MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

J.H.,

Appellant-Respondent,

v.

M.P.,

Appellee-Petitioner,

September 17, 2021

Court of Appeals Case No. 21A-AD-740

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause Nos. 35C01-2009-AD-21 35C01-2009-AD-22

Robb, Judge.

Case Summary and Issue

[1] Jo.H. ("Father") and C.P. ("Mother") are the parents of J.H., born April 1, 2007, and L.H., born June 26, 2009 (collectively, "the Children"). With Mother's consent, M.P. ("Stepfather") filed petitions to adopt the Children on September 10, 2020, alleging Father's consent to adoption was unnecessary. Father presents one issue, which we restate as whether the trial court's conclusion that Father's consent to Stepfather's petitions for adoption was unnecessary is clearly erroneous. Concluding the trial court's determination that Father's consent was not required was not a final, appealable order, and Father failed to have the order certified for a discretionary interlocutory appeal, we dismiss the appeal without prejudice to Father's right to file an appeal once a final judgment has been entered or the order has been certified for an interlocutory appeal.

Facts and Procedural History

[2] Mother and Father were married on June 13, 2008. J.H. was born before Mother and Father married. His paternity was established at his birth by Father's execution of a paternity affidavit. L.H.'s paternity was established by being born during the marriage.

[3] Mother's and Father's marriage was dissolved on March 28, 2012. Mother was granted custody of the Children; Father was granted parenting time and ordered to pay child support. On March 31, 2018, Mother married Stepfather. At some

point, Father remarried and began living with and supporting his new wife, her daughter and son, and a son that was born to Father and his new wife.

[4] From the time of Father's divorce from Mother until around May 2016, Father visited Children "occasionally and as much as he could." Transcript of Proceedings, Volume II at 11. However, beginning in May 2016, Father's visits became "very sporadic." *Id.* Between September 2016 and September 10, 2020—the day Stepfather filed his petitions to adopt the Children—Father saw J.H. twice and L.H. once. On two occasions, Father spoke with L.H. on the phone but spoke by phone with J.H. only once. Father last spoke to the Children by phone on November 1, 2020, after Stepfather's petitions to adopt the Children had been filed.

[5] Prior to the filing of the petitions to adopt the Children, Father was charged with Non-Support of a Dependent, a Level 6 felony, for failure to pay child support between May 1, 2016 and February 28, 2019. His arrearage was $10,748.51. In 2020, Father pleaded guilty to the charge and admitted that he had been ordered to provide support for the Children but had failed to do so.[1]

[1] This information is taken from the transcript for the hearing on Father's motion to contest the adoptions, as the plea agreement was not included in the record.

[6] On September 10, 2020, Stepfather filed his petitions to adopt the Children, alleging Father's consent to the adoptions was unnecessary for the following reasons:

> 7. [Father] has failed to, without justifiable cause, communicate significantly with the [Children] when able to do so for a period in excess of one year. He has not visited nor had any form of communication with the [Children] between December 2017 and June 2020, a period in excess of one (1) year.
>
> 8. [Father] was ordered to pay child support in the amount of $76.00 per week. He has knowingly failed to provide for the care and support of the [Children] for a period in excess of one year. . . .
>
> 9. [Father] is not a fit and proper person to parent the minor [Children].

Appellant's Appendix, Volume 2 at 30-31, 33-34.

[7] Father received notices of the adoptions on October 13, and, the following day, he filed a "Motion to Contest Adoption, Motion for Court Appointed Counsel, and Motion for Continuance" for each child. *Id.* at 43-49. On October 27, the trial court appointed pauper trial counsel to represent Father.

[8] The trial court held a hearing on Father's motion to contest the adoptions on January 21, 2021, during which Mother consented to the adoptions. At the conclusion of the hearing, the trial court took the matter under advisement. On

April 22, the trial court issued its findings of fact, conclusions thereon, and order, concluding that

> the consent of [Father] is not required in this matter as he failed to provide the necessary support for the minor children for a period in excess of one (1) year when[ ]able to do so and because he failed to communicate significantly with the children without justifiable cause for a period in excess of one (1) year.

Appealed Order at 3. Father now appeals.

