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IN THE
COURT OF APPEALS OF INDIANA

Tiffany M. Shelton and William M. Shelton,

Appellants-Respondents,

v.

Thomas M. Hayes,

Appellee-Petitioner.

June 20, 2022

Court of Appeals Case No. 22A-MI-120

Appeal from the Lake Superior Court

The Honorable Thomas P. Hallett, Judge

The Honorable Shaun T. Olsen, Magistrate

Trial Court Cause No. 45D03-2003-MI-249

Najam, Judge.

Statement of the Case

[1] Tiffany M. Shelton ("Mother") and William M. Shelton ("Adoptive Father") (collectively, "Parents") appeal the trial court's order denying their motion to modify a grandparent visitation order as well as the court's sanction after it

found Mother in contempt for having violated that order. Parents raise three issues for our review:

1. Whether the trial court erred when it appointed a guardian ad litem.

2. Whether the court erred when it placed the burden of proof on them in support of their motion to modify the grandparent visitation order.

3. Whether the court erred when it maintained Thomas M. Hayes' ("Grandfather") current visitation schedule and added ten overnight visits after it found Mother in contempt.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] Mother was married to Grandfather's son, Thomas M. Hayes, II. Beginning in 2013, Mother and Hayes lived with Grandfather in Grandfather's home. On October 14, 2015, Mother gave birth to J.S. ("Child"). Mother, Hayes, and Child continued to live with Grandfather. On January 6, 2019, Hayes passed away. Thereafter, Mother began a relationship with Adoptive Father. In August, Mother and Child moved out of Grandfather's house and moved in with Adoptive Father. Mother married Adoptive Father on June 25, 2020.

[4] On September 6, after Grandfather had filed a petition for joint custody of Child, Mother and Grandfather entered into a mediated agreement ("the Agreement"). Pursuant to the Agreement, Mother agreed that "Grandfather is

entitled to grandparent visitation with the Child" and that it is "in the best interests of the Child to have visitation with Grandfather." Appellants' App. Vol. 2 at 30. Pursuant to the terms of the Agreement, Grandfather was entitled to four visits with Child per month, including one weekend session from Friday evening through Sunday evening. *See id*. The Agreement further permitted Grandfather to video chat with Child "up to three nights per week[.]" *Id*. at 32. The court accepted the Agreement as an order that same day. On March 25, 2021, Adoptive Father adopted Child.

[5] On April 15, Grandfather filed a petition for contempt and a motion to enforce the Agreement. Grandfather alleged that "Mother has wholly failed and/or refused to comply with" the Agreement in that she "denied" Grandfather visitation and "failed" to permit Grandfather to video chat with Child. *Id*. at 34-35. Shortly thereafter, Parents filed a petition to modify the Agreement. Parents alleged that "there have been substantial changes of circumstances" and that the visitation with Grandfather was "no longer in [Child's] best interest." *Id*. at 46.

[6] Grandfather then filed a motion for the appointment of a guardian ad litem ("GAL"). Parents objected and asserted that "grandparents do not have standing to petition a trial court for a visitation evaluation under the Grandparent Visitation Statute." *Id*. at 64. Following a hearing, the court granted Grandfather's motion and appointed a GAL. In his interim report, the GAL found that Child "wants to see" Grandfather and that "the prospect of not seeing [Grandfather] made him very sad, very quickly." Ex. at 9. And in his

final report, the GAL concluded that "the modification of the grandparent[] visitation order is not in [Child's] best interests." *Id*. at 23.

[7] On November 10, the court held a hearing on the pending motions. During the hearing, the GAL testified that Child "very much enjoyed" the visits with Grandfather and that seeing Grandfather is "a positive thing" for Child. Tr. at 15, 20. The GAL then reaffirmed his conclusion that modification of the Agreement was not in Child's best interests. The GAL further testified "without any hesitancy" that, if Parents had the ability to determine the visitation schedule, the result would be "no time" between Grandfather and Child. *Id*. at 23. And the GAL testified that there were not any circumstances "that are different now than they were" when the parties entered into the Agreement. *Id*. at 29.

