MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Anthony J. Aguilera
Westville, Indiana

IN THE COURT OF APPEALS OF INDIANA

Anthony Jose Aguilera,
Appellant-Respondent,

v.

Breaunna R. Kertai and Cheryl A. Hochstetler,
Appellee-Petitioners

April 29, 2021

Court of Appeals Case No. 20A-GU-2154

Appeal from the Marshall Circuit Court

The Honorable Curtis D. Palmer, Judge

Trial Court Cause No. 50C01-1902-GU-7

Mathias, Judge.

[1] Anthony Jose Aguilera ("Father"), who is incarcerated, appeals pro se the Marshall Circuit Court's order denying his request for video visitation with his child. Concluding that Father did not timely file his notice of appeal, and that

our court lacks subject matter jurisdiction because the order is not a final judgment, we dismiss this appeal.

Facts and Procedural History

[2] On December 11, 2018, Gina Simari ("Mother") was incarcerated when she gave birth to the child at issue in this appeal. Father is the child's biological father, and he is currently serving a six-year executed sentence for a 2018 aggravated battery conviction.

[3] At the parents' request, Cheryl Hochstetler, the child's paternal great aunt, took custody of the child when he was released from the hospital after his birth. Breaunna Kertai, Hochstetler's niece took custody of the child when Hochstetler was no longer able to physically care for him. On March 14, 2019, the trial court granted Kertai's and Hochstetler's petition to act as the child's co-guardians.

[4] In August 2019, Father filed a "Motion for Right to See Child." The court declined to grant Father a hearing on his motion because the pleadings were nonconforming. Appellant's App. p. 5. In December, Father filed a motion to modify parenting time. The court set the matter for a hearing on February 11, 2020. Father, however, did not provide his contact information for a telephonic appearance and did not appear at the hearing. Therefore, the trial court declined to rule on his motion and the motion remained pending. *Id*. Father continued to send letters to the court but did not file another motion requesting

visitation with the child until April 27. Mother also filed a petition for parenting time on that same date.

The trial court held a hearing on Father's motion and Mother's petition on June 18, 2020. Mother and the child's co-guardians appeared in person, and Father appeared by telephone. The child was eighteen months old on the date of the hearing.

[5] Father informed the court that his earliest possible release date was October 25, 2021. *Id.* at 12. However, Father stated that he would be eligible for work release when he completed the Recovery While Incarcerated Program .Tr. pp. 13–14. Father informed the court that in-person visits were not allowed at the prison as a result of the COVID-19 pandemic. *Id.* at 18. But inmates were allowed free video visits once per week. *Id.*

[6] Kertai testified at the hearing that it was not in the eighteen-month-old child's best interests to have visitation with Father while he was incarcerated because the child does not know Father and would not be able to recognize him. *Id.* at 34. Kertai did not want Father to have visitation with the child until Father could provide the child with a stable home environment. *Id.* at 35. The trial court noted that Kertai desired to adopt the child. *Id*. at 34.

[7] At the end of the hearing, the trial court indicated that Father could have video visitation with the child. *Id.* at 49. But the court stated, "I don't know exactly how much that's gonna be" and expressed concern with the eighteen-month-old child's ability to participate in video visitation. *Id.*

[8] In its written order, issued on June 23, the trial court deviated from its statements at the hearing by denying Father's request for video visitation. Appellant's App. p. 17. The court found that "there was no evidence such video visitation would be in the best interests of the" eighteen-month-old child. *Id.* The trial court also set a review hearing for October 8, 2020, to determine if Father was "in work release and can begin visits." *Id*. at 18. Father filed a motion to reconsider on July 9. The court, however, did not rule on the motion within five days, and it was therefore deemed denied under Trial Rule 53.4(B).

[9] At the October 8 review hearing, Mother did not appear, and Father appeared telephonically. Father was still incarcerated and working to become eligible for work release. Father stated that his earliest possible release date had moved up to May 28, 2021. The court told Father to notify the court of any change in placement. Video visitation was not discussed at the hearing. That same day, the trial court issued a written order that did not mention Father or video visitation with the child.

[10] Father appeals pro se[1] and argues that his due process rights were violated when the trial court denied him video visitation with the child.

[1] Pro se litigants are held to the same standards as a trained attorney and are afforded no inherent leniency simply by virtue of being self-represented. *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014).

