Children's Law Center of Indiana

Custody and Parenting Time

3/19/14

In **D.C., Jr. v. C.A.**, 5 N.E.3d 473 (Ind. Ct. App 2014), the Court dismissed Father's appeal from the trial court's denial of his petition for modification of custody of his child. Id. at 477. Mother gave birth to the child on February 7, 2011, when she and Father were not married. The child began living with his maternal grandparents (Grandparents) shortly after his birth. On February 18, 2011, Father filed a petition to establish paternity, in which he also requested custody of the child. Grandparents petitioned to intervene in the paternity action and petitioned for and were appointed as temporary guardians of the child. Father then petitioned to intervene in the guardianship action. The trial court joined the cases and transferred the guardianship action into the paternity proceeding. Grandparents moved for temporary custody, and on June 20, 2011, the trial court entered an order establishing Father's paternity, granting visitation to Father, and ordering the child to remain in Grandparents' custody pending a full hearing. The parties reached an agreement, and, on September 30, 2011, the trial court entered an order giving Father and Grandparents joint legal custody of the child. On June 26, 2012, Father filed a petition for change of custody, alleging that a substantial and continuing change in circumstances had occurred since the previous shared custody order of September 2011. The trial court held an evidentiary hearing on Father's petition on January 7, 2013, and denied Father's petition, leaving the terms of the previous shared custody order in place. The denial of Father's petition for change of custody was entered into the CCS on January 31, 2013, with a notation that the order was signed on January 17, 2013. On February 8, 2013, Father filed a motion to correct error and requested an extension until March 31, 2013 to submit a memorandum in support of the motion. In an order dated February 12, 2013, the trial court granted the extension to file the memorandum of law. Father timely filed his memorandum of law. Grandparents did not respond to Father's motion to correct error, and the motion was deemed denied pursuant to Indiana Trial Rule 53.3. On or about May 20, 2013, Father filed his Notice of Appeal. After Father filed his appellant's brief, Grandparents filed a motion to dismiss the appeal for lack of jurisdiction. On November 22, 2013, the motion panel of the Court of Appeals denied Grandparents' motion to dismiss.

The Court opined that it did not have jurisdiction over Father's appeal because his Notice of Appeal was not timely; therefore, his appeal was dismissed. Id. at 477. The Court looked to Appellate Rule 9, which states that a party initiates an appeal by filing a notice of appeal within thirty days after entry of judgment. Id. at 475. The Court quoted Ind. Appellate Rule 9(A)(5), which states "[u]nless the [n]otice of [a]ppeal is timely filed, the right to appeal shall be forfeited[.]" Id. Citing Claywell v. Review Bd. of Ind. Dep't. of Emp't & Training Servs., 643

N.E.2d 330, 330 (Ind. 1994), the Court observed that our Supreme Court has considered perfecting a timely appeal a jurisdictional matter. D.C., Jr. at 475.

The Court said that it must determine the date of the deemed denial of Father's motion to correct error in order to determine whether Father's appeal was timely. The Court looked to Indiana Trial Rule 53.5, which sets forth the time limitations that apply when a party files a motion to correct error, and noted that T.R. 53.3(A) provides that if a court fails for forty-five days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty days after it was heard *or forty-five days after it was filed*, if no hearing is required, the pending Motion shall be deemed denied, and a Notice of Appeal shall be filed within thirty days after the Motion to Correct Error is deemed denied (emphasis in opinion) D.C., Jr. at 475-76. The Court also observed that T.R. 53.3(D) provides that the Judge before whom a Motion to Correct Error is pending *may extend the time limitation for ruling no more than thirty days* by filing an entry advising all parties of the extension, which must be in writing, must be noted in the Chronological Case Summary before the expiration of the initial time period for ruling set forth under T.R. 53.3(A), and must be served on all parties (emphasis in opinion). D.C., Jr. at 476. The Court explained that: (1) the trial court's order denying Father's petition for change of custody was entered on January 17, 2013; (2) Father filed his timely motion to correct error on February 8, 2013; (3) the trial court did not set the motion for a hearing; therefore it would have been deemed denied on March 25, 2013, forty-five days after it was filed; (4) Father's Notice of Appeal would have been due thirty days thereafter, on April 24, 2013. Id. The Court noted that T.R. Rule 53.3(D) allows a trial court to extend the time limit for ruling on a motion to correct error for a period of no more than thirty days, but Father had not sought an extension of the time limitation for ruling. Id. The Court further noted that: (1) Father had requested an extension of time until March 31, 2013, to file a memorandum of law in support of his motion to correct error, and the trial court granted this motion; (2) Father had filed a second motion for extension of time to file the memorandum on March 2, 2013, which the trial court denied. Id. The Court assumed without deciding that the trial court's order granting Father's motion for extension to file the supporting memorandum also extended the trial court's ruling on the motion to correct error, which would have made April 24, 2013, the deadline for the trial court's ruling. Id. The Court said that when the trial court failed to rule by April 24, 2013, Father's motion to correct error was deemed denied, and his Notice of Appeal would have been due on May 24, 2013. Id. The Court noted that Father did not file his Notice of Appeal until May 30, 2013. Id. at 477.

The Court observed that Father's Notice of Appeal had to be filed no later than thirty days after his Motion to Correct Error was deemed denied. Id. The Court concluded that, without regard to the question of whether the trial court's extension of time for filing the memorandum extended the time period for its ruling on the Motion to Correct Error, Father's Notice of Appeal was not timely. Id. The Court opined that a timely filing is a jurisdictional prerequisite; therefore the Court did not have jurisdiction over Father's appeal and timely dismissed it. Id. The Court noted In Re Adoption of T.L., 4 N.E.3d 658 (Ind. 2014), in which the Supreme Court granted transfer of a Court of Appeals decision which had dismissed Father's appeal as untimely and addressed the merits of the case. Id. at 477 n.7. In T.L., an adoption case where the trial court determined that Father's consent to adoption of his children by their stepfather was not necessary, the trial court had treated the unrepresented father's letter as a notice of appeal and appointed counsel.

<u>T.L.</u> at 661. <u>D.C., Jr.</u> at 477 n.7. The <u>D.C., Jr.</u> Court opined that <u>T.L.</u> was not controlling of the issue before it because Father in <u>D.C., Jr.</u> was at all times represented by counsel and because the dismissal of his appeal was not a final determination as to Father's parental rights. <u>Id</u>.