2022 IL App (2d) 210667
No. 2-21-0667
Opinion filed March 31, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re V.S., a Minor	)	Appeal from the Circuit Court
	)	of McHenry County.
	)	
	)	No. 21-FA-128
	)	
(Leila S., Petitioner-Appellant, v.	)	Honorable
Liisa S. and David S.,	)	Jeffrey L. Hirsch,
Respondents-Appellees).	)	Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices Zenoff and Jorgensen concurred in the judgment and opinion.

OPINION

¶ 1 Petitioner, Leila S., appeals from a circuit court order denying her petition for visitation with her minor grandchild, V.S. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 V.S. was born in 2006. Her mother's parental rights were terminated, and her father never established parentage. V.S. was adopted by her mother's cousin, Liisa S., and Liisa's husband, David S.

¶ 4 In June 2021, Leila filed a petition for grandparent visitation in Lake County circuit court. See 750 ILCS 5/602.9 (West 2020). Liisa and David filed a petition to change venue, and the matter was transferred to McHenry County circuit court. Leila also subsequently filed a petition for guardianship.

¶ 5 Liisa and David filed a combined motion to dismiss the petition for grandparent visitation, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2020)). They argued that Leila's petition for grandparent visitation (1) failed to sufficiently allege that Liisa and David unreasonably denied visitation and that V.S. suffered undue harm as a result (*id.* § 2-615(a)) and (2) was barred by an affirmative matter (*id.* § 2-619(a)(9)) in that Leila failed to show that she satisfied any one of the conditions required to file a petition for grandparent visitation (750 ILCS 5/602.9(c)(1) (West 2020)). In response, Leila argued that the requirements of subsection (c)(1)(E) (*id.* § 602.9(c)(1)(E)) had been met. Liisa and David also filed a motion to strike the petition for guardianship.

¶ 6 The trial court held oral argument on both motions on August 18, 2021, and, on August 20, 2021, entered a written order striking the petition for guardianship and dismissing the petition for grandparent visitation. The court struck the petition for guardianship pursuant to section 2-615 of the Code, stating, "The petition for guardianship of the minor child and the emergency motion for temporary guardianship are stricken without prejudice ***. Petitioner is granted leave to file and serve notice of an amended petition for guardianship within 30 days from the date of this order."

¶ 7 The court dismissed the petition for grandparent visitation pursuant to section 2-619(a)(9) of the Code. It concluded that "[Leila] has special standing *** pursuant to 750 ILCS 5/602.9(b)(6)[(West 2020)] because [Liisa and David] were related to their adopted child as defined by Section 1 of the Adoption Act" and that Leila had pled sufficient facts to sustain the petition. Nevertheless, the court concluded that Leila had not satisfied any of the conditions of section 602.9(c)(1).

¶ 8 Following oral argument, the trial court orally explained that it interpreted section 602.9 to require a petitioner who has standing under subsection (b)(6) to nevertheless allege and prove the

existence of one of the conditions under subsection (c)(1). Moreover, it interpreted the reference to "parent" or "parents" in subsection (c)(1) to refer to the adoptive parent or parents. Accordingly, in its written order, the court rejected Leila's argument that subsection (c)(1)(E) was satisfied, explaining that the requirements were not met because Liisa and David were married and living together. It stated, "This dismissal order is entered without prejudice should any of the conditions under Section 602.9(c)(1)(A)-(E) be found to exist in the future." The court also indicated following oral argument that Leila could request a final order, though she did not do so at that time.

¶ 9 Leila filed a motion to reconsider the dismissal of her petition for grandparent visitation. The court denied the motion to reconsider in an October 20, 2021, written order, stating, "This is a final and appealable order." Leila filed her notice of appeal on November 12, 2021.

¶ 10 After the case was docketed in this court, we directed Leila to file a jurisdictional statement. Leila filed her jurisdictional statement on December 16, 2021, and, on December 20, 2021, Liisa and David filed a motion to strike the same. We denied that motion without prejudice and allowed the parties to address this court's jurisdiction in their briefs. Leila's appellant brief incorporated by reference her jurisdictional statement.