Standard of Review

[11] The child's guardians did not file a brief in this appeal. In these circumstances, we will not develop an argument on the appellee's behalf. *See, e.g.*, *L.O. v. D.O.*, 124 N.E.3d 1237, 140 (Ind. Ct. App. 2019). We may reverse the trial court's judgment if the appellant establishes prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id.*

Discussion and Decision

[12] Father challenges the trial court's June 23 order denying his "Motion on Right to see Child." Appellant's Br. at 9. Father, however, filed his notice of appeal on November 2, 2020. Under Indiana Appellate Rule 9, Father was required to file the notice of appeal within thirty days of the entry of the June 23 order. Because Father did not comply with the thirty-day requirement, he has forfeited his right to appeal. Ind. Appellate Rule 9(5).[2]

[13] However, "forfeiture of the right to appeal on timeliness grounds does not deprive the appellate court of jurisdiction to hear the appeal." *Cooper's Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097, 1098 (Ind. 2021). Indeed, we may restore a forfeited right to appeal if we find "extraordinarily compelling

[2] Although Father is also attempting to appeal from the order issued as a result of the October 8 hearing, Father and the trial court did not discuss video visitation with the child at that hearing. And contrary to Father's claim, the trial court's October 8 order did not address visitation between Father and child.

reasons" for doing so. *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014). But under these circumstances we still must have jurisdiction to hear the appeal.

[14] Our court has jurisdiction in all appeals from final judgments. Ind. Appellate Rule 5(A). A judgment is final if "it disposes of all claims as to all parties; . . . or [] is otherwise deemed final by law." App. R. 2(H). *See also Bacon v. Bacon*, 877 N.E.2d 801, 804 (Ind. Ct. App. 2007) (""A final judgment disposes of all issues as to all parties, thereby ending the particular case and leaving nothing for future determination.").Whether an order is a final judgment governs our subject matter jurisdiction, and a challenge to subject matter jurisdiction can be raised at any time by any party or the court itself. *See Bacon,* 877 N.E.2d at 804.

[15] Here, Father does not appeal from a final judgment. Father filed a motion seeking visitation with his child. The trial court denied the motion due to Father's continued incarceration in the Department of Correction.[3] However, the court's June 2020 order did not completely dispose of Father's motion. The order left open the possibility that Father's request for visitation could be granted at a later time, in the event he was placed on work release. To that end, the court set a review hearing for October 8, 2020, to determine if Father was in

[3] "Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." *K.T.K. v. Ind. Dep't of Child Servs., Dearborn Cnty. Office*, 989 N.E.2d 1225, 1235–36 (Ind. 2013) (quoting *In re A.C.B.*, 598 N.E.2d 570, 572 (Ind.Ct.App.1992)). This is particularly true when the child is born while the parent is incarcerated. However, we also observe that a trial court should not allow a child's guardian to determine the parent's parenting time with his or her child during guardianship proceedings. *Manis v. McNabb*, 104 N.E.3d 611, 621 (Ind. Ct. App. 2018). Allowing a guardian to dictate a parent's and child's parenting time potentially deprives the parent and child of the opportunity to develop a meaningful relationship and bond. *Id.* This is especially true when the guardian has a personal stake in the matter as is the circumstance in this case because Kertai is seeking to adopt the child.

work release "and can begin visits." Appellant's App. p. 18. In turn, the issue of Father's visitation with the child remained pending in the trial court after the court issued the June 23 order. And although the issue was not expressly discussed at the October 8 reviewing hearing, we may presume the issue remained pending because the trial court again advised Father to notify the court of any change in his placement in the Department of Correction. Because the court's June 23 order did not dispose of the issue raised, it was not a final judgment.

[16] Father cannot appeal that order unless it is an appealable interlocutory order. *See Bacon*, 877 N.E.2d at 804. Indiana Appellate Rule 14(A) describes interlocutory orders that are appealable as a matter of right. The court's June 23 order is not of the type described in Rule 14(A). Other interlocutory orders may be appealed "if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." Ind. Appellate Rule 14(B). But no such certification and acceptance of jurisdiction have occurred in this case.

[17] In short, even if we found "extraordinarily compelling reasons" to restore Father's forfeited right to appeal, we lack jurisdiction to hear the appeal.

Conclusion

[18] Because Father forfeited his right to appeal, and because our court lacks appellate jurisdiction, we dismiss Father's appeal.

[19] Dismissed.

Riley, J., and Crone, J., concur.