Circuit Court for Baltimore City
Petition No. T17243005

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2567

September Term, 2018

IN RE: D.H.

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: June 7, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Ms. S. ("Mother") appeals from the September 6, 2018, order of the Circuit Court for Baltimore City, which dismissed her untimely notice of appeal of the June 8, 2018, order granting appellee, Baltimore City Department of Social Service's (the "Department"), guardianship with the right to consent to adoption of Mother's minor child, D.H. She presents four questions for this Court's review,[1] which we have consolidated and rephrased as follows:

Did the circuit court err in striking Mother's untimely notice of appeal?

For the reasons set forth below, we shall answer this question in the negative, and therefore, we shall affirm the judgment of the circuit court.

---

[1] Mother presents the following four questions for our review:

1. Did the mother of D.H. receive ineffective assistance of counsel when her counsel failed to note a timely appeal of the Order terminating mother's rights?

2. Is the Strickland Test satisfied by the failure to note a timely appeal?

3. Is the proper remedy to accept mother's personal appeal as conveyed in person on July 9, 2018?

4. Do constitutional due process rights, mandate that mother's appeal proceed as filed on July 9, 2018?

FACTUAL AND PROCEDURAL BACKGROUND

I.

Initial Background

D.H. was born on May 8, 2016, at which time both D.H. and Mother tested positive for marijuana and benzodiazepines. Shortly thereafter, the Department filed a Petition With Request for Shelter Care, which the circuit court granted. On August 19, 2016, the circuit court determined that D.H. was a CINA[2] and granted limited guardianship to the Department. On September 8, 2017, after mother continued to have positive drug test results, failed to enter into service agreements, and visited D.H. only sporadically, the Department filed a Petition for Guardianship with the Right to Consent to Adoption or Long Term Care Short of Adoption.

II.

Termination of Parental Rights Hearing

The court held a hearing on the Department's petition on April 24, 2018, April 25, 2018, and May 3, 2018. Dr. Ruth Zajdel testified that she performed a bonding evaluation

[2] A child in need of assistance, or "CINA," is a child who "requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." Md. Code (2018 Supp.), § 3-801(f) of the Courts and Judicial Proceedings Article ("CJP").

on D.H.'s foster care provider, Ms. Street, and D.H.[3] Ms. Street was "nurturing and caring and was able to interact with [D.H.] in an . . . age-appropriate, cognitive development appropriate way." D.H. was "securely bonded" to Ms. Street.

Mother was scheduled for both a parental fitness evaluation and a bonding evaluation, but she failed to appear for either. Because Dr. Zajdel did not have the opportunity to evaluate Mother, she was unable to make recommendations about general custody of the child.

Nia Noakes, a Child Protective Services ("CPS") Safety Unit worker, testified that CPS became involved with D.H. when he was born substance exposed. Mother advised CPS that she "did not want the baby to go to the house where she was staying." On May 20, 2016, the hospital issued a visitor restriction form for Mother because she was visibly impaired when she visited D.H.

Delores Basilio, a CPS Permanency Department worker, testified that the hospital called her advising that they had "ejected [Mother] from the hospital for her behavior." She sent Mother a letter explaining Mother's right to weekly visitation, but Mother's visitation was "sporadic," i.e., out of the possible 104 weekly Wednesday visits that Mother could have attended, Mother had exercised her visitation rights only approximately 26 times. Ms. Basilio offered Mother a service agreement, but Mother failed to comply

[3] The parties stipulated that Dr. Zajdel was "an expert in the area of children's relationships with their caregivers; psychological evaluation of children and adults; parental fitness and bonding studies; evaluate and secure attachment and providing related treatment recommendations."

because she frequently tested positive for drugs, she was unable to secure housing, despite CPS offering to assist Mother with one month rent once Mother provided documentation of housing, and Mother failed to provide documentation of proof of income. For 15 months the goal under the permanency plan was reunification of Mother with D.H., but due to Mother's inability to comply with the service agreement, as well as its goal of permanency for D.H., CPS sought to terminate Mother's parental rights to allow for the adoption of D.H.

