of the granting of permanent custody.

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[1] R.C. 2151.29 refers to service by certified or registered mail, while the Ohio Rules of Civil Procedure refer to service by certified or express mail before ordinary mail service may be appropriate. See, e.g., Civ.R. 4.1, Civ.R. 4.3 and Civ.R. 4.6. The distinction between "certified

Documentation of service in the record

{¶19} It is also important to recognize the manner in which service is to be reflected in the record. Civ.R. 4.1 not only describes the means by which service shall be made, but also the manner in which service is to be demonstrated in the record. If a process server is involved for personal or residential service, that person must endorse the fact of accomplished service or failed service on the process. Id. And whether service is accomplished by personal service, residence service, certified mail, registered mail, or express mail, the rule requires the clerk to make an appropriate entry on the appearance docket demonstrating either that service has been accomplished or that the attempted service has failed. Id.

{¶20} As demonstrated below, the trial court did not adhere to these requirements. The purported notices of the permanent custody hearing that were issued by the trial court to Mother were deficient in content, in the means by which they were served, and in the manner by which the return was reflected in the record.

Arguments in support of notice

{¶21} In its appellate brief, CSB has attempted to demonstrate that proper notice of the permanent custody motion and of the permanent custody hearing was made. CSB first relies on a document styled "Citation" which was time-stamped on November 18, 2009. The document is addressed to "File Copy." The body of the document states:

> "You are hereby cited to appear in **Juvenile Court** before **JUDGE RAYMOND E. LEISY** within and for said County, on **December 10, 2009 at 10:00 a.m.** for hearing on the MOTION filed by ROBERT BURRIDGE, ASST. PROS. ATTY. A copy of said motion is herewith attached.

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or registered mail" and "certified or express mail" is inconsequential here because only regular or ordinary mail was utilized by the trial court.

"In witness whereof, I have hereunto set my hand and affixed the seal for said Court at Wooster, Ohio, on November 19, 2009.

"RAYMOND E. LEISY, JUDGE
BY: P. DELPROPOST
Assignment Commissioner

"PROOF OF SERVICE
On November 18, 2009, I served the same on the following:
RENEE JACKWOOD [GAL]
[CSB]
[CSB'S LEGAL COUNSEL]
[MOTHER]
FOSTER PARENTS

"RAYMOND E. LEISY, JUDGE
BY: P. DELPROPOST
Assignment Commissioner"

{¶22} To the extent that this document purports to be a notice of the filing of the motion for permanent custody, of a hearing on the motion for permanent custody, or indicates a return of such notice, it is insufficient. The document does not contain the signatures of either the judge or the assignment commissioner. Those names are in type-set. Nor does the document indicate who purportedly served the document on Mother or the method by which Mother was allegedly served. No one has endorsed the document to indicate that service was accomplished by delivering it to Mother or by leaving a copy at Mother's usual place of residence. Moreover, there is no return card or notation indicating that the document was sent by registered or certified mail. Instead, the juvenile court docket states that the document was served by "regular mail." Additionally, the document fails to include the requisite admonishments that a parent has the right to be represented by counsel and to have counsel appointed or that the granting of permanent custody permanently divests the parents of their parental rights and privileges.

Therefore, the document and the juvenile court docket do not comport with the requirements of Ohio law cited above.

{¶23} Thereafter, on December 10, 2009, the date initially set for a hearing on the motion, the trial judge entered another order which stated as follows:

> "This matter came on this 10th day of December, 2009 before the Court for an Initial Appearance.
>
> "Present before the Court were [the caseworker, the assistant prosecuting attorney, the guardian ad litem, and counsel for the child]. Mother did not appear. Father is deceased.
>
> ***
>
> "It is therefore ORDERED, ADJUDGED AND DECREED that the Motion to Change Disposition is set for February 11, 2010 at 9:00 a.m. This entry shall be the only notice issued to the parties and counsel.
>
> "/s/ Raymond E. Leisy
> JUDGE RAYMOND E. LEISY
>
> "CC: WCCSEA
> [Assistant Prosecuting Attorney]
> [CSB]
> [Mother] (Regular Mail)
> [Guardian ad litem]" (Emphasis added.)

