

## MEMORANDUM DECISION

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



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### ATTORNEY FOR APPELLANT

Mark F. James  
Anderson, Agostino & Keller, P.C.  
South Bend, Indiana

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## IN THE COURT OF APPEALS OF INDIANA

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In re the Paternity of Alexander Isack,  
Benjamin J. Isack (Father),  
*Appellant,*

v.

Sarah Ann Chidister (Mother),  
*Appellee.*

September 28, 2021  
Court of Appeals Case No.  
21A-JP-590  
Appeal from the St. Joseph Probate Court  
The Honorable Barbara J. Johnston, Referee  
The Honorable Jason A. Cichowicz, Judge  
Trial Court Cause No.  
71J01-1207-JP-536

**Brown, Judge.**

- [1] Benjamin J. Isack (“Father”) appeals the trial court’s September 10, 2020 and March 9, 2021 orders. We dismiss this appeal.

### ***Facts and Procedural History***

- [2] On September 10, 2020, the trial court entered an Order on Relocation, Custody, and Parenting Time which granted the request of Sarah Ann Chidister (“Mother”) to relocate with the child to Carmel, Indiana, denied Father’s motion to modify custody, and awarded Father certain parenting time. On September 15, 2020, Father filed a Motion for Clarification. On October 12, 2020, Father filed a motion to correct error.<sup>1</sup>
- [3] On March 9, 2021, the court held a hearing on the Motion for Clarification. At the beginning of the hearing, Father’s counsel mentioned the motion to correct error and stated: “I don’t know if that’s actually set for today or not.” Transcript Volume 2 at 177. The court stated: “If you attorneys are prepared to address the motion to correct error, we can do that.” *Id.* at 178. After the presentation of testimony, Mother’s counsel stated: “we still have this motion to correct error[], pending; there’s a lot going on in this case.” *Id.* at 210-211. After some discussion, the court stated:

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<sup>1</sup> The chronological case summary indicates that the court held a hearing on October 13, 2020. An entry dated November 18, 2020, states: “The Court on its own Motion continues further hearing due to the potential public health concerns.” Appellant’s Appendix Volume 2 at 154. The court scheduled a status hearing for December 22, 2020. An entry dated December 17, 2020, indicates that the court again continued the hearing due to public health concerns.

As I look at the motion to correct error, and that's really not why we're here this morning, because we set this for status due to [the] pandemic and continuances, and so forth and so on. Let me say that I am going to take that under advisement and I will issue an order by next week. The motion to correct error is taken under advisement and I will issue an order next week.

With regard to the motion to clarify, and I agree, that there are matters that need to be clarified. Let me take a look at that motion and see what we can accomplish today. Okay. First of all, I'm concerned about – I don't believe that these folks at this point in time can share legal custody. I don't believe that it is in this child's best interest. But I'm going to show that Mother is temporarily the legal custodian of the child, temporarily. It's going to all change, that's why I call it temporary because we have too much tension, and too much upheaval, and that I am also saying that the child is – parents are – Mother is ordered to determine if a therapist can see [the child] as soon as possible.

*Id.* at 212.

- [4] That same day, the court entered an Order on Status Hearing in which the court took the motion to correct error under advisement, granted Mother "temporary legal custody," granted Father certain parenting time, and scheduled a status hearing for May 18, 2021. Appellant's Appendix Volume 2 at 145.
- [5] On April 7, 2021, Father filed a notice of appeal of the September 10, 2020 and March 9, 2021 orders. The notice of appeal states: "Date of Motion to Correct Error deemed denied, if applicable: April 8, 2021." Notice of Appeal at 1. It also indicates the basis for appellate jurisdiction was an appeal from a final judgment.

## ***Discussion***

[6] Pursuant to Ind. Appellate Rule 5, this Court has jurisdiction over appeals from final judgments of trial courts and only those interlocutory orders from trial courts that are brought in accordance with Ind. Appellate Rule 14. Ind. Appellate Rule 2(H) provides that a judgment is a final judgment if:

- (1) it disposes of all claims as to all parties;
- (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;
- (3) it is deemed final under Trial Rule 60(C);
- (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
- (5) it is otherwise deemed final by law.

[7] With respect to the March 9, 2021 order, we note that order took the motion to correct error under advisement, granted Mother “temporary legal custody,” and scheduled a status hearing for May 18, 2021. Appellant’s Appendix Volume 2 at 145. Under the circumstances, we conclude that the March 9, 2021 order was not a final judgment. Father is therefore appealing from an interlocutory order. Parties are permitted to appeal “as a matter of right” certain

interlocutory orders.<sup>2</sup> The court's order does not fall under any of these categories. An appeal may be taken from other interlocutory orders if the trial court certifies its order and this Court accepts jurisdiction over the appeal, Ind. Appellate Rule 14(B), or if an interlocutory appeal is provided by statute. Ind. Appellate Rule 14(D). There is no indication that Father sought certification from the trial court or permission from this Court to file a discretionary interlocutory appeal, and he has not stated a statutory right to appeal.

[8] Still, Father also appeals the trial court's denial of his motion to correct error regarding the September 10, 2020, order. We will assume without deciding that the March 9, 2021 hearing constituted a hearing on the motion to correct error. Pursuant to Ind. Trial Rule 53.3, we agree with Father that the motion was

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<sup>2</sup> Ind. Appellate Rule 14(A) provides:

Appeals from the following interlocutory orders are taken as a matter of right by filing a Notice of Appeal with the Clerk within thirty (30) days after the notation of the interlocutory order in the Chronological Case Summary:

- (1) For the payment of money;
- (2) To compel the execution of any document;
- (3) To compel the delivery or assignment of any securities, evidence of debt, documents or things in action;
- (4) For the sale or delivery of the possession of real property;
- (5) Granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction;
- (6) Appointing or refusing to appoint a receiver, or revoking or refusing to revoke the appointment of a receiver;
- (7) For a writ of habeas corpus not otherwise authorized to be taken directly to the Supreme Court;
- (8) Transferring or refusing to transfer a case under Trial Rule 75; and
- (9) Issued by an Administrative Agency that by statute is expressly required to be appealed as a mandatory interlocutory appeal.

deemed denied on April 8, 2021.<sup>3</sup> However, Father filed his notice of appeal on April 7, 2021, one day prior to the date that the motion to correct error was deemed denied. Because the motion had not yet been deemed denied when Father filed his notice of appeal, we conclude that his appeal was untimely.

- [9] It is well settled that an untimely notice of appeal, whether belated or premature, is not a jurisdictional issue. *See In re D.J. v. Ind. Dep’t of Child Servs.*, 68 N.E.3d 574, 578 (Ind. 2017). However, it is never error for an appellate court to dismiss an untimely appeal. *See id.* at 579. On this record, Father has not demonstrated that we should disregard the forfeiture and address the appeal on its merits.
- [10] For the foregoing reasons, we dismiss Father’s appeal of the trial court’s orders.
- [11] Dismissed.

Najam, J., and Riley, J., concur.

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<sup>3</sup> Ind. Trial Rule 53.3 provides:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.