[8] As to Grandfather's contempt petition, Grandfather testified that, through no fault of his own, his visits with Child had not been "consistent." *Id*. at 71. He further testified that, in the fourteen months that the Agreement had been in place, there were only two months during which he was able to exercise visitation as provided in the Agreement. *See id*. at 91. And Grandfather submitted as evidence a document that demonstrated that he had missed twenty-seven total weekday visits and ten overnight visits. Ex. at 26-38.

[9] Following the hearing, the court entered the following findings and conclusions:

42. The circumstances concerning and surrounding Grandfather's visitation have not substantially changed or been altered in any appreciable way during the time between entry of the Agreed Order and the time of the November hearing.

43. Notably:

* * *

> d. Neither party has demonstrated any change, substantial or otherwise, in [Child's] home environment, within his immediate family, or his engagement with new family members from Mother's marriage before or after the Agreed Order [was] entered.
>
> * * *
>
> f. Mother was a fit and proper parent to [Child] at the time the Agreed Order was entered, and Parents remain fit and proper parents to [Child] now.
>
> g. [Child] had, and continues to have, a strong and substantial relationship with Grandfather.
>
> * * *

45. Neither party has proven that Grandfather has done, or not done, something that created a change in circumstances in this matter to suggest his visitation should be modified.

* * *

> 47. Grandparent Visitation remains just as much in [Child's] best interest now as it was at the time Mother agreed to the Agreed Order in 2020.
>
> 48. Neither party has demonstrated that it is in [Child's] best interest to modify or change the rate and frequency of Grandfather's visitation under the Agreed Order.

Appellants' App. Vol. 2 at 21-22. Accordingly, the court denied Mother's motion to modify.[1] The court then found that Mother had violated her obligations under the agreement, held her in contempt, and awarded Grandfather ten overnight visits with Child as "make-up visitation." *Id*. at 23. This appeal ensued.

Discussion and Decision

Standard of Review

[10] Parents appeal the court's denial of their motion to modify the Agreement and the court's award of ten make-up visitation days to Grandfather as a contempt sanction.[2] Here, the court entered findings of fact and conclusions thereon following an evidentiary hearing. As this Court has recently stated:

> In such appeals, we review the court's judgment under our clearly erroneous standard. *E.g., Salyer v. Washington Regular*

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[1] Grandfather had also filed a motion to modify the Agreement to provide for specific days for his visitation. The court granted that motion and ordered that Grandfather's weekend visits would occur during the third weekend of the month and that his weekday visits would occur on Wednesdays.

[2] Parents do not challenge the portion of the court's order finding Mother in contempt.

> *Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020). We "neither reweigh evidence nor judge witness credibility." *R.L. v. Ind. Dep't of Child Servs. & Child Advocates, Inc.*, 144 N.E.3d 686, 689 (Ind. 2020). Rather, a judgment is clearly erroneous only when there are no record facts that support the judgment or if the court applied an incorrect legal standard to the facts. *Id*.

Jones v. Gruca, 150 N.E.3d 632, 640 (Ind. Ct. App. 2020). Pure questions of law, however, are reviewed *de novo*. *M.S. v. C.S.*, 938 N.E.2d 278, 282 (Ind. Ct. App. 2010).

Issue One: Appointment of GAL

[11] Parents first contend that the court erred when it appointed a GAL over their objection. In particular, Parents assert that, "in grandparent visitation cases, grandparents do not have standing to request an expert to conduct a visitation evaluation, unless the parent agrees." Appellants' Br. at 20-21. We must agree.

[12] This Court has previously addressed whether a grandparent was able to request a visitation evaluation. In *E.R. v. M.S. (In re Guardianship of C.R.)*, 22 N.E.3d 657 (Ind. Ct. App. 2014), the grandparents petitioned to resume visits with their grandchildren. *Id*. at 659. In addition, they requested a parenting time evaluation, which "would consist of clinical psychologists conducting several interviews with the parties involved, reviewing records, and consulting with other professionals[.]" *Id*. at 659 n.2. The court granted the grandparents' motion over the adoptive father's objection.