{¶24} Apparently, a hearing was held on December 10, 2009, but in this post-hearing order, the procedure was described as an "Initial Appearance" as opposed to a "hearing on the motion" filed by the prosecutor, as referenced in the prior order of November 18, 2009. If this second order is to be considered a notice of the permanent custody hearing, as opposed to the previously issued Citation constituting such notice, the second order also fails to comply with the statutory requirements set forth above. It was served on Mother by regular mail as opposed to personal delivery, residential delivery, registered mail, certified mail, or express mail. There is no endorsement that service was accomplished by a process server and there is no entry in the

appearance docket indicating service according to the relevant statutes and rules. Like the November 18, 2009 document, the December 10, 2009 document similarly fails to include the requisite admonishments that parents have the right to be represented by counsel and to have counsel appointed or that the granting of permanent custody permanently divests the parents of their parental rights and privileges. Therefore, this document and the juvenile court docket do not comport with the requirements cited above.

{¶25} On the other hand, assuming the second order was notice of a continuance of the permanent custody hearing, it might have been sent to Mother's attorney, if she had legal counsel. See *In re D.H.*, 177 Ohio App.3d 246, 2008-Ohio-3686, at ¶38; *In re Lee P.*, 2004-Ohio-1976, at ¶8, citing Juv.R. 20. The issue of whether Mother had legal representation and whether personal jurisdiction was obtained by the appearance or actions of such counsel is therefore of consequence to the issue of notice.

Right to Counsel

{¶26} The right to the custody of one's children is one of the most important of our fundamental rights and the guarantee of the right to counsel at the critical time when that right is being challenged by the state is a matter of public or great general interest. As this case is being remanded to the trial court, CSB may see fit to initiate similar proceedings after obtaining proper service of notice. Mother is entitled to counsel at "all stages of the proceedings." R.C. 2151.352.

{¶27} The trial court appointed counsel to represent Mother during the early phase of the proceedings below. Mother appeared with counsel at the adjudicatory and dispositional hearing in January 2009. When CSB filed its motion for permanent custody in November 2009, however, the trial judge, sua sponte, issued a new case number, sought to require Mother to

reapply for appointed counsel, and to assess her another $25 application fee. See R.C. 120.36. Mother apparently attempted to reapply for counsel, and submitted an affidavit of indigency with her application for appointed counsel. The judge returned her affidavit as being deficient, however, and cited the failure to have the affidavit notarized and the failure to include any income. The remainder of the proceedings regarding the termination of Mother's parental rights took place without any involvement by Mother and without any legal representation for her.

{¶28} As a parent involved in a proceeding under Chapter 2151, Ohio has guaranteed that Mother was entitled to legal counsel, including appointed legal counsel if indigent, "at all stages of the proceedings." R.C. 2151.352. See, also, *State ex rel. Asberry v. Payne* (1998), 82 Ohio St.3d 44, 48, and Juv.R. 4. In addition, there is a protected right to counsel under the federal constitution that may be applicable to Mother, but is determined by the trial court on a case-by-case basis. See *Lassiter v. Dept. of Social Services* (1981), 452 U.S. 18, 31-32.

Local Procedures

{¶29} Certain procedures instituted by the Wayne County Juvenile Court are integrally related to Mother's claimed denial of her right to counsel and those procedures warrant review. When a motion for permanent custody is filed in a case initially brought for reasons of abuse, neglect, or dependency, the Wayne County juvenile court judge re-designates the case from one with the prefix of "AND" to one with the prefix of "PCU" and also changes the case number. It appears that this change is routinely announced through a standard Administrative Order. The order issued in this case is set forth here in full:

"**ADMINISTRATIVE ORDER**

> "WHEREAS, the Supreme Court of Ohio has enacted the rules of Superintendence for the Courts of Ohio; and

"WHEREAS, Superintendence Rule 37(A)(2) specifies that the Juvenile Courts of Ohio shall report cases pending, filed, transferred, reactivated, re-designated and terminated on Supreme Court Report Form D; and

"WHEREAS, Superintendence Rule 43 and the Implementation Manual for Supreme Court Reporting specifies the methods for numbering juvenile cases; and

"WHEREAS, the Wayne County Court of Common Pleas, Juvenile Division has previously determined it will designate abuse, neglect and dependency cases reported on Column C of Form D using the designator 'AND' and Motions for Permanent Custody on Column F for Form D using the designator 'PCU'; and

"WHEREAS, the Wayne County Court of Common Pleas, Juvenile Division has determined that in the event that a Motion for Permanent Custody is filed affecting the child subject of a pending AND case, the court will report the AND designated case as terminated and re-designate the case as a PCU case.*

"NOW THEREFORE, the Court hereby orders that Case No. 08-1089 AND is re-designated.

