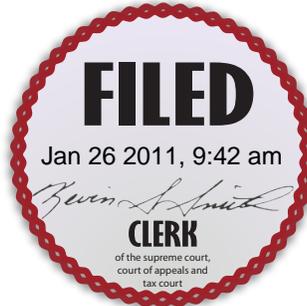


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

J. M.
Bunker Hill, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

J.M.,)
)
Appellant,)
)
vs.) No. 28A01-1007-JP-387
)
A.A.,)
)
Appellee.)

APPEAL FROM THE GREENE CIRCUIT COURT
The Honorable Erik C. Allen, Judge
Cause No. 28C01-0709-JP-80

January 26, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

J.M. (“Father”), *pro se*, appeals the juvenile court’s order that his minor child should assume the surname of A.A., the child’s mother (“Mother”).

We affirm.

ISSUES

1. Whether the juvenile court abused its discretion by granting Mother’s petition for name change.
2. Whether the juvenile court judge erred in failing to recuse himself from the underlying name change hearing after having presided over criminal proceedings involving Father.

FACTS

On August 24, 2007, T. was born out of wedlock to Mother and Father. Subsequently, Mother filed a verified petition to establish paternity, and Father requested genetic testing, which established that he had fathered T. On April 24, 2008, after a hearing, the juvenile court ordered that T. should assume Father’s surname. Father was also granted parenting time in accordance with the Indiana Parenting Time Guidelines.

On July 8, 2008, Father moved for modification of parenting time. The juvenile court held a hearing on August 5, 2008, and subsequently increased Father’s visitation opportunities. On September 16, 2008, Father was arrested for a narcotics offense. The juvenile court judge from the instant paternity action also presided over Father’s criminal jury trial. Father was convicted of attempted dealing of methamphetamine and sentenced

to thirty years with five years suspended. Father's earliest possible release date with good time credit is "2020 or 2021."¹ (Tr. 28).

On April 1, 2010, Mother filed a verified petition for name change, seeking to have T. assume her surname. She alleged, in part, the following:

2. That [T.] desires to change his legal name to [T.A.].

* * *

9. Mother has another child whose last name is the same as Mother's, i.e., [A.].

10. Father . . . does not and has never exercised significant visitation/parenting time with [T.].

11. Father has recently been sentenced to thirty (30) years in prison with five (5) years suspended;

12. For reasons of his incarceration, Father does not pay child support and does not attempt parenting time or contact with the child.

13. Neither Father, nor his family[,] attempt to see or visit with [T.] nor [sic] assist in the support of [T.].

14. Mother . . . has the sole care, custody, and financial support of [T.].

15. Next friend/Mother submits that it is in the best interest of the child to have the same surname as Mother and his sibling.

(App. 4-5) (emphasis added). The juvenile court conducted a hearing on June 1, 2010.

On June 11, 2010, it ordered T.'s surname changed to Mother's surname. The order provided, in pertinent part, as follows:

2. The parties cohabited until the child was 3-4 months of age and after the parties separated[,] Father have [sic] very minimal contact with the child.

¹ Father contends that with good time and application of time cuts for furthering his education, his earliest possible release date is 2017.

Father has not had contact with the child since shortly before the child's first birthday.

