MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Jennifer O'Connell,
Appellant-Respondent

v.

Donna Clay,
Appellee-Petitioner

August 9, 2024

Court of Appeals Case No.
24A-MI-129

Appeal from the Porter Superior Court

The Honorable Mark A. Hardwick, Magistrate

Trial Court Cause No.
64D02-1807-MI-006597

Memorandum Decision by Judge Felix
Judges Riley and Kenworthy concur.

Felix, Judge.

Statement of the Case

[1] Jennifer O'Connell ("Mother") and Jeffrey Clemens Jr. ("Father") are the parents of Isabelle Ann O'Connell ("the Child"). Father died in 2014. Prior to his death, Father did not establish paternity in the Child. Donna Clay, the Child's paternal grandmother ("Grandmother") participated in the Child's upbringing. On July 13, 2018, Grandmother filed a petition for visitation in the present cause (the "Visitation Cause"). On October 11, 2018, Mother and Grandmother filed an agreed order (the "Agreed Order") with the trial court which established a visitation schedule for Grandmother and the Child.

[2] The parties almost immediately had trouble living under the terms of the Agreed Order. In less than three months, both parties filed motions to change the terms of the Agreed Order. In 2023, Grandmother filed a motion attempting to obtain custody of the Child. Following a hearing, Mother filed a motion seeking relief from the Agreed Order, arguing that Grandmother lacked standing to seek visitation. The trial court issued an order denying both Grandmother's petition for custody and Mother's motion.

[3] Mother appeals, presenting multiple issues for our review, which we revise and restate as the following single issue: Whether the trial court erred in denying Mother's motion seeking relief from judgment.

[4] We reverse.

Facts and Procedural History

[5] The Child was born on July 28, 2013, to Mother and Father, an unmarried couple. Father's name was not listed on the Child's birth certificate. The couple lived together with the Child for two months, but they eventually separated, and Father moved out. On December 13, 2014, Father died. Father did not establish paternity in the Child before his death. After Father's death, Grandmother maintained a presence in the Child's life, helping Mother with expenses and visiting the Child.

[6] Three years after Father's death, in February 2018, Grandmother filed a petition to establish paternity and for visitation in a separate cause (the "Paternity Cause").[1] In the Paternity Cause, Grandmother attempted to transfer the case to juvenile court on April 12, 2018, but this transfer was denied. On July 13, 2018, Grandmother filed a motion to dismiss the Paternity Cause, and the trial court granted the motion that same day. Also on July 13, 2018, Grandmother initiated the Visitation Cause, petitioning the trial court for grandparent visitation and to establish paternity. With her petition, Grandmother provided a "Personal Paternity Analysis Report" from an Identigene test, which indicated there was a 99.99% chance that Father was the biological father of the Child.

[1] Cause Number 64D02-1802-DC-2021.

[7] On October 11, 2018, Mother and Grandmother filed the Agreed Order with the trial court. The Agreed Order provides in relevant part:

> 4. That Mother agrees [sic] change the child's surname from "O'Connell" to "O'Connell-Clemens", and agrees to file a Verified Petition for Name Change within thirty (30) days of the date of the hearing in this matter.
>
> 5. That Mother agrees to add Father's name to [the Child's] birth certificate within thirty (30) days of receipt of the Court's Order changing the child's name.
>
> * * *
>
> 7. That Mother acknowledges, in open Court and on the record, that Jeffrey A. Clemens, Jr., is the Father of [the Child] that is the subject of this cause of action.

Appellant's App. Vol. II at 26. The Agreed Order also provided a visitation schedule for Grandmother and the Child.

[8] Within three months of submitting the Agreed Order, Mother filed a motion to suspend Grandmother's visitation because of allegations of neglect, which also included an allegation that another grandchild initiated sexual contact with Child while in Grandmother's care. Grandmother filed two motions for contempt against Mother for failing to follow the agreed visitation schedule. At one point during the proceedings, Mother requested a protective order against Grandmother. At least once, the trial court found Mother in contempt for

violations of the Agreed Order and ordered temporary modifications to the visitation schedule.

[9] On February 23, 2022, Grandmother filed a petition for custody over the Child and requested the trial court to appoint a Guardian Ad Litem ("GAL") for the Child. On August 15, 2022, the trial court appointed Rebecca Billick as the GAL for the Child. On June 23, 2023, Billick filed a GAL report with the trial court, recommending that the trial court order joint legal custody of the Child between Mother and Grandmother with Grandmother having primary physical custody of the Child.