"/s/ Raymond E. Leisy
JUDGE RAYMOND E. LEISY"

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* "Dependency, Neglect, or Abuse – Column C. This column is used to record cases concerning a neglected child, as defined by section 2151.03 of the Revised Code, as a dependent child, as defined by section 2151.04 of the Revised Code, an abused child, as defined by section 2151.031 of the Revised Code. If an action originally entered correctly in this category is later changed to an action for permanent custody, the case should be reported as terminated on line 15 (Other terminations), and reported in Column F on line 3 as a re-designated case. – The Supreme Court of Ohio Rules of Superintendence Implementation Manual. Section 8 Instructions for Preparation of Report Forms – Court of Common Pleas VI. Form D (Juvenile Division)" (Emphasis sic.)

{¶30} From the face of this order, it appears that the trial court's reason for re-designation of a case after a motion for permanent custody is filed stems from the court's effort to simplify the statistical reporting of the actions taken on cases pending before the juvenile court. Notably, nothing in this Administrative Order informs the parent that he or she must reapply for counsel upon the filing of a motion for permanent custody.

{¶31} Two days later, the guardian ad litem filed a motion on her own behalf, asking the trial court to reauthorize her as guardian ad litem and to incorporate the documents from the 08-1089-AND file into the 09-0963-PCU file. As grounds, the guardian ad litem explained that the new PCU file does not contain the filings that would constitute the basis for the permanent custody case, including verification of the 12-of-22 issue, contempt filings, case plan objectives, and other basic information about the history of the child's legal proceedings which led to the current pending motion for permanent custody to be determined.

{¶32} On December 2, 2009, the trial court denied the guardian ad litem's motion, stating that the orders sought by the motion are unnecessary as they are currently in place by operation of law. In this responsive entry, the trial court included an explanation of its reasons for re-designating such cases similar to that included in its previously issued Administrative Order. In addition, the court included the following statement within its entry:

> "All adult parties represented by court appointed counsel must reapply to the court and submit payment of the application fee for court appointed counsel in the PCU case number if they wish to be represented by an attorney in the matter of the motion for permanent custody"

{¶33} It is significant that this is the only statement in the record where "adult parties," i.e., Mother, are advised that they must reapply for court appointed counsel, and the statement occurs only in response to the motion of the guardian ad litem. The statement is located on the second page of the order, at the end of the last full paragraph. The sentence is not printed in bold-face type, nor is it in any other way highlighted to assure notice. According to a notation on the document, the order was sent by regular mail to Mother. If the guardian ad litem had not filed a motion to incorporate files, it is unclear whether Mother would have had any notice at all that she was to reapply for counsel.

{¶34} It is clear that Mother had legal representation prior to the issuance of this order. Attorney Conrad Olson had been appointed by the trial court to represent her, and he appeared with Mother at the hearing for adjudication and disposition. The record does not contain a motion by Attorney Olson requesting permission to withdraw from representation of Mother. Nor is there an order from the court terminating his representation of Mother. Apparently, Attorney Olson's representation ended by virtue of the re-designation of the case.

{¶35} There are several problems with the procedure followed by the Juvenile Court of Wayne County. First, the record does not demonstrate that Mother was adequately notified of her obligation to reapply for counsel under the juvenile court's procedure. It is not reasonable to believe that a parent would anticipate a need to reapply for appointed counsel in – what the parent undoubtedly considers to be – the middle of a court proceeding. There was no reason for Mother to believe that the previously begun proceeding had reached a conclusion. Her child was still in the temporary custody of the agency. No final order had been issued to her since the adjudication and disposition that occurred ten months earlier, in January 2009. Most importantly, the record does not include the sort of clearly presented notification of this important fact that would be expected in this context.