Discussion and Decision

Final Judgment

[9] Father challenges the trial court's determination that his consent was not required for the adoptions. Stepfather counters with the assertion that this appeal is premature because the trial court's order is neither a final judgment nor an appealable interlocutory order. The trial court's order was silent on the finalization of the adoptions and neither granted nor denied Stepfather's adoption petitions.

[10] Under Indiana 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 Indiana Appellate Rule 14. As set forth, in relevant part, in Indiana Appellate Rule 2(H), a judgment is a "final judgment" if:

> (1) it disposes of all claims as to all parties; [or]
>
> (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[.]

"Trial Rule 54(B) certification of an order that disposes of less than the entire case must contain the magic language of the rule." *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003). "This is intended to provide a bright line so there is no mistaking whether an interim order is or is not appealable." *Id.; see Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998) (adopting "bright line" rule requiring strict compliance with Trial Rule 54(B) before order disposing of fewer than all claims will be deemed final and appealable by right), *cert. denied*, 525 U.S. 1049 (1998).

[11] If an order is not a final judgment, then an appellant may appeal the order only if it is an appealable interlocutory order. *See In re Adoption of S.J.*, 967 N.E.2d 1063, 1066 (Ind. Ct. App. 2012); *see also* Ind. Appellate Rule 14. "An interlocutory order is one made before a final hearing on the merits and requires something to be done or observed but does not determine the entire controversy." *S.J.*, 967 N.E.2d at 1066 (quotation marks and citation omitted). Under Appellate Rule 14(A), certain interlocutory orders may be appealed as a matter of right. Such appeals must be expressly authorized, and that

authorization is to be strictly construed. *Bacon v. Bacon*, 877 N.E.2d 801, 804 (Ind. Ct. App. 2007), *trans. denied*. Under Appellate Rule 14(B), interlocutory orders may be appealed "if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." App. R. 14(B).

[12] In *S.J.*, a case we find instructional, the father appealed the trial court's order concluding that his consent to adoption was not required. We dismissed the appeal, sua sponte, finding that

> the trial court's . . . order concluding that Father's consent to the adoption was not required did not dispose of all issues as to all parties or put an end to the case because the relief requested in the adoption petition, i.e. the adoption of S.J., was neither granted nor denied. Rather, the trial court ruled that, provided all other statutory requirements for the adoption were met, the petition could proceed to a final hearing. Accordingly, the trial court's . . . order concluding that Father's consent to the adoption was not required is not a final judgment within the meaning of Appellate Rule 2(H)(1) because it left the question of whether the adoption petition would be granted for future determination.

967 N.E.2d at 1065.

[13] In *In re D.J. v. Ind. Dep't of Child Servs.*, 68 N.E.3d 574 (Ind. 2017), which stemmed from a child in need of services ("CHINS") proceeding, our Supreme Court discussed the procedural implications when an appellant files a "premature" or untimely notice of appeal from a judgment that is not a final judgment. 68 N.E.3d at 578. The Court in *D.J.* applied the rationale from *In re*

Adoption of O.R., 16 N.E.3d 965 (Ind. 2014) (which involved an untimely notice of appeal that was "belated"), and held that a "reviewing court is not deprived of jurisdiction if the notice is untimely—meaning belated or premature." 68 N.E.3d at 578. The Court discussed the distinction between "jurisdiction" and "forfeiture" and explained that an appellant's untimely notice of appeal results in the forfeiture of the appellant's right to appeal, not the divestiture of an appellate court's appellate jurisdiction. *Id.* at 579. The Court explained that when an appellant has forfeited his right to appeal, our appellate courts retain "jurisdiction to disregard the forfeiture and resolve the merits" of the untimely appeal. *Id.* The Court, however, emphasized that "it is never error for an appellate court to dismiss an untimely appeal[.]" *Id.*