Mother was scheduled to testify on the first day of the hearing. After someone reported that Mother was using illegal substances, however, the court ordered an instant drug test. When the test came back positive for marijuana and benzodiazepines, the court postponed Mother's testimony to the next day.[4]

On April 25, 2018, Mother testified. She stated, contrary to Ms. Noake's testimony, that she never had any discussion with CPS as to where D.H. should live before CPS took him to shelter care. Mother testified that she complied with the service agreement offered by CPS, and she claimed that she showed Ms. Basilio documents indicating that she received TCA[5] and food stamps.[6] With respect to drug treatment, Mother testified that she

[4] At the time of the hearing, Mother was in a methadone program, so she was expected to test positive for methadone, but not other substances.

[5] According to the Maryland Department of Human Services, TCA stands for "temporary cash assistance." *Public Assistance*, Department of Human Resources, https://perma.cc/WTH2-C7D3.

[6] Mother testified that she also generates secondary income as a hairdresser.

no longer smoked marijuana, despite that the court ordered test the prior day was positive for marijuana. Mother then stated that her drug use did not affect her ability to care for D.H. Mother also disputed Ms. Basilio's testimony that she had exercised her visitation rights only 26 of the 104 possible times over the approximately two-year time span.

Following the close of the proceedings on April 25, 2018, the circuit court ordered the parties to appear on May 3, 2018, "for [the] parties [to] present closing arguments." The circuit court subsequently ordered the parties to appear on June 8, 2018, "for the Court's ruling."

III.

Circuit Court's Decision to Terminate Parental Rights

On June 8, 2018, the court rendered its decision from the bench. Mother did not appear. The court considered the factors set forth in Maryland Code (2012 Repl. Vol.), § 5-323(d) of the Family Law Article ("FL"), regarding the grant of nonconsensual guardianship, and it stated, in pertinent part, as follows:

> The Court finds that Mother did not fulfill her obligations of the service agreement completely and that she participated in the REACH [drug] program but did not reach sustained abstinence. She consistently tested positive for CDS or did not provide instances where she was clean.
>
> . . . Mother failed to find housing, although she currently lives in a basement apartment on Allendale Road, it is not appropriate for her, her daughter, and her son.[7] Mother has failed to find gainful employment, although Mother testified that she is receiving TCA.
>
> Mother has not found permanent housing that would accommodate her, her daughter[,] and her son. Although she indicated through her testimony that she did provide the Department with information that she

[7] Mother testified that she also has a daughter. Mother's rights regarding her daughter are not at issue in this case.

> applied for housing, but did not provide proof that she applied for that housing.
>
> * * *
>
> Also, upon the birth of [D.H.], the child tested positive for drugs, as evidenced by the State's exhibit. Mother refused the level of drug treatment recommended by qualified addiction specialists.
>
> The Court concludes that Mother did refuse . . . the level of drug treatment recommended by qualified addiction specialists because during the course of the time that the service agreements existed she continued to test positive for drugs, whether they were narcotics or prescribed, but not prescribed by a professional doctor.

With respect to visitation, the court noted that, even using Mother's estimation as to the number of visitation sessions she attended, she only exercised her right to visitation approximately 40 of the 104 possible times. Mother "either had the inability to provide financial support or chose not to provide financial support" to D.H., and "[t]here was no evidence, including receipts, for what she now claims to be her current employment prospect, which is doing hair." The court found that the majority of D.H.'s emotional ties were with Ms. Street, and "the likely impact of terminating the parental rights on the child [would] be minimal," given Mother's sporadic visitation and that D.H. had been in Ms. Street's care since he was approximately two weeks old.

The court continued:

> Mother participated in REACH for two years. She failed to sustain abstinence, she failed to provide adequate proof of compliance with the program. There was no evidence of treatment for mental health issues. But evidence of non-prescribed prescription medications for mental health issues. Mother has been unable to assist counsel during [the] initial hearing and tested positive for CDS when the hearing was recessed for that purpose.

The court found that "the child has been away from the biological parent for more than 99 weeks," and it noted that any possible emotional effect on D.H. if a relationship with Mother did not continue was unknown because Mother failed to appear for a bonding evaluation. The court further found that Mother "didn't initiate contact or interest" in reclaiming D.H. "until the initiation of the TPR," and Mother had made "little effort to create amenable conditions so that her child [could] be returned to her care and custody." The court thus concluded that a continued parental relationship with Mother "would be detrimental to the best interest of [D.H.]."

The same day that the court rendered its decision from the bench, it issued an order. The order stated that the court "found that termination of parental rights is in the best interests of" D.H., and it appointed the Department "guardian of [D.H.], with the right to consent to adoption and with the right to consent to long-term care short of adoption."

