

SUPREME COURT OF THE STATE OF DELAWARE

Welsch v. Division of Family Services (DFS)

No. 340, 2019 · No. No. 340, 2019 · Decided September 17, 2019

SUMMARY

The Delaware Supreme Court dismissed Jimmy Welsch’s appeal from a Family Court order terminating his parental rights because the notice of appeal was received after the applicable thirty-day deadline. The Court held that counsel had no duty to docket the appeal because Welsch did not timely inform counsel of his desire to appeal, and Delaware does not apply the prison mailbox rule.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Gary F. Traynor; Justice Valihura; Justice Seitz; Justice Traynor
JURISDICTION	Delaware
DECIDED	September 17, 2019
DOCKET	No. 340, 2019
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appeal from a Family Court order terminating the appellant's parental rights; the Supreme Court issued a notice to show cause why the appeal should not be dismissed as untimely.
STANDARD OF REVIEW	The court applied the jurisdictional deadline for filing a notice of appeal and reviewed whether the untimely filing fell within the exception for delay attributable to court-related personnel.
PRECEDENTIAL VALUE	Published Delaware Supreme Court order
PARTIES	Jimmy Welsch v. Division of Family Services (DFS)

TOPICS

- appellate procedure
- appellate jurisdiction
- termination of parental rights
- parental rights
- family law procedure

PRACTICE AREAS

- Appellate Procedure
- Family Law
- Termination of Parental Rights

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because the notice of appeal was received after the thirty-day jurisdictional deadline.
2. Whether the appellant's incarceration and deposit of the notice of appeal in a prison mailbox satisfied Delaware's filing requirement under a prison mailbox rule.
3. Whether counsel had a continuing obligation to docket the appeal under Delaware Supreme Court Rule 26.1(a) when the appellant did not timely inform counsel of his desire to appeal.

HOLDINGS

1. Counsel did not have a duty to docket the appeal because Welsch did not timely inform counsel of his desire to appeal.
2. A notice of appeal must be received by the Court within the applicable filing period, and Welsch's notice was untimely because it was received after the thirty-day deadline.
3. Delaware does not recognize a prison mailbox rule under which a pro se prisoner's notice of appeal is deemed filed when delivered to prison authorities for forwarding.

KEY QUOTATIONS

"Time is a jurisdictional requirement." (at 3)

"Delaware has declined to adopt the prison mailbox rule, wherein a pro se prisoner's notice of appeal is deemed 'filed' at the moment it is delivered to prison authorities for forwarding to the Court." (at 3)

FACTUAL BACKGROUND

The Family Court terminated Welsch's parental rights on July 1, 2019. His attorney sent him a letter advising him of his right to appeal and identifying July 31, 2019, as the filing deadline. Welsch asserted that he attempted to contact counsel from prison on July 11 and deposited his notice of appeal in the prison mailbox on July 29 or 30, but the notice was not received by the Supreme Court until August 5.

PROCEDURAL HISTORY

The Delaware Family Court entered an order terminating Welsch's parental rights on July 1, 2019. Welsch's notice of appeal was received by the Delaware Supreme Court on August 5, 2019, after the July 31, 2019 deadline. After receiving responses from Welsch and his former Family Court attorney, the Supreme Court dismissed the appeal as untimely.

DISPOSITION

dismissed

CASES CITED

- Carr v. State, 554 A.2d 778, 779 (Del.), cert. denied, 493 U.S. 829 (1989)

- *Bey v. State*, 402 A.2d 362, 363 (Del. 1979)
- *Smith v. State*, 47 A.3d 481, 483-87 (Del. 2012)

OPINION

Welsch v. DFS

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JIMMY WELSCH, §

§ No. 340, 2019 Respondent Below, § Appellant, § § v. § Court Below–Family Court § of the State of Delaware

DIVISION OF FAMILY §

SERVICES (DFS), § File Nos.: 18-07-11TN § CN17-05153 Petitioner Below, § Appellee. § Petition Nos.: 17-27550 § 18-21948 Submitted: September 6, 2019 Decided: September 17, 2019 Before VALIHURA, SEITZ, and TRAYNOR, Justices.

ORDER

Upon consideration of the notice to show cause and the appellant’s response, it appears to the Court that:

(1) On August 5, 2019, the Court received Jimmy Welsch’s notice of appeal from a July 1, 2019 Family Court order terminating Welsch’s parental rights in his minor child. To be timely filed, the notice of appeal had to be received by the Clerk or a Deputy Clerk in any county on or before July 31, 2019.¹ 1 Del. Supr. Ct. R. 6(a)(iii); Del. Supr. Ct. R. 10(a); Del. Supr. Ct. R. 11(a).

(2) The Clerk issued a notice directing Welsch to show cause why his appeal should not be dismissed as untimely. Welsch filed a response to the notice to show cause, stating that he had been represented by counsel in the Family Court and that he had advised counsel he wished to appeal the Family Court’s order.

(3) Under Supreme Court Rule 26.1(a), a trial attorney has the continuing obligation to represent her client on appeal when her client’s parental rights have been terminated. The Senior Court Clerk directed Welsch’s attorney to respond to Welsch’s assertion that he had notified her that he wished to file an appeal. Welsch’s attorney filed a response, including a copy of a letter she sent to Welsch wherein she advised him of his right to appeal the Family Court’s order and provided him with the July 31, 2019 deadline for doing so. The letter directed Welsch to contact counsel at his earliest convenience if he wished to appeal. Welsch’s attorney informed the Court that she had not spoken to Welsch since the date of the termination of parental rights hearing and that she had not received any communication from Welsch advising her of his desire to appeal.

(4) The Clerk directed Welsch to respond and provide the Court with any evidence he had that would show he had, in fact, contacted his attorney and advised her of his desire to file an appeal. Welsch has responded and attests that he attempted to call his attorney

from prison via a three-way phone call on July 11, 2019, but was unable to reach her. Welsch also informed the Court that he had deposited the notice of appeal in the mail box at the James T. Vaughn Correctional Center on either July 29 or July 30.

(5) Welsch does not dispute that he received his attorney's letter and that he was unable to communicate a desire to file an appeal to her on July 11, 2019. Accordingly, we find that Welsch did not timely inform counsel of his desire to appeal and, therefore, counsel did not have a duty to docket Welsch's appeal.

(6) Time is a jurisdictional requirement. ² A notice of appeal must be received by the Court within the applicable time period to be effective. ³ Unless an appellant can demonstrate that the failure to file a timely notice of appeal is attributable to court-related personnel, the appeal cannot be considered. ⁴ It is undisputed that Welsch's notice of appeal was received after the thirty-day deadline. Delaware has declined to adopt the prison mailbox rule, wherein a pro se prisoner's notice of appeal is deemed "filed" at the moment it is delivered to prison authorities for forwarding to the Court. ⁵

(7) There is nothing in the record to reflect that Welsch's failure to file a timely notice of appeal is attributable to court-related personnel. Consequently, this case does not fall within the exception to the general rule that mandates the timely ² Carr v. State, 554 A.2d 778, 779 (Del.), cert. denied, 493 U.S. 829 (1989). ³ Del. Supr. Ct. R. 10(a). ⁴ Bey v. State, 402 A.2d 362, 363 (Del. 1979). ⁵ Smith v. State, 47 A.3d 481, 483-87 (Del. 2012). ³ filing of a notice of appeal. Thus, the Court concludes that the appeal must be dismissed. NOW, THEREFORE, IT IS HEREBY ORDERED, under Supreme Court Rule 29(b), that the appeal is DISMISSED. BY THE COURT: Gary F. Traynor Justice ⁴