[14] In *Town of Ellettsville v. DeSpirito*, 87 N.E.3d 9 (Ind. 2017), our Supreme Court clarified its holding in *D.J.*, noting that "[n]othing in *D.J.* eliminated or relaxed the requirements for appellate jurisdiction." *Id.* at 11. Rather, "[i]t reaffirmed that the prerequisites for appellate jurisdiction are (1) entry of an appealable order by the trial court and (2) the trial court clerk's entry of the notice of completion of the clerk's record on the chronological case summary ("CCS")." *Id.* The Court noted that in *D.J.*, "the trial court found the children to be CHINS, the parents then filed their separate notices of appeal, *the court thereafter entered its dispositional order*, and the clerk later filed the notice of completion of the clerk's record." *Id.* (emphasis added). The Court explained that "[a]ppellate jurisdiction was secure in *D.J.* because the trial court entered

its dispositional order—a final judgment—*before* the clerk entered the notice of completion of clerk's record on the CCS." *Id.* The Court added:

> Although the parents [in *D.J.*] had already filed their notices of appeal, the trial court still had jurisdiction to enter a final judgment because the clerk had not yet entered the notice of completion of clerk's record on the CCS, and we concluded the parents' premature notices of appeal did not deprive the Court of Appeals of jurisdiction to hear the appeal.

Id. (internal quotation marks and citation omitted).

[15] In *Town of Ellettsville*, however, the record on appeal showed no final judgment. Our Supreme Court ultimately elected—"[f]or judicial economy under th[e] case's particular circumstances"—to stay consideration of the appeal and remand the case to the trial court to decide whether to direct entry of judgment and make its interlocutory order a final judgment. 87 N.E.3d at 12. Nevertheless, the Court cautioned that "in the overwhelming majority of cases, the proper course for an appellate court to take where it finds appellate jurisdiction lacking is simply to dismiss the appeal." *Id.*

[16] Here, as in *Town of Ellettsville*, no final judgment was issued. The trial court's September 10 order concluded that Father's consent to the adoptions was not required. However, the order did not dispose of all issues as to all parties or put an end to the case because the relief requested in the adoption petition, that is, the adoption of the Children, was neither granted nor denied. Also, the trial court's written order was not appealable under Trial Rule 54(B) because the

court neither specified that "there is no just reason for delay" nor "expressly direct[ed] entry of judgment." T.R. 54(B).

[17] Additionally, none of the grounds for interlocutory appeals set forth in Appellate Rule 14(A) apply to the case before us; therefore, Father is not entitled to an interlocutory appeal as a matter of right. And, no such certification and acceptance took place here pursuant to Appellate Rule 14(B); thus, the trial court's September 10 order is not appealable under that rule.

[18] In sum, the trial court's order is neither a final, appealable order nor an appealable interlocutory order. As such, we dismiss Father's appeal without prejudice to Father's right to file an appeal once a final judgment has been entered or the order has been certified for an interlocutory appeal.[2]

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[2] Were we not constrained by our Supreme Court's ruling in *Town of Ellettsville*, our decision in this case—under the circumstances presented—would be to address on the merits whether Father's consent to the adoptions was required and then remand if necessary for further proceedings to determine whether adoption is in the Children's best interests. In situations like this, where the trial court proceedings have focused exclusively on consent such that the trial court has not yet heard evidence regarding the other requirements to grant an adoption and is not prepared to enter a final order, the best alternative would be for the trial court to use the "magic language" in its order regarding consent, allowing an immediate appeal. Remanding this matter and then waiting until the trial court issues its final order regarding consent and whether the adoptions are in the Children's best interests may prove extremely disruptive to the Children's lives and prolong the opportunity to provide the Children with permanency and stability. *But see, e.g., In re Adoption of K.S.*, 980 N.E.2d 385, 389 (Ind. Ct. App. 2012) (parties and trial court focused on the statutory requirements to waive Mother's consent to the adoption of K.S. by Stepmother, but parties did not present any evidence regarding impact of adoption on K.S.'s life and whether severance of child's ties with Mother would be in child's best interest; albeit, the issue of jurisdiction was not raised – nevertheless, this court reversed the trial court's decision and concluded that Mother's consent to the adoption by Stepmother *was not* required but then remanded the matter to the trial court to determine whether adoption would be in K.S.'s best interest).

Conclusion

[19] The trial court's September 10 order is neither final nor properly appealable as an interlocutory order. Accordingly, we dismiss Father's appeal as premature and remand to the trial court for further proceedings.

[20] Dismissed and remanded.

Bradford, C.J., and Altice, J., concur.