{¶36} In addition, if the filing of a motion for permanent custody represents the initiation of a new case, requires adult parties to apply for counsel anew, and requires such parties to pay another $25 application fee, then the method for service of such notification should be in accord with the traditional rules for service of process of a complaint. Those rules similarly require service by certified mail, express mail, personal service, or residence service, with results endorsed on the process and appropriately reflected on the appearance docket. See Juv.R. 16(A) and Civ.R. 4.1

{¶37} Second, the trial court has permitted a technical reporting procedure to infringe upon Mother's right to counsel. When weighing the importance of a reporting procedure against a parent's right to counsel in a permanent custody proceeding, the right to counsel must be protected. CSB has not pointed to anything in the Local Rules of the Wayne County Juvenile Court that appears to mandate or even authorize this procedure, nor is this Court aware of any local rule that relates to this procedure.

{¶38} Moreover, the requirement to reapply for counsel upon the filing of a motion for permanent custody is not necessitated by the Rules of Superintendence or by the related Implementation Manual. The Implementation Manual, under which authority the trial judge ascribes his procedure, explains and provides for the implementation of the Rules of Superintendence. Sup.R. 35(E). The Commentary to Rule 2 of the Rules of Superintendence states that those rules "relate primarily to the internal operation of Ohio courts" and are "not intended to apply to questions of statutory interpretation." By way of an example, the commentary explains that the definition of the word "case" as used in the Rules of Superintendence is "designed as a benchmark *for statistical reporting purposes* that will allow for some uniform measure of the workload of the courts. *The definition is not designed to address statutory issues such as the proper assessment of court costs or filing fees in civil or criminal cases*." (Emphasis added.) If the definition of the word "case" as used for statistical reporting purposes is not intended to affect the assessment of court costs or filing fees, nor should it be used as a basis for the assessment of application fees for appointed counsel. Timely disposition of cases and the accurate reporting of them are worthy goals, but cannot be relied upon to override or substantially infringe upon the right to counsel of the parties before the court.

{¶39} Third, this Court concludes that the assessment of another $25 application fee for appointed counsel when a motion for permanent custody is filed following a previous assessment of such fee in an abuse, neglect, or dependency action is counter to Ohio statutory law. R.C. 120.36 is the provision which requires indigent parties to pay a $25 nonrefundable application fee if they request or are provided counsel in criminal or juvenile cases. The same statute provides that the court shall assess this application fee only "one time per case." R.C. 120.36(A)(7). R.C. 120.36(A)(7) defines "a case" for these purposes. It states:

> "For purposes of assessing the application fee, *a case means one complete proceeding or trial held in one court for a person on* an indictment, information, complaint, petition, citation, writ, motion, or other document *initiating a case that arises out of a single incident or a series of related incidents*, or when one individual is charged with two or more offenses that the court handles simultaneously." (Emphasis added.) R.C. 120.36(A)(7).

{¶40} By this definition, it appears that the legislature intended the application fee to be assessed only once in a case that is based on allegations of abuse, neglect, and dependency, regardless of whether the matter ends with a return to the parent, an award of legal custody, placement in a planned permanent living arrangement, or the termination of parental rights. See R.C. 2151.415. An order granting temporary custody of a child to an agency, followed by a dispositional order, is, in fact, a final appealable order within the meaning of R.C. 2505.02. *In re Murray* (1990), 52 Ohio St.3d 155, syllabus. Nevertheless, that is not the conclusion of the action because "some future action is contemplated in a temporary custody order." *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, at ¶13. Indeed, it has been held that an order continuing temporary custody in the aftermath of a denial of a motion for permanent custody is not a final appealable order. *In re Adams*, 115 Ohio St.3d 86, 2007-Ohio-4840, syllabus. We conclude that

a Chapter 2151 action based on the abuse, neglect, or dependency of a child followed by a motion for permanent custody is "one case" for purposes of R.C.120.36.[2]

{¶41} Fourth, the procedure adopted by the trial court risks creating unwarranted record problems. For example, the guardian ad litem's motion to merge the files makes reference to the existence of contempt citations that were in the "AND" file. There are no contempt citations in the appellate file now before this Court. When case files are bi-furcated in this manner, there is a risk – substantiated here – that a reviewing court will not receive the full record of proceedings from which an appeal has been taken.