[13] On appeal, the adoptive father asserted that the grandparents did not have "any basis to request a visitation evaluation." *Id*. This Court observed that Indiana Code Section 31-17-2-12 "provides the statutory basis for requesting and ordering a parenting time evaluation." *Id*. at 660. The Court then noted that, "[u]nder the express language" of that statute, "Grandparents are not eligible to request a custody evaluation as they are neither the parents of nor the custodians for" the children. *Id*. at 661. The Court further stated that the Grandparent Visitation Act "expressly provides additional means by which the court may ascertain the best interest of the child, such as interviewing the child in chambers." *Id*. (citing Ind. Code § 31-17-5-2(c)). The court continued that, "[n]oticeably absent from this list is any type of visitation evaluation or investigation." *Id*. Accordingly, the Court concluded that "the law currently provides no authority for grandparents to request visitation evaluations[.]" *Id*.

[14] Grandfather responds and asserts that *In re Guardianship of C.R.* is "factually distinguishable" from the present case. Appellee's Br. at 24 (emphasis removed). Specifically, Grandfather asserts that, unlike in that case, he did not request a parenting time evaluation but "only sought the involvement of a [GAL] to investigate whether a modification of the visitation schedule would be in [Child's] best interests." *Id*. Thus, Grandfather maintains that the holding in that case does not apply and that the court properly appointed a GAL.

[15] However, in holding that grandparents are not entitled to request visitation evaluations, the Court observed:

> In other Indiana family law statutes, the legislature has limited the power of the trial court when determining grandparents' visitation rights, as opposed to rights of a parent or custodian. Indiana Code section 31-17-6-1, the authorizing statute for court appointment of Guardians ad litem and Court Appointed Special Advocates ("CASA"), reads as follows: "A court, in a proceeding under [Indiana Code sections] 31-17-2, [ ] 31-17-4, this chapter, [ ] 31-17-7, or [ ] 31-28-5, may appoint a guardian ad litem, a [CASA], or both, for a child at any time." *The Grandparent Visitation Act, Indiana Code Chapter 31-17-5, was not included*, presumably because the legislature did not think it appropriate for courts to have such a potentially burdensome appointment power in cases of grandparent visitation. The Grandparent Visitation Act itself makes no mention of a grandparent's ability to request or compel a visitation evaluation, *or any other evaluation* for that matter.

Id. at 662 (alterations in original) (emphases added). It is clear that the Court did not limit our analysis to whether a grandparent can request a visitation evaluation but more broadly held that a grandparent is not entitled to request any type of evaluation, including an evaluation by a GAL.

[16] And we find support for that holding in the statute. Indeed, as we pointed out, proceedings under the Grandparent Visitation Statute are not included among the proceedings during which a court may appoint a GAL. *See* I.C. § 31-17-6-1 (2021). And "we do not believe this exclusion was unintentional." *In re Guardianship of C.R.*, 22 N.E.3d at 662. Had the legislature intended to provide courts with the ability to appoint a GAL during a grandparent visitation proceeding, it could have said so.

[17] Further, the Grandparent Visitation Act provides that a court may grant grandparent visitation if it is in the child's best interests. I.C. § 31-17-5-2(a). In making that determination, the statute specifically provides that a court can "consider whether a grandparent has had or has attempted to have meaningful contact with the child" or may "interview the child[.]" I.C. § 31-17-5-2(b), (c). That statute does not provide that a court can appoint a GAL. And it is well settled that the Grandparent Visitation Act "must be strictly construed" because it was "enacted in derogation of the common law." *Schenkel v. Gaunt (In re Visitation of J.D.G.)*, 756 N.E.2d 509, 512 (Ind. Ct. App. 2001).

[18] Because neither the Grandparent Visitation Act nor the statute authorizing the appointment of a GAL provides for the appointment of a GAL in a grandparent-visitation proceeding, we hold that a grandparent cannot request, and a court cannot appoint, a GAL in such proceedings over the objection of a party. As such, the trial court erred when it granted Grandfather's motion and appointed a GAL.

[19] Still, Grandfather asserts that we need not reverse the court's order because the court "made no reference to the [GAL's] report or recommendations" in its order. Appellee's Br. at 25. While the court may not have explicitly stated that it relied on the GAL in making its determination, we cannot say for certain that the GAL did not influence the court's findings of fact. Indeed, many of the court's findings mirror the GAL's reports or testimony. As such, we reverse the court's order. But because both parties had an opportunity to present evidence on Parents' motion to modify the Agreement, the court need not hold a new

hearing. Rather, on remand, we instruct the court to disregard the GAL's reports and testimony. The court may then consider the other evidence previously presented by the parties and, in the court's discretion, may interview Child in chambers, to determine whether a modification of the Agreement is in Child's best interests. *See* I.C. § 31-17-5-2(c). While we reverse the court's order, we will nonetheless consider the other issues raised by Parents as they will likely be issues on remand.