IV.

Appeal of the June 8, 2018, Order

On June 15, 2018, trial counsel sent Mother a letter, advising that the court terminated Mother's parental rights to D.H. and enclosing a copy of the order. The letter continued:

> Please note that you have thirty (30) days from the date of the Order to file a notice of appeal. **This means that any objection must be received by the Clerk of the Circuit Court for Baltimore City Division for Juvenile Causes within thirty (30) days from the date "ORDERED" on the Court Order.** This notice of appeal must be in writing. If you do not file a timely notice of appeal, you will be barred forever from taking an appeal of Judge Jones's ruling terminating your parental rights. If you wish to file an appeal, you may contact me to discuss it and to request the Office

> of the Public Defender to file a notice of appeal on your behalf **or** you may do so on your own by filing notice of appeal with the Clerk's Office. The Office of the Public Defender will not file a notice of appeal that would be frivolous.

On July 10, 2018, 32 days after the order was entered, the Office of the Public Defender filed a Notice of Appeal.[8] On July 11, 2018, the Department filed a motion to dismiss, asserting that the notice of appeal was not timely because "Mother . . . had until July 9th, 2018 to note [the] appeal." On July 13, 2018, D.H. filed a motion to dismiss the notice of appeal on the same ground. On August 2, 2018, a different member of the Office of the Public Defender was substituted as counsel for Mother.

Mother opposed the motions to dismiss. She did not dispute that the notice of appeal was filed after the 30-day deadline to note an appeal, but she requested that the court "vacate the June 8, 2018 Order, and re-issue an Order nunc pro tunc to July 10, 2018." Alternatively, she requested that the court authorize the filing of her appeal on July 10, 2018, on the grounds that she received ineffective assistance of counsel in filing the appeal from the termination of her parental rights, and that preventing her "from filing a timely pro se [a]ppeal . . . constituted a deprivation of her constitutional right to due process." Mother attached to the oppositions an affidavit, in which she affirmed:

> 1. I received a copy of the letter dated July [sic] 15, 2018, from my attorney. No other papers or Order w[ere] enclosed with the letter.

[8] The final day of the 30-day period to appeal fell on a weekend. Pursuant to Maryland Rule 1-203, when the last date to file a paper in court falls on a Saturday, Sunday, or holiday, the time for filing is the next day that the clerk's office is open. Thus, the notice of appeal in this case needed to be filed by Monday, July 9, 2018, to be timely.

2. Sometime after I attended the termination of parental rights trial, my attorney called me and told me the Court terminated my parental rights for [D.H.]. He asked if I wanted to file an appeal and I said yes.
3. I called my attorney after that a number of times but I was never able to contact him. At some point his voice mail was full so I could not leave a message.
4. I went to the Clerk's Office on Monday, July 9, 2018[,] and asked to file an appeal. They sent me downstairs to the Office of the Public Defender to have my Attorney assist me.
5. On July 10, 2018[,] I went back to the Public Defender's Office and spoke with Ms. Taylor.

Mother also attached two other affidavits. An affidavit signed by Brittany Askew provided:

1. That [Ms. Askew] is not a party to the Guardianship Petition regarding [D.H.].
2. That [Ms. Askew] is the Receptionist in the Office of the Public Defender, Parental Defense Division.
3. That on Monday, July 9, 2018[,] at approximately 3:10 p.m., in the afternoon, [Mother] came to the second floor Office of the Public Defender looking for [trial counsel]. [Mother] stated that she came into the office because the Juvenile Court Clerk told her to come to the Parental Defense Division where [trial counsel's] office is located.
4. That [trial counsel] was not in his office at this time.
5. That on Tuesday July 10, 2018[,] at approximately 3:50 pm [Mother] and her minor daughter returned to the Office of the Public Defender, Parental Defense Division.
6. That [Ms. Askew] attempted to reach [trial counsel via telephone, but there was no answer after numerous rings. [Ms. Askew] then telephoned Monica Wiggins, the Parental Defense Paralegal, who subsequently personally spoke with [Mother].
7. That after speaking directly with [Mother], the Paralegal telephoned the Parental Division Chief Attorney, Vanita Taylor, to request that Ms. Taylor come from her office to speak to [Mother].