{¶42} A trial court is entitled to establish its own internal procedures, provided they are consistent with Ohio law and are implemented in a way that does not infringe upon the statutory or constitutional right to counsel of the parties that come before that court. The trial court has

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[2] We note that the Ohio Public Defender, whose office is directly involved with the implementation of R.C. 120.36, has addressed the question of what constitutes "a case" and how often the application fee should be assessed with some clarity. In an April 28, 2006 memorandum from Public Defender David Bodiker to Ohio officials including all judges, clerks of court, county public defenders, county treasurers, and county auditors, Mr. Bodiker quotes the statutory definition of the word "case" and writes:

> "Persons should be assessed the application fee based on this definition, *not by the number of* charges, counts, *case numbers assigned, or other definitions used by a particular court*." (Emphasis added.)

Office of the Ohio Public Defender, Memorandum from David Bodiker, State Public Defender (April 28, 2006), No. 7 Definition of a Case, http://opd.ohio.gov/Reimbursement/Rm_4_28_06_memo.pdf (accessed December 20, 2010). The Ohio Public Defender's office has also indicated that "the fee is independent from the number of case numbers assigned by the clerk." Office of the Ohio Public Defender, $25.00 Indigent Application Fee Frequently Asked Questions (FAQ's), No. 7, (November 17, 2006), http://opd.ohio.gov/Reimbursement/rm_App_fee_FAQ.htm (accessed December 20, 2010).

Although this information is not binding on this Court, it is useful in implementing the process.

permitted a technical reporting procedure to take precedence over Mother's right to counsel at the most critical time in the proceeding – precisely at the point when she faced the termination of her parental rights. Accordingly, because Mother had no legal representation from the time of the filing of the motion for permanent custody until the conclusion of the permanent custody hearing, and because that was not a result of her knowing, intelligent, and voluntary choice, personal jurisdiction could not have been obtained through any service on counsel or through any actions of counsel.

Personal Jurisdiction

{¶43} "It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. Personal jurisdiction over a party may be obtained not only through proper service of process, but also by the voluntary appearance of the party or his legal representative or by actions of the party or his legal representative that constitute an involuntary submission to the jurisdiction of the court. Id. Unless the trial court obtained personal jurisdiction over Mother in one of these ways, however, the judgment of the trial court is void. See *In re Miller* (1980), 61 Ohio St.2d 184, 190; *In re Frinzl* (1949), 152 Ohio St. 164, 174; *In re Cowling* (Feb. 13, 1991), 72 Ohio App.3d 499, 502. On this point, this Court has explained:

> "Due to the relationship between parents and children, and because of the social consequences involved, a juvenile court cannot make a valid order changing temporary commitment of a child to a permanent commitment without service of notice upon the parent of the child, strictly in accordance with the law." *In re Cowling*, 72 Ohio App.3d at 500-501.

{¶44} CSB has argued that service of notice of the permanent custody hearing by ordinary mail was sufficient because the mail was not returned as undeliverable. The agency asks us to presume receipt of service from that fact. The argument is without merit. First, the

agency fails to cite any authority in support of its position. The use of ordinary mail for purposes of service of summons is appropriate only in very limited circumstances. For example, ordinary mail may be used where service of process by certified or express mail has been refused or unclaimed. See Civ.R. 4.6(C) and (D). In addition, when the residence of a party is unknown and cannot with reasonable diligence be determined, service may be accomplished through posting followed up by ordinary mail. See Juv.R. 16(A). Accord Civ.R. 4.4(A). Neither of these situations is applicable here because Mother's address was apparently known to the court and service by certified, registered, or express mail was not first attempted.

{¶45} Second, proper service may be presumed only where the civil rules regarding service are followed. See *Eisel v. Austin*, 9th Dist. No. 09CA009653, 2010-Ohio-3458, at ¶11; *In re Lane* (Oct 5, 2000), 8th Dist. No. 74565, at *3. Here, those rules were not followed, and there can, therefore, be no presumption of proper service. As stated by the *Lane* court, "Court rules and statutes are designed to obtain proof of constructive, if not actual, notice of proceedings. Where these provisions have been ignored, there is no record of service on which to base a presumption." Id.