Issue Two: Burden of Proof

[20] Parents next assert that the court erred when it placed the burden on them to show that modification of the Agreement was in Child's best interest. Parents contend that, "by utilizing the same burden of proof in grandparent visitation modifications as in parenting time modifications, grandparents are being treated as if they were parents." Appellants' Br. at 29. Parents contend, in essence, that the court must place the burden on Grandfather to show that the continuation of his visits is in Child's best interests.

[21] Our Court has twice addressed this issue. First, in *J.B. v. R.C. (In re Adoption of A.A.)*, the court granted the grandparents visitation with the children. 51 N.E.3d 380, 384 (Ind. Ct. App. 2016), *trans. denied*. When the parents failed to comply with the court's order, the grandparents filed a motion to enforce. *Id*. at 385. In response, the parents filed a petition to terminate the grandparent visitation. *Id*. The court found the parents in contempt and denied their request to terminate the visits. *Id*. On appeal, the parents asserted that the court erred when it denied their petition because the grandparents had failed to

present any evidence to demonstrate that visitation was in the children's best interests. *Id*. at 389. This Court interpreted that argument as an attempt by parents "to shift the burden to Grandparents to show that grandparent visitation is still in Children's best interests." *Id*.

[22] The Court observed that there had been "no Indiana case that specifically speaks to the burden of proof on a petition to modify an existing order of grandparent visitation rights." *Id*. at 389. But the court looked to cases interpreting the parenting time statute and noted that those cases have held that, after an initial custody determination, "a petitioner seeking modification of a parenting time order bears the burden of showing that custody should be altered." *Id*. at 390. The Court then remarked that the grandparent visitation statute contains "nearly identical language" to the parenting time statute, which "suggests that we place the burden on modification of grandparent visitation rights with the same party as on modification of parenting time rights." *Id*. at 389-90. As such, the Court held that, "[e]ven though the petitioning grandparent carries a high burden on the initial petition for grandparent visitation rights, the petitioner seeking a subsequent change in a grandparent visitation order bears the burden of showing the order should be modified." *Id*. at 390. The Court then determined that the parents, as the moving parties, bore the burden of demonstrating that modification of the existing order would be in the children's best interests. *Id*.

[23] Similarly, in *D.G. v. W.M.*, the grandparents were awarded visitation with the children. 118 N.E.3d 26, 28 (Ind. Ct. App. 2019), *trans. denied*. The mother did

not comply with the order, and she filed a petition to terminate the grandparents' visitation. *Id*. at 28-29. Following a hearing, the court found mother in contempt and denied mother's petition to terminate the visits. *Id*. The mother appealed and asserted that "the trial court should have required Grandparents to bear the burden of proving that visitation remained in the Children's best interests." *Id*. at 30. Relying in part on *In re Adoption of A.A.*, this Court again declined to place the burden on the grandparents. *Id*. at 31.

[24] Parents acknowledge the holdings in *In re Adoption of A.A.* and *D.G.* but contend that they were "decided incorrectly." Appellants' Br. at 26. And Parents invite us to "correct" those prior rulings. *Id*. at 39. Parents claim that those cases elevate the status of grandparents to that of a parent and violate parents' fundamental rights to raise their children. We cannot agree.

[25] Indeed, many of the concerns regarding a parent's fundamental right to raise his or her children that Parents raise are issues that a court must consider when fashioning an initial visitation order, not in an order on a motion to modify an already existing order. In *K.J.R. v. M.A.B. (In re Visitation of M.L.B.)*, our Supreme Court held that courts are required to enter findings and conclusions that specifically address four factors, commonly known as the *McCune* factors, which are: (1) the presumption that a fit parent's decision about grandparent visitation is in the child's best interests; (2) the special weight that must be given to a fit parent's decision regarding non-parental visitation; (3) some weight given to whether a parent has denied or simply limited visitation; and (4) whether the grandparent has established that visitation is in the child's best

interests. 983 N.E.2d 583, 586 (Ind. 2013). However, a trial court is only required to enter those findings when it "enters a decree granting or denying grandparent visitation[.]" *J.I. v. J.H. (In re Paternity of K.I.)*, 903 N.E.2d 453, 462 (Ind. 2009). It does not apply when the court enters an order on a motion to modify.