An affidavit signed by Ms. Wiggins provided:

1. That [Ms. Wiggins is] a paralegal in the Office of the Public Defender.
2. That on Monday, July 9, 2018[,] at approximately 3:15 in the afternoon, [Ms. Wiggins] received a call from . . . [Ms.] Askew who is the

receptionist in the Office of the Public Defender. [Ms. Askew] asked [Ms. Wiggins] if [she] could speak with [Mother], a client of [trial counsel's].

3. Upon arriving at the front desk, [Ms. Wiggins] spoke with [Mother] who stated that she had spoken to [trial counsel] and he told her to go to the Clerk's office to file her appeal. [Mother] also said when she went to the Clerk's office she was told to come to the Office of the Public Defender and get her attorney to file her appeal but [trial counsel] was not in the office. [Ms. Wiggins] checked his docket and he [had] finished his cases for the day so [she] called the CINA suite and he was not there. [Mother] was given [trial counsel's] number and was asked to call him in the morning.
4. That on Tuesday, July 10, 2018 at approximately 3:50 in the afternoon, [Mother] arrived in the Office of the Public Defender looking for [trial counsel] again. Upon checking his docket and calling the CINA suite [trial counsel] was not there so [Ms. Wiggins] asked Vanita Taylor, Division Chief to speak with [Mother].
5. Ms. Taylor asked [Ms. Wiggins] to print the last court order, after Ms. Taylor calculated the days from the court order, Ms. Taylor asked [Ms. Wiggins] to Note the appeal . . . on the behalf of [Mother].

V.

Hearing on the Motions to Dismiss Mother's Notice of Appeal

On September 6, 2018, the circuit court held a hearing on the motions to dismiss the notice of appeal. At the hearing, the Department submitted an affidavit signed by trial counsel, which stated:

1. I, [trial counsel], am former counsel for [Mother].
2. On June 8, 2018, honorable Judge Cynthia Jones entered her order terminating the parental rights to [D.H.].
3. On June 15, 2018, I personally mailed a letter to [Mother] informing her of . . . the Judge's decision, and . . . [Mother's] right to appeal that decision.
4. On or about June 19, 2018, I telephoned [Mother] speaking with her directly to . . . verify receipt of the letter (she said she had not yet received the letter), so on that date I personally sent her another copy of the letter.
5. On or about June 19, 2018, during the same telephone conversation, I fully explained the letter which had been sent, including . . . the Judge's

decision about terminating her parental rights [and] her right to appeal by either the Office of the Public Defender, or by herself. [Mother] stated she was thinking about it.

6. I also sent [Mother] a copy of the letter by Certified Mail, Return Receipt Requested, which per the United States Postal Service was delivered to [Mother's] address on June 23, 2018.
7. On July 11, 2018, upon arriving at my office I found a copy of a Notice of Appeal dated the prior day after 4 p.m.
8. I was informed on July 11, 2018, that [Mother] had come to Room A2400 on both July 9[,] 2018 and July 10, 2018, to see me.
9. On July 9, 2018, I was in trial at the Juvenile Justice Center to approximately 3:15 p.m., returning to my office at 4 p.m. to check for voicemail and email. I left my office between 4:15 and 4:20 p.m., and had no notice whatsoever that [Mother] had come to Room A2400.
10. On July 10, 2018, I was in trial at the Juvenile Justice Center to approximately 4:45 p.m., and had no notice whatsoever that [Mother] had come to Room A2400.

The court heard argument from counsel. Counsel for the Department argued that a notice of appeal must be filed within 30 days after entry of the order. Counsel continued:

> There was argument subsequently made that pursuant to the revisory powers of this Court the remedy, the relief that is being asked by Mother's counsel is to either – and it's my understanding, is to either postdate [the court's] date of judgment so that it will be within 30 days or predate Mother's entry of notice of appeal to the day before, with the same effect of making her notice of appeal . . . timely.
>
> However, the revisory powers of this Court are also limited to 30 days. And after if a request for the court to exercise its revisory powers is asked for outside of 30 days then it becomes an[] Appellate issue. And that is the basis, typically, of an action for ineffective assistance of counsel.
>
> So I would argue pursuant, and in my opposition to Mother's motion to dismiss Mother's untimely notice of appeal, I have cited the correct rules with regard to the authority of the Court to entertain Mother's Counsel's request.
>
> And after a judgment is entered, which was entered by this Court on June 8th, this Court still had authority within 30 days to modify, vacate, due to very limited argument of fraud, abuse, mistake, clerical error. None of those arguments were made.
>
> Post 30 days the only authority of this Court is the 3-803 for post-TPRs regarding guardianships and adoptions. This court has no authority,

> with all due respect, to entertain ineffective assistance of counsel claims outside of 30 days. This is an [a]ppellate issue that must be decided by the Court of Special Appeals.
>
> And I would ask for this Court to find that the requirements of a notice to appeal to be filed is untimely. And there's no way around it. There's no, you know, you can't predate it, because event the request to modify is outside of 30 days.