¶ 11 II. ANALYSIS

¶ 12 At issue in this appeal is whether the trial court erred in granting Liisa and David's motion to dismiss Leila's petition for grandparent visitation and in denying the motion to reconsider the same, finding that Leila failed to establish the existence of any of the conditions in subsection (c)(1). We review both judgments *de novo*. *Jaros v. Village of Downers Grove*, 2020 IL App (2d) 180654, ¶ 35; *In re Tyreke H.*, 2017 IL App (1st) 170406, ¶ 109. Preliminarily, however, we must address this court's jurisdiction.

¶ 13 A. This Court Has Jurisdiction

¶ 14 Leila argues that this court has jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. July 1, 2017), while Liisa and David counter that Leila did not obtain a final judgment and, therefore, this court lacks jurisdiction.

¶ 15 At the outset, Liisa and David argue that Leila attempts to flout Illinois Supreme Court Rule 23(e)(1) (eff. Jan. 1, 2021) by citing a Rule 23 order (*Village of East Dundee v. Village of Carpentersville*, 2014 IL App (2d) 131006-U) entered prior to January 1, 2021, in her jurisdictional statement. Leila's brief incorporated by reference her previously entered jurisdictional statement without modification, thus it included the offending citation. Leila, in her reply brief, acknowledges the oversight and requests that we consider her jurisdictional statement without the offending citation. Liisa and David request that we strike the jurisdiction section of Leila's brief, dismiss the appeal, and sanction Leila. We decline that drastic request, but we disregard the offending citation.

¶ 16 We next consider Liisa and David's substantive jurisdiction argument that Leila did not appeal from a final order. Rule 303 provides, "The notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from ***." Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). "A final order is one that 'resolve[s] every right, liability or matter raised.' " *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 22 (quoting *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 465 (1990)); *cf. Armstead v. National Freight, Inc.*, 2021 IL 126730, ¶ 23 (" '[T]o be considered final and appealable for purposes of Rule 304(a), a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court only has to proceed with execution of the judgment.' "). Liisa and David contend that Leila did not appeal from a final order, because the trial court disposed of both the

petition for grandparent visitation and the petition for guardianship "without prejudice." In support of their contention that we lack jurisdiction, they cite *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 23, for the proposition that a trial court clearly manifests its intent that an order is not final and appealable whenever it includes the phrase "without prejudice." Leila responds that the finality and appealability of an order is determined by its effect rather than its form. *Krause v. USA DocuFinish*, 2015 IL App (3d) 130585, ¶ 16 (" '[I]f the dismissal is because of a deficiency that could be cured by simple technical amendment, the order is not the subject of appeal.' [Citation.] On the other hand, if the dismissal is because of a 'perceived substantive legal deficiency,' the dismissal order is final and therefore appealable.").

¶ 17 We agree with Leila. Liisa and David are correct in noting that the trial court's August 20, 2021, order was entered "without prejudice" to Leila's ability to refile. But the court's order required Leila to file an amended petition for guardianship within 30 days. She did not do so, and thus that part of the order became final by its own terms on September 19, 2021. And while the court also dismissed Leila's petition for grandparent visitation "without prejudice," she filed a motion for reconsideration, which the trial court denied on October 20, 2021, stating, "This is a final and appealable [o]rder." The trial court was not required to render any express finding as with an appeal under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). Rather, the only requirement was the entry of a final judgment. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). The effect of the trial court's October 20, 2021, order was to resolve every matter raised in the trial court after the amendment of the petition for grandparent visitation had been disallowed, and thus it was a final judgment. Liisa and David's argument fixates on the trial court's August 20, 2021, order, while ignoring what followed. Leila filed her notice of appeal on November 12, 2021, within 30 days of the entry of the final judgment. See *id.* We have jurisdiction.