[10] At the hearing on Grandmother's change-of-custody motion, Mother, Grandmother, and Billick testified. At the conclusion of the hearing, the trial court expressed uncertainty about whether it could order custody to Grandmother in the Visitation Cause and asked the parties to prepare briefs on that single issue.

[11] Both Grandmother and Mother filed their responses with the trial court. Grandmother filed a brief alleging that the trial court could change custody under the Visitation Cause because the trial court had previously denied her request to transfer the Paternity Cause to juvenile court. Mother did not file a brief as requested by the trial court; instead, Mother filed a motion to dismiss, pursuant to Trial Rule 12(B)(6), seeking to declare the Agreed Order void and claiming Grandmother did not have standing to file the 2018 petition seeking grandparent visitation.

[12] On December 15, 2023, the trial court issued an order on the October 16 hearing. The order provides in relevant part:

> 7. The Court cannot agree with Grandmother's reasoning that her original case and it's winding through the different courts then ultimately being dismissed somehow creates a situation where the [Visitation Cause] allows this Court to hear all matters custody for the minor child.
>
> 8. [Mother] then argued in her brief that the [Visitation Cause] should never have been filed in the first place because Grandmother did not have standing as paternity was never established. Mother argues all orders from grandparent visitation to the appointment of a GAL were voidable by this Court.
>
> 9. While an argument could have been made at the time Grandmother first filed her pleading creating this instant cause, the parties agreed in their October 11, 2018 Agreed Order Regarding Grandparent Visitation and All Related Matters that:
>
> > a. In paragraph 7 that Jeffrey A. Clemens, Jr. (Grandmother's son) is the Father of [the Child];
> >
> > b. In paragraph 4 that the minor child's last name be changed to "O'Connell-Clemens";
> >
> > c. In paragraph 3 and all its sub-parts, a very detailed grandparent Visitation schedule;
> >
> > d. Other related matters from notification to transfer point, etc.

> 10. The creation the [sic] above Agreed Order on October 11, 2018 waives any argument this Court does not have authority to order grandparent visitation. Therefore, the Court declines to dismiss this case as Mother requests.

Appellant's App. Vol. II at 17–18. Mother now appeals.

Discussion and Decision

[13] Although Mother filed a motion to dismiss pursuant to Trial Rule 12(B)(6), the substance of her motion at trial and her argument on appeal demonstrate the motion should be deemed a motion for relief from judgment under Indiana Trial Rule 60(B)(6). "There is a 'preference to place substance over form,'" *Safeco Ins. Co. of Ind. v. Blue Sky Innovation Grp., Inc.*, 230 N.E.3d 898, 906 (Ind. 2024) (citing *MDM Invs. v. City of Carmel*, 740 N.E.2d 929, 933 (Ind. Ct. App. 2000), *trans. not sought*), so we will construe Mother's motion to dismiss as an Indiana Trial Rule 60(B)(6) motion for relief from a void judgment, *see id.* at 906–07; *Town of St. John v. Home Builders Ass'n of N. Ind., Inc.*, 428 N.E.2d 1299, 1302 (Ind. Ct. App. 1981) (treating a party's motion to reconsider as a Trial Rule 60 motion because its substance met the requirements of a Rule 60 motion). "When a judgment is void under Rule 60(B)(6), the trial court has no discretion to enforce it, and thus, we review the court's decision de novo." *T.D. v. State*, 219 N.E.3d 719, 724 (Ind. 2023) (citing *M.H. v. State*, 207 N.E.3d 412, 416 (Ind. 2023)).

[14] "Trial Rule 60(B)(6) allows a party to move for relief *at any time* if 'the judgment is void.'" *T.D.*, 219 N.E.3d at 725 (emphasis added) (quoting Ind.

Trial Rule 60(B)(6)). The party seeking relief under Trial Rule 60(B)(6) must establish that the judgment is void and not merely voidable. *Id.*

> "A void judgment is one that, from its inception, is a complete nullity and without legal effect[.] By contrast, a voidable judgment is not a nullity, and is capable of confirmation or ratification. Until superseded, reversed, or vacated, it is binding, enforceable, and has all the ordinary attributes and consequences of a valid judgment." [*Stidham v. Whelchel*, 698 N.E.2d 1152, 1154 (Ind. 1998).] "A voidable judgment or order may be attacked only through a direct appeal, whereas a void judgment is subject to direct or collateral attack at any time." *M.S. v. C.S.*, 938 N.E.2d 278, 284 (Ind. Ct. App. 2010).