Counsel for D.H. argued that, pursuant to Rule 8-203(a), the circuit court was empowered to strike Mother's notice of appeal that had not been filed within 30 days of the entry of the June 8, 2018, order. Counsel asserted that, pursuant to Rule 1-204, the court could not "shorten or extend the time for an appeal to be filed." Moreover, she contended that an appellate court would be without jurisdiction to hear the notice of appeal, as it was not filed within the 30-day time limit.

Mother's counsel agreed that, pursuant to the Maryland Rules, Mother's appeal was not timely. Counsel stated, however, that they were asking the court to "vacate the June 8th order and reissue an[] order nunc pro tunc to July 10th, 2018, which would be the date that Mother's appeal was filed. And that would make it within the 30 day period."[9] Alternatively, counsel asked that "the Court authorize the filing of Mother's appeal on July 10, 2018," stating that "[t]he grounds for that request are ineffective assistance of counsel and deprivation of due process." Counsel contended that claims of ineffective assistance

---

[9] Mother does not pursue this argument on appeal. *See Michael v. State*, 85 Md. App. 735, 737–38 (1991) (trial court could not, in absence of specific authority to do so, extend time for filing application for leave to appeal by revising imposition of sentence nunc pro tunc to a later date).

of counsel were applicable to termination of parental rights proceedings pursuant to *In re Adoption of Chaden M.*, 189 Md. App. 411 (2009), *aff'd*, 422 Md. 498 (2011).

Mother's counsel argued that Maryland Code (2018 Repl. Vol.), § 16-204 of the Criminal Procedure Article ("CP") "guarantees an indigent person a right to counsel in a termination of parental rights case through the Public Defender's Office," and "if you have a right to an attorney then the assistance of that attorney should be effective." Counsel asserted that, under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), there was deficient performance because, according to Mother's affidavit, she spoke on the phone with her trial attorney well within the 30-day period and indicated that she wanted to file an appeal, yet no appeal was filed. Counsel also stated that the letter Mother's trial attorney sent her did not include the relevant date of the June 8, 2018, order, and the "actions by the support staff for the Public Defender's Office," as explained in Ms. Askew's and Ms. Wiggins' affidavits, could be imputed to her attorney. With respect to the second prong of *Strickland*, counsel argued that there was "a per se satisfaction" of this prong, asserting that counsel's failure to timely note the appeal prejudiced Mother because, "had an appeal been timely filed[,] then [Mother] would have been able to proceed with [her] appeal of the termination of parental rights decision."

Counsel for the Department, in rebuttal, argued that, even if *Strickland* applied, trial counsel's affidavit explained that, on July 9, 2018, he went to his office to check his messages before leaving for the day, and therefore, Mother failed to prove the first prong of an ineffective assistance claim. Any errors committed were committed by support staff,

and "because this is an ineffective assistance of counsel claim you cannot piggyback the support staff." Counsel reiterated its view to the court: "Your Honor, after 30 days the applicable case law is the [Rule] 8-202 and 8-203 . . . It's not *Strickland*. It's not anything else."[10]

After hearing from the parties, the circuit court noted its ruling from the bench:

> So the Court's going to start backwards. And it does involve the credibility of the witnesses. In the Court's experience it's not by happenstance that a litigant shows up on the 30th day that an appeal is due. So I don't think that [Mother's] appearance on [July] 9th happened by happenstance. . . .
>
> * * *
>
> Which means if that's true she would have had to have notice that that was the 30th day. And how would she get notice? She would get notice either by mail, which was on June 15th. Or by conversation, which was on June 19th. Or by a certified letter that was sent on June 19th and received, by certified return receipt requested, as delivered on June 23rd, 2018.
>
> The Court agrees with [c]ounsel for Mother that under Courts and Judicial Proceedings Article 3-813 and the Criminal Procedure Article 16-204, that Mother based on the nature of the proceedings involving her and her child, she's entitled to counsel.
>
> * * *
>
> The Court will note that, and I didn't have the opportunity to look at the record because I didn't think I would have to. But with regard to [trial counsel's] representation of his clients, and in this case in particular, what I