¶ 18 B. The Trial Court Properly Dismissed Leila's Petition

¶ 19 Before reviewing the trial court's order, we must construe section 602.9 in light of its history, structure, and text. The rules that guide our analysis are well established:

> "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. [Citations.] The best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. [Citations.] The statute should be evaluated as a whole, with each provision construed in connection with every other section. [Citations.] Further, in construing a statute, a court is not at liberty to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. [Citations.] Where the statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction. [Citations.] We conduct *de novo* review when resolving an issue of statutory construction." *Lulay v. Lulay*, 193 Ill. 2d 455, 466 (2000).

Section 602.9 was enacted as part of Public Act 99-90 (eff. Jan. 1, 2016). It is the successor to sections 607(b)(1) and 607(b)(3) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act), which were declared unconstitutional by our supreme court in *Wickham v. Byrne*, 199 Ill. 2d 309, 321 (2002). Until the adoption of section 602.9, *Wickham* was interpreted as rendering the grandparent visitation statute void *ab initio*, thereby reviving the common law right to grandparent visitation under "special circumstances." *In re M.M.D.*, 344 Ill. App. 3d 345, 348 (2003), *aff'd*, 213 Ill. 2d 105 (2004).

¶ 20 1. *Structure of Section 602.9*

¶ 21 Section 602.9, titled "Visitation by certain non-parents," is codified in the Marriage Act. 750 ILCS 5/602.9 (West 2020). It has six subsections: (a) through (f). *Id.* Subsection (a) defines

four terms used in the statute. *Id.* § 602.9(a). Subsection (b) provides general provisions, including the general procedure to be followed under the statute. *Id.* § 602.9(b). Subsection (c) is labeled, "Visitation by grandparents, great-grandparents, step-parents, and siblings." *Id.* § 602.9(c). Subsection (d) provides the procedure for the modification of a visitation order. *Id.* § 602.9(d). Subsections (e) and (f) establish that certain criminal convictions disqualify individuals from petitioning for visitation. *Id.* § 602.9(e), (f). Most pertinent to our analysis is subsection (c). We do not believe that the text of subsections (a), (b), (d), (e), or (f) are relevant, and, with a minor exception, neither party suggests otherwise.

¶ 22 Unlike subsection (b)(2)(D), which renders the nonparent visitation provisions inapplicable where an adoptive parent is "*not related* to the biological parents of the child," Leila notes that subsection (b)(6) provides standing for a "grandparent, great-grandparent, or sibling" to seek visitation where "the person or persons adopting the child *are related to the child*." (Emphases added.) *Id.* § 602.9(b)(2)(D), (b)(6). In turn, " '[r]elated child' " is defined under section 1 of the Adoption Act as "a child subject to adoption where either or both of the adopting parents stands in any of the following relationships to the child by blood, marriage, adoption, or civil union: parent, grand-parent, great-grandparent, brother, sister, step-parent, step-grandparent, step-brother, step-sister, uncle, aunt, great-uncle, great-aunt, first cousin, or second cousin." 750 ILCS 50/1(B) (West 2020).

¶ 23 Liisa and David acknowledge that they are related to V.S. and do not dispute that Leila is a grandparent who has standing to file a visitation petition. Rather, they contend that the trial court properly dismissed the petition because Leila did not allege any of the prerequisite conditions set forth in subsections (c)(1)(A) through (E). 750 ILCS 5/602.9(c)(1)(A)-(E). Leila concedes that she was required to satisfy at least one of the preconditions in order to survive the motion to dismiss

her petition, but she argues that the trial court erred in finding that she failed to do so, specifically as to subsection (c)(1)(E), to which we now turn.