In re Guardianship of A.J.A., 991 N.E.2d 110, 114 (Ind. 2013). "A judgment is void when the issuing court lacks personal jurisdiction, subject matter jurisdiction, or the authority to render the judgment." *T.D.*, 219 N.E.3d at 726.

[15] Here, Mother claims that the trial court did not have authority to enter the Agreed Order because Grandmother lacked standing to seek grandparent visitation. The Grandparent Visitation Act is the only basis for a grandparent to seek visitation, and the statute "must be strictly construed." *Campbell v. Eary*, 132 N.E.3d 413, 415 (Ind. Ct. App. 2019) (quoting *In re Guardianship of A.J.A.*, 991 N.E.2d at 113). "Grandparents must have standing as prescribed under the Act to seek visitation rights." *In re Guardianship of A.J.A.*, 991 N.E.2d at 113 (citing *In re Visitation of C.R.P.*, 909 N.E.2d 1026, 1028 (Ind. Ct. App. 2009)). "The primary purpose of standing is to ensure that the party before the court

has a substantive right to enforce the claim being made." *In re Visitation of C.R.P.*, 909 N.E.2d at 1028. The Grandparent Visitation Act provides:

> (a) A child's grandparent may seek visitation rights if:
>
> (1) the child's parent is deceased;
>
> (2) the marriage of the child's parents has been dissolved in Indiana; or
>
> (3) subject to subsection (b), the child was born out of wedlock.
>
> (b) A court may not grant visitation rights to a paternal grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child.

Ind. Code. § 31-17-5-1. Grandmother's 2018 petition for visitation does not specify her grounds for seeking visitation, but the circumstances at the time of filing were that Father had died and the Child had been born out of wedlock. Neither party argues that (a)(1) is applicable to this situation. Therefore, we analyze this matter under (a)(3).

[16] We addressed circumstances similar to the present case in *In re Paternity of S.A.M.* 85 N.E.3d 879 (Ind. Ct. App. 2017). There, S.A.M. was a child born out of wedlock, and M.H., an alleged paternal grandfather, sought visitation with S.A.M. *Id.* at 882. Shortly after the child's birth, S.A.M's mother and legal father believed another man—M.H.'s son—might be the biological father

of S.A.M. *Id.* Based on this belief, M.H. filed a petition for visitation and paternity after his son had passed away. The trial court ordered S.A.M.'s parents and M.H. to conduct mediation, and the parties ultimately entered an agreement which granted M.H. visitation with S.A.M. *Id.* at 882–83. Later, S.A.M.'s legal father filed a motion to set aside the mediation agreement with the trial court, which denied the request. *Id.* at 884–85. On appeal, we reversed the trial court's denial of the motion to set aside judgment and determined that the trial court lacked authority to order the parties to mediation because M.H., as an alleged paternal grandparent, lacked standing to seek visitation since his son had not established paternity in S.A.M. *Id.* at 890. Our Supreme Court also addressed a similar situation and found even if the parties submit an agreed order establishing visitation, that order is void if the grandparent did not meet one of the circumstances provided by the statute. *See In re Guardianship of A.J.A.*, 991 N.E.2d at 114–15.

[17] Here, Grandmother filed her petition seeking visitation on July 13, 2018. By 2018, the child, almost 5 years old, had been born out of wedlock, Father died nearly 4 years earlier, and paternity had never been established over the Child. Thus, Grandmother did not have standing to file for grandparent visitation. *See* I.C. § 31-17-5-1; *In re Paternity of S.A.M.*, 85 N.E.3d at 890. Because Grandmother did not have standing to seek visitation, the trial court did not have the authority to order grandparent visitation and the Agreed Order is void. *See In re Guardianship of A.J.A.*, 991 N.E.2d at 114–15; *T.D.*, 219 N.E.3d at 726. On appeal, Grandmother echoes the trial court's order and claims that Mother

failed to timely establish that the Agreed Order is void and has waived her right to seek relief on these grounds. However, there is no time limitation for bringing a Rule 60(B)(6) motion. *See Stidham*, 698 N.E.2d at 1156 (citing *Person v. Person*, 563 N.E.2d 161, 163 (Ind. Ct. App. 1990) (holding "the 'reasonable time' limitation under Rule 60(B)(6) means no time limit"). Thus, we reverse the trial court's order denying Mother's motion for relief from the Agreed Order.

[18] Reversed.

Riley, J., and Kenworthy, J., concur.

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