[10] Mother's Counsel also summarily argued that the actions by the staff at the Public Defender's Office amounted to a deprivation of Mother's due process rights. Counsel for the Department contended that "[i]t is undisputed that Mother was afforded her substantive and procedural due process rights," noting "Mother participated in her TPR proceedings with competent counsel during the entire duration of contested proceedings and was afforded 30 days to note an appeal afterwards."

can say based on my own experience is that when his client doesn't appear timely I am always asked, Your Honor, my client is not here. Can you give me 15 more minutes. Or, Your Honor, my client's on their way, they said they'll be here in 45 minutes. Or, I talked to my client and my client forgot but they're on their way.

So combinate [sic] any of the things that I just mentioned and that is what I know [trial counsel] to do.

* * *

[W]hat I will say is, that I have witnessed his level of communication with this particular client. I accepted as evidence [trial counsel's] affidavit indicating that he communicated with his client after the June 8th hearing for which his client did not appear.

* * *

And per Exhibit Number 3, [trial counsel] indicated that on June 15th, 2018[,] he personally mailed a letter to [Mother] informing her of the decision of the Court as well as the right for her to appeal the decision.

Now, on June 19th, [Mother] said that she had not received the letter. That information came to [trial counsel] by way of a telephone call and conversation he had with [Mother] on June 19th, 2018[,] where he indicated that he personally sent her another copy of the letter.

He also indicated during that same telephone conversation that he fully explained the letter which had been sent, including the Court's decision about terminating her parental rights as well as her right to appeal by either the Office of the Public Defender or by herself. And, according to the affidavit, [trial counsel] said [Mother] stated that she was thinking about it.

[Trial counsel's] affidavit is corroborated by [the] June 15th letter that trial counsel indicated that he sent to [Mother], which included the dates of the hearing . . . That he included a copy of the court order and that he also informed her of the Court's determination and indicated that she had 30 days to file a notice of appeal.

He also indicated in bold and underline that it meant that any objection must be received by the Clerk of the Circuit Court for Baltimore City,

Division of Juvenile Causes, not the Office of the Public Defender, within 30 days of the date ordered on the court order.

. . . [W]hat we know to be true is that however it was communicated to [Mother], she showed up on the 30th day[,] went to the Clerk's Office per the letter of June 15th and asked to file an appeal.

* * *

So the level of communication from the evidence presents, as well as what the Court observed during the course of the trial, seemed to be consistent with what Mother proffers in her affidavit; what the two support staff members of the . . . Public Defender's Office proffer in their affidavit; what [D.H.] proffers in [the June 15th letter]; and what [the Department] proffers in [trial counsel's affidavit].

* * *

And so, I agree with [counsel for D.H.] that basically the argument of Counsel for Mother is that if trial counsel is found . . . ineffective then I can change the order of the date, to which this Court disagrees. What I'm charged with making a decision about is whether Mother can file her notice of appeal.

The Court finds that she cannot, pursuant to Rule 8-203(a)[11] as well as Maryland Rule 1-204.[12] The Court finds that I cannot revise my order. I cannot allow Mother to file a late appeal. And that I don't have the authority to do so. Therefore, the Court will be striking the notice of appeal pursuant to the Maryland Rules, the Statutes.

And the Court will be granting both [the Department's] motion to dismiss Mother's request. As well as [D.H.'s] motion to dismiss Mother's request. And that will be the order of the Court.

---

[11] Rule 8-203(a) states, in pertinent part, that, "[o]n motion or on its own initiative, the lower court may strike a notice of appeal . . . that has not been filed within the time prescribed by Rule[] 8-202." Rule 8-202(a) states, in pertinent part, that "[e]xcept as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken[.]"

[12] Rule 1-204(a) states, in pertinent part, that "[t]he court may not shorten or extend the time for filing . . . a notice of appeal . . . where expressly prohibited by rule or statute."

The same day that the court rendered its ruling from the bench, it issued an order reflecting its decision. This appeal followed.