¶ 24 2. *Subsection (c)*

¶ 25 Subsection (c) is labeled "Visitation by grandparents, great-grandparents, step-parents, and siblings." *Id.* § 602.9(c). Subsection (c)(1) provides that one of the above people may bring a petition for visitation if (1) "there is an unreasonable denial of visitation by a parent" and (2) the denial of visitation "causes undue mental, physical, or emotional harm to the child." *Id.* § 602.9(c)(1). However, one of five additional enumerated conditions must also be present before grandparent visitation may be ordered by the court. *Id.* § 602.9(c)(1)(A)-(E). The enumerated condition that Leila contends she satisfied is subsection (c)(1)(E), which requires: "(i) the child is born to parents who are not married to each other; (ii) the parents are not living together; (iii) the petitioner is a grandparent, great-grandparent, step-parent, or sibling of the child; and (iv) the parent-child relationship has been legally established." *Id.* § 602.9(c)(1)(E).

¶ 26 Leila contends that she has satisfied subsection (c)(1)(E) because the biological parents of V.S. were unmarried and not living together at the time of the adoption. Liisa and David counter, as the trial court found, that "parent" for purposes of subsection (c)(1)(E) refers to the adoptive parents in this case, and not the biological parents. Because the adoptive parents are married and living together, the trial court interpreted subsection (c)(1)(E) as inapplicable to the instant situation.

¶ 27 Considering the structure of the statute, its plain language, and its intended purpose, we disagree with both parties' interpretation of subsection (c)(1)(E). Simply put, subsection (c)(1)(E) has no application where a child has been adopted.

¶ 28 Initially we note that the subparts of subsection (c)(1)(E) are in the conjunctive and must all be satisfied. Subpart (i) requires that "the child *is born to parents who are not married* to each other." (Emphasis added.) *Id.* § 602.9(c)(1)(E)(i). Obviously, a child is not generally understood to be "born to" the adoptive parents. Subpart (ii) requires that the parents are not living together. Liisa and David's interpretation that "parents" in the second subpart refers to adoptive parents makes little sense when considered in the context of the first subpart. Both subparts (i) and (ii) are phrased in the present tense, suggesting they refer to the same parents. Clearly, subpart (ii) is designed to further qualify those unmarried parents who may be subject to a grandparent visitation petition, *i.e.*, unmarried parents who are also not living together. Subpart (ii)'s additional hurdle to grandparent visitation merely acknowledges the societal reality that many unmarried, cohabitating parents are as capable of raising their children as married parents. In further support that subsection (c)(1)(E) does not apply in the adoption context, we observe that subpart (iii) allows "step-parents" to petition for visitation, though they are specifically not included in subsection (b)(6)'s list of possible petitioners for visitation where a related adoption occurs. *Id.* § 602.9(b)(6) ("If the person or persons who adopted the child are related to the child *** any person who was related to the child as grandparent, great-grandparent, or sibling ***shall have standing to bring an action under this Section ***.").

¶ 29 Leila's interpretation of subsection (c)(1)(E) is equally untenable. She correctly reads both subparts (i) and (ii) as referring to the biological parents but then asserts that these factual antecedents will always permit a grandparent to seek visitation where the adoptive parents are related. First, we note that such an outcome is at odds with the purpose of the statute, which is to honor the decisions of parents except where there has been a breakdown in the nuclear family. Moreover, Leila's interpretation ignores subpart (iv)'s requirement that "the parent-child

relationship has been legally established." *Id.* § 602.9(c)(1)(E)(iv). While this is a potential issue for paternal grandparents where biological parents are not married, it will never apply where the parental relationship has been established through adoption proceedings. Accordingly, we construe subsection (c)(1)(E) as applying *only when a biological parent* has unreasonably denied visitation so as to cause harm to the child.