{¶46} The agency also asserts that Mother received an affidavit of indigency at the same address and claims that to be evidence that Mother must have received notice of the hearing when it was sent by regular mail. This argument also fails. The record does not demonstrate where or when Mother obtained the affidavit of indigency. The record indicates only that on December 18, 2009, the trial judge returned Mother's previously submitted application for counsel and affidavit of indigency for the reason that Mother did not include income for herself or her husband and did not have the form notarized. Furthermore, and importantly, from this record, while it may be assumed that Mother wanted to have appointed counsel, it cannot be

assumed that Mother knew the scheduled date of the hearing on the motion for permanent custody. Of course, had Mother done more and participated in the merits of the case, an argument could be made that she had voluntarily submitted to the jurisdiction of the court and waived any objection to defective service. See, e.g., *In re Crow* (Jan. 22, 2001), 2d Dist. Nos. CA1521 and CA1522, at *3. But she did not do so. Therefore, we cannot conclude that personal jurisdiction over Mother was accomplished by virtue of her mailing an unaccepted affidavit of indigency to the trial court.

{¶47} CSB has also argued that its own caseworker testified that she told Mother about the hearing. This argument is inadequate because "[n]otice by telephone or conversation is not sufficient" to establish proper service. *In re Frinzl*, 152 Ohio St.164, 172. Moreover, R.C. 2151.29 and R.C. 2151.414 place the duty of ensuring service on the juvenile court. The trial judge is not entitled to rely on statements by the caseworker, who is, after all, the opposing party's employee, to determine whether service was perfected. See *In re Lane*, supra at *4 (stating that "the judge had no business relying on [the agency's] attorney or the guardian ad litem to tell him whether service had been perfected").

{¶48} Finally, CSB cites *State v. King* (Nov. 4, 1981), 9th Dist. No. 10165 for the proposition that compliance with R.C. 2151.414(A)(1) is not jurisdictional, but is rather a matter of due process. In *King*, this Court found that the notice provisions of the statute were satisfied because personal service was obtained on the parent. Beyond that, from the brief discussion, the case is not persuasive on the question before us.

Conclusion

{¶49} In this case, there was no effort to accomplish service of notice of the permanent custody hearing by personal delivery or by residence delivery. There was no attempt at service

of notice by certified, registered, or express mail. And because the trial court had terminated Mother's legal representation when the motion for permanent custody was filed, there could be no constructive notice to counsel or appearance by counsel to raise the issue of notice at the hearing. There was only an effort to obtain service of notice through the use of regular or ordinary mail, and those efforts did not include the admonishments included within R.C. 2151.28(I). As noted above, due process requires "reasonable diligence" in attempting to notify a parent that his or her parental rights are subject to termination. *Thompkins*, 2007-Ohio-5238, at ¶14-15. This Court has previously emphasized that: "Minimal efforts do not constitute 'reasonable diligence;' rather it is demonstrated by such diligence, care, or attention as might be expected from a person of ordinary prudence and activity." *In re Cowling*, 72 Ohio App.3d at 502.

{¶50} Upon this record, we conclude that the trial court failed to comply with the relevant statutes and rules regarding service of notice of the filing of the motion for permanent custody and service of notice of the permanent custody hearing, and that the trial court offered no valid reason to vary from those established procedures. Moreover, Mother did not make a voluntary or involuntary appearance or otherwise submit to the jurisdiction of the court, nor did she have the benefit of counsel who could make an appearance on her behalf or raise the issue of inadequate notice of the permanent custody motion or permanent custody hearing.

{¶51} For these reasons, the trial court lacked personal jurisdiction over Mother and the judgment of the trial court is void. See *In re Frinzl* (1949), 152 Ohio St. 164, paragraph one and paragraph three of the syllabus. (a juvenile court is without jurisdiction to make permanent a temporary commitment of a dependent child unless notice of the time and place of hearing is

served on the parent as provided in the statute, and the order of permanent custody is void ab initio).

{¶52} Accordingly, because the trial court failed to obtain personal jurisdiction over Mother, the trial court's judgment is void. The judgment of the Wayne County Court of Common Pleas, Juvenile Division, is vacated and the cause is remanded for further proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, P.J.
CONCUR

APPEARANCES:

CLARKE W. OWENS, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.

RENEE JACKWOOD, Guardian ad Litem.