DISCUSSION

I.

Mother contends that the circuit court erred in dismissing her untimely notice of appeal. In support, she argues that she received ineffective assistance of counsel due to her attorney's failure to timely file her notice of appeal, and "the appropriate remedy" is "a belated appeal." Mother asserts that the ineffectiveness of her counsel denied her the right to appeal, which violated her rights to due process and equal protection of the laws.[13]

The Department contends that "neither this Court nor the juvenile court have authority to extend [Mother's] time to appeal because" the 30-day requirement for a notice of appeal is jurisdictional. It asserts that, "[a]lthough appellate courts have permitted criminal defendants, through post-conviction proceedings, to file belated notices of appeal . . . that procedure is not applicable in a guardianship proceeding and is beyond the scope of the statutory authority of the juvenile court." In any event, the Department argues that Mother's "claim does not meet the requirements for ineffective assistance of counsel."

[13] Mother did not argue a denial of equal protection at the hearing below, and therefore, we will not consider this argument on appeal. *See* Rule 8-131 ("Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *DiCicco v. Baltimore County*, 232 Md. App. 218, 224–25 (2017) (declining to consider an issue on appeal that was not raised in the trial court).

Counsel for D.H. contends that Mother received effective assistance of counsel because "counsel adhered to the Maryland Rules of Professional Conduct." Counsel notes that the circuit court found that Mother's counsel advised her of the date the notice of appeal must be filed, and that Mother's counsel stated in his affidavit that she was "thinking about" whether to appeal. Counsel for D.H. asserts that there was "no credible proof" that Mother requested trial counsel to file an appeal, and her expectation that counsel would be available when she appeared at the Public Defender's Office 90 minutes before the clerk's office closed on the last day to file the appeal was unreasonable.

We address first a suggestion in the Department's brief that a parent is not "entitled to the effective assistance of counsel in noting an appeal." This Court previously has explained:

> Generally, the right to counsel is guaranteed in criminal cases by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. It is also clear that the right to counsel in such cases includes the right to the effective assistance of counsel. However, a case involving the termination of parental rights is a civil proceeding, and, therefore, Sixth Amendment and Article 21 protections do not apply. Thus, if there is a right to effective assistance of counsel in TPR proceedings, specifically a proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, then that right must originate in the Maryland statutes.

In re Adoption/Guardianship of Chaden M., 189 Md. App. 411, 425 (2009) (internal citations and quotation marks omitted), *aff'd* 422 Md. 498 (2011). Pursuant to the provisions of the Public Defender Act, CP §§ 16-101–16-104, representation shall be provided to indigent parties in a family law procedure in connection with guardianship or adoption, including an appeal. *Id.*; CP § 16-204(b). Thus, Mother had a statutory right to

counsel, and this right to counsel includes the right to effective assistance of counsel. *See Chaden M.*, 422 Md. at 509.

The issues presented here are whether Mother received ineffective assistance of counsel, and if so, whether there is a remedy. We will address the remedy issue first.

We begin by noting what is not in dispute. There is no contention that the notice of appeal here was not timely filed. *See* Rule 8-202(a) (except as otherwise provided, a notice of appeal shall be filed within 30 days after entry of the order sought to be appealed).

The parties on appeal, as well as the circuit court below, assert that the rule requiring notice of appeal to be filed within 30 days is jurisdictional. The Court of Appeals, however, recently reviewed its "prior classification of Maryland Rule 8-202 as a 'jurisdictional' rule that required immediate dismissal of an appeal for lack of jurisdiction." *Rosales v. State*, __Md.__ , No. 6, Sept. Term, 2016, slip op. at 1–2 (filed April 17, 2019). Noting that the 30-day time limitation is set forth in a rule, as opposed to the statutory authorization to appeal set forth in Md. Code (2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP"),[14] the Court stated:

---

[14] CJP § 12-301 provides:

> Except as provided in § 12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.

> As explained above, some opinions of this Court have referred to the thirty-day time limitation in the Maryland Rules as "jurisdictional," failing to recognize that the thirty-day requirement no longer appears in the statute. We now recognize that Maryland Rule 8-202(a) is a claim-processing rule, and not a jurisdictional limitation on this Court.

Id., slip op. at 13.