¶ 30 Constitutional concerns also support our interpretation that subsection (c)(1)(E) is inapplicable in the related-adoption context. Parents have a fundamental right to make decisions regarding the care, custody, and control of their children. See *Wickham*, 199 Ill. 2d at 316. A statute that permits *any third party* to subject any decision by a parent concerning visitation of his or her children to state-court review, without affording the parent any deference, is unconstitutional. *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (holding unconstitutional a Washington statute that permitted " '[a]ny person' " to petition for visitation " 'at any time' " (emphases omitted)). Indeed, a statute that limits standing to petition for visitation rights to relatives is nevertheless unconstitutional if it "places the parent on equal footing with the party seeking visitation rights," as doing so "directly contravenes the traditional presumption that parents are fit and act in the best interests of their children." *Wickham*, 199 Ill. 2d at 320-21. Leila's reading of subsection (c)(1)(E) would allow grandparents to interfere with the rights of adoptive parents upon satisfaction of a condition unrelated to the adoptive parents, an outcome with constitutional significance. This would contravene the intent of the statute, which is to permit relatives to petition for visitation only where there is some breakdown of the nuclear family (see *Robert H. v. Andrea Abbott H.*, 2019 IL App (5th) 180559, ¶ 16 (construing section 602.9)) to which the child is a *current* member. We decline Leila's invitation to interpret subsection (c)(1)(E) in a manner that would unnecessarily raise constitutional issues.

¶ 31 Leila's citation to *In re Guardianship of A.N.B.*, 2021 IL App (4th) 210215-U, as persuasive authority is equally unavailing. In *A.N.B.*, the Fourth District reversed the trial court's award of grandparent visitation due to its unchallenged finding that the petitioner grandmother was unable to establish that her grandchild had suffered mental, physical, or emotional harm. *Id.* ¶ 40. In reaching this conclusion, the court concluded that a petitioner could establish standing under section 602.9 by demonstrating that a child's guardian, rather than a parent, denied visitation. *Id.* ¶ 39. It is unclear what Leila attempts to show in citing this decision, but to the extent she suggests that the biological parent is always the subject of the subsection (c)(1) inquiry regardless of who actually denies visitation, we disagree for reasons already stated.

¶ 32 Finally, Leila argues that (1) many of the provisions in section 602.9 indicate the legislative intent to preserve the grandparent-grandchild relationship when the child is adopted by a relative and (2) these provisions would be rendered meaningless if an interpretation alternative to hers were used. While we agree that the legislature intended to preserve the grandparent-grandchild relationship in related adoptions by permitting visitation where breakdowns occur in the adopted nuclear family, we disagree with Leila's conclusion that limiting subsection (c)(1)(E) to birth parents "would effectively always [preclude grandparents from] seeking grandparent visitation" in the related-adoption context. This argument ignores subsections (c)(1)(A) through (D), which by their plain language apply to adoptive parents. 750 ILCS 5/602.9(c)(1)(A) (West 2020) ("the child's other parent is deceased or has been missing for at least 90 days"); *id.* § 602.9(c)(1)(B) ("a parent of the child is incompetent as a matter of law"); *id.* § 602.9(c)(1)(C) ("a parent has been incarcerated in jail or prison for a period in excess of 90 days immediately prior to the filing of the petition"); *id.* § 602.9(c)(1)(D) ("the child's parents have been granted a dissolution of marriage or have been legally separated from each other"). Grandparents may invoke the jurisdiction of the

circuit court to consider a petition for visitation by showing that any of the conditions listed in subsections (c)(1)(A) through (D) exists with respect to adoptive parents as well as biological parents.

¶ 33 Leila argued solely that subsection (c)(1)(E) was satisfied because V.S.'s biological parents were unmarried and did not live together. For the reasons expressed earlier, the parties and the trial court erred in interpreting that subsection (c)(1)(E) applied to Liisa and David. Nevertheless, the trial court's ultimate conclusion that Leila failed to satisfy any condition of subsection (c)(1) was correct. Accordingly, the trial court's judgment is affirmed.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 36 Affirmed.

No. 2-21-0667

Cite as:	*In re V.S.*, 2022 IL App (2d) 210667
Decision Under Review:	Appeal from the Circuit Court of McHenry County, No. 21-FA-128; the Hon. Jeffrey L. Hirsch, Judge, presiding.
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