[26] The fundamental rights of parents are considered by courts when fashioning an initial order on grandparent visitation. However, once that order is crafted—whether by a court or, as here, by an agreement—it can only be modified "whenever modification would serve the best interests of the child." I.C. § 31-17-5-7. We therefore hold that *In re Adoption of A.A.* and *D.G.* were decided correctly, and we decline Parents' invitation to disapprove of those opinions.

[27] The court properly placed the burden on Parents to prove that modification of the Agreement was in Child's best interests. On remand, the court shall continue to place the burden on Parents, as the parties seeking to modify the Agreement, to demonstrate that modification of the Agreement is in the best interests of Child.

Issue Three: Number of Visits Awarded to Grandfather

[28] Finally, Parents contend that the court erred when it maintained Grandfather's visitation because it "is more in line with parenting time than with grandparent visitation[.]" Appellants' Br. at 39. In general, the Grandparent Visitation Act "'contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education,

and religious training of their children.'" *In re Visitation of M.L.B.*, 983 N.E.2d at 586 (quoting *In re Paternity of K.I.*, 903 N.E.2d at 462). Parents allege that the court erred when it did not modify the visitation order and "allowed" Grandfather to keep seventy-two visits per year because that is "far from occasional and temporary." Appellants' Br. at 40. And they maintain that it had "become unworkable." *Id.* at 41.

[29] But, again, Parents disregard the fact that this is not an appeal from an initial grandparent visitation order and that the court did not fashion the Agreement. Rather, it was Mother who agreed to give Grandfather seventy-two days per year plus up to three video chat sessions per week when she entered the Agreement. If Mother had not wanted Grandfather to see Child as often, she could have agreed to fewer days. But she did not.

[30] As discussed above, it is Parents' burden on remand to demonstrate that a modification of the Agreement is in Child's best interests. If Parents meet that burden, it will be up to the court's discretion to determine how to modify the Agreement. But if Parents do not meet their burden, then the court cannot modify the Agreement simply because it is no longer convenient for Parents.

[31] Still, Parents also appear to contend that the court erred when it awarded Grandfather ten additional overnight visits as a sanction on the contempt finding. "It lies within the inherent power of the trial court to fashion an appropriate punishment for the disobedience of its order." *MacIntosh v. MacIntosh*, 749 N.E.2d 626, 631 (Ind. Ct. App. 2001). Here, Parents do not

dispute that Mother violated the Agreement by not allowing Grandfather to visit Child pursuant to the terms of the Agreement. Indeed, Grandfather presented evidence at the hearing that he had missed twenty-seven total weekday visits and ten overnight visits. Ex. at 26-38. As a result, the court held Mother in contempt and awarded Grandfather "make-up visitation" of ten overnight visits with Child as a "remedy to enforce Grandfather's visitation under the Agreed Order that Parents denied to him." Appellants' App. Vol. 2 at 23. Given that the court was only granting visits to Grandfather that he was previously owed but denied, we cannot say that the court's award of ten overnight visits was outside of the court's inherent power. As a result, on remand, regardless of whether the court grants or denies Parents' motion to modify the Agreement, the court's sanction on the contempt finding was not improper. We therefore affirm that sanction.

Conclusion

[32] In sum, the trial court erred when it appointed a GAL over Parents' objection. And it is clear from the face of the court's order that the court relied at least in part on GAL's reports and testimony when it entered its findings and conclusions. We therefore reverse the court's order and instruct the court on remand to determine whether modification of the Agreement is in Child's best interests based on the previously presented evidence and, in the court's discretion, an interview with Child. However, the court properly placed the burden on Parents to prove that modification of the Agreement is in Child's best interests, and the burden shall remain on Parents on remand. Finally,

regardless of the outcome on remand, we affirm the court's award of ten make-up visits to Grandfather as a contempt sanction. We therefore affirm in part, reverse in part, and remand with instructions.

[33] Affirmed in part, reversed in part, and remanded with instructions.

Bradford, C.J., and Bailey, J., concur.