Despite this change, the Court made clear that "Maryland Rule 8-202(a) remains a binding rule on appellants, and this Court will continue to enforce the Rule." *Id.*

> We are not concluding that it is inappropriate for a court to dismiss an untimely appeal. Rather, we are stating that the appropriate grounds for dismissal of an untimely appeal is to dismiss for a failure to comply with the Maryland Rules, instead of for lack of jurisdiction. Further, as the Rule is not jurisdictional, a reviewing court must examine whether waiver or forfeiture applies to a belated challenge to an untimely appeal.

Id., slip op. at 14. In *Rosales*, the Court stated that, although it ordinarily would dismiss the appeal for the failure to comply with the 30-day deadline, due to the exceptional circumstances of that case, including the extensive litigation that had already ensued and that the State waived its right to argue that the appeal was not timely filed, the Court would consider the merits of the case. *Id.* slip op. at 16.

Here, as indicated, Mother filed her notice of appeal of the June 8, 2018, order on July 10, 2018, 32 days after entry of the order. Accordingly, pursuant to Rule 8-203(a), the circuit court was permitted to strike Mother's notice of appeal for her failure to file her appeal within the 30-day time limitation prescribed by Rule 8-202.

Mother contends, however, that the failure to timely file her notice of appeal was due to ineffective assistance of counsel. She has not cited, nor have we found, any statute,

rule, or other authority permitting a trial court to extend the time to note an appeal in a TPR proceeding. And as this Court has made clear, a court does not have the power to extend the time for filing a notice of appeal in the absence of a statute, rule, or constitutional provision conferring that power. *Ruby v. State,* 121 Md. App. 168, 174 (1998) (There is no provision "in the Maryland Rules, or elsewhere, authorizing a trial court to extend the time within which notice of an appeal to the Court of Special Appeals shall be filed."), *vacated on other grounds,* 353 Md. 100 (1999). *Accord Michael v. State*, 85 Md. App. 735, 738 (1991); *Cornwell v. State,* 1 Md. App. 576, 577–78, *cert. denied,* 246 Md. 739 (1967).

In a criminal case, the General Assembly has provided a collateral civil remedy to challenge a judgment of conviction based on a claim of ineffective assistance of counsel, i.e., a petition for post-conviction relief. *See* CP § 7-102; *Garrison v. State*, 350 Md. 128, 142–43 (1998) ("[W]hen an accused can show that appellate review of his conviction has been frustrated by his trial or appellate attorney's inaction in failing to file timely an appeal that an accused has promptly and diligently requested be filed, or when, through no fault of his own, an accused's desired appeal is not timely filed on his behalf, a belated appeal may be a proper remedy under post conviction procedures.") (footnote omitted). No similar statutory remedy exists in a civil case involving the termination of parental rights.

Mother contends that constitutional due process concerns mandate that her appeal be accepted as filed on July 9, 2018. She does not cite any cases specifically supporting her claim. The Court of Appeals of Ohio, however, has considered a similar claim. In *In*

re K.J., 36 N.E.3d 804 (Ohio Ct. App. 2015), the court rejected the claim that due process required that a parent have the right to file a delayed appeal, holding that, unlike criminal defendants, a parent has no right to file a delayed appeal from a TPR order, even if "the failure to appeal results from patently ineffective assistance of trial counsel in failing to timely perfect the appeal." *Id.* at 809. The circuit court here properly granted the motion to dismiss the appeal as untimely.[15]

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[15] Because we have concluded that the circuit court properly granted the motion to dismiss the untimely appeal, we need not reach the issue whether Mother received ineffective assistance of counsel. We note, however, that the argument is weak. In her brief, Mother points to three facts that show ineffective assistance of counsel: (1) evidence of failing to provide Mother with the date on which the notice of appeal was due; (2) "failing to note an appeal on a client's behalf when [M]other's overall actions indicated that she was opposed to the TPR"; and (3) "failing to confirm with [M]other that she wanted to waive her rights to any appeal." Initially, the circuit court's statements regarding trial counsel's conduct indicate that it found, contrary to Mother's argument on appeal, that counsel did advise Mother of the due date to note her appeal. And the court also noted that trial counsel's affidavit stated, not that Mother wanted to appeal, but that Mother was "thinking about" her right to appeal. Finally, Mother cites no case supporting an argument that counsel's conduct is deficient if, after advising a client about the right to appeal, counsel fails to follow up with the client to confirm that she wants to waive her right to appeal.