3. [] Father has been continuously incarcerated since on or about September 16, 2008[.] Mother took the child to the [Greene County] jail one time shortly after Father's initial arrest and Father has only written 4 letters to the child since incarceration. Father has not requested Mother to bring the child to see him. Father filed his request after Mother filed her request for name change.
4. The child's last name was changed to [M.] within the Order on Verified Petition to Establish Paternity entered in this case on April 24, 2008. Father has not maintained contact with the child. Mother has been responsible for raising the child and providing care and support without Father's involvement. Due to Father's long-term incarceration[,] Father will not be present nor be a substantial presence in the child's life until the child is much older. Mother has another child that lives with her and has her last name, which is [A.]. Father's family has no involvement with the child.
5. The court hereby finds and concludes that due to Father's complete lack of involvement in the child's life, Father's family having no involvement in the child's life, Father's long-term incarceration, and the consistency of the last name of [A.] for other members of Mother's household (i.e., Mother and her other child), it is in the child's best interest to change his name to [T.A.], and the Court hereby orders the child's name changed to [T.A.]²
6. The Indiana Court of Appeals in McCurdy v. McCurdy, 363 N.E.2d 1298 (Ind. App. 1977) established a strong presumption in favor of occasional visitation between an incarcerated parent and child, unless the evidence supports a finding that the visitation would endanger the child's physical health or significantly impair his emotional development. The fact that visitation would take place in a prison setting in and of itself was rejected as a basis for denying visitation. The opinion states that “. . . neither past delinquency . . . nor former conviction and confinement . . . nor present incarceration . . . necessarily requires denial of the finding that visitation between Father and the child would endanger the child's physical health or

² The Court also ordered State and local agencies to modify T.'s birth records accordingly.

significantly impair his emotional development. Therefore, Mother is required to allow the child to occasionally visit Father during the period of his incarceration. The holding in McCurdy and other cases decided on the visitation issue do not hold that the non-incarcerated parent is responsible for transportation, and that issue has not been specifically addressed by the higher Courts. This Court concludes that the non-incarcerated parent is not responsible for transportation of the child.

(Order 1-2). Father now appeals.

DECISION

Father argues that the juvenile court erred in ordering that T. should bear Mother's surname. He also alleges the existence of a conflict of interest. We cannot agree.

1. Standard of Review

Mother has failed to file an appellee's brief. In such cases, we need not undertake to develop arguments for the appellee. *Painter v. Painter*, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Rather, we employ a less stringent standard of review and may reverse the juvenile court if the appellant establishes prima facie error. *Butrum v. Roman*, 803 N.E.2d 1139, 1142 (Ind. Ct. App. 2004), *trans. denied*. Prima facie error means error "at first sight," "on first appearance," or "on the face of it." *Id.*

2. Name Change

Father argues that Mother failed to present sufficient evidence that it was in T.'s best interests to bear her surname. "A father and mother enjoy equal rights with regard to naming their child." *In re Fetkavich*, 855 N.E.2d 751, 755 (Ind. Ct. App. 2006) (citing *Tibbitts v. Warren*, 668 N.E.2d 1266, 1267 (Ind. Ct. App. 1996)), *trans. denied*. Indiana

Code section 34-28-2-4 governs when a parent seeks to change the surname of his or her minor child.

In deciding on a petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under [Indiana Code Section] 31-17-2-8. However, there is a presumption in favor of a parent³ of a minor child who:

(1) has been making support payments and fulfilling other duties in accordance with a decree issued under [Indiana Code Articles] 31-15, 31-16, or [Indiana Code Article] 31-17 (or [Indiana Code Chapter] 31-1-11.5 before its repeal); and

(2) objects to the proposed name change of the child.

Ind. Code § 34-28-2-4(d). *See In re Paternity of J.C.*, 819 N.E.2d 525, 527 (Ind. Ct. App. 2004) (“A biological father seeking to obtain the name change of his non-marital child bears the burden of persuading the court that the change is in the best interest of the child.”). Absent evidence of the child’s best interests, the father is not entitled to obtain a name change. *Id.* The statutory presumption does not apply here inasmuch as Father is neither paying child support nor exercising parenting time with T.

When a surname change is sought in a paternity action, the trial court may properly consider, *inter alia*, whether the child holds property under a given name, whether the child is identified by public and private entities and community members by a particular name, the degree of confusion likely to be occasioned by a name change and (if the child is of sufficient maturity) the child’s desires.

In re Paternity of M.O.B., 627 N.E.2d 1317, 1318-19 (Ind. Ct. App. 1994) (citing *Matter of G.L.A.*, 430 N.E.2d 433, 434 (Ind. Ct. App. 1982)).

³ We have interpreted I.C. § 34-28-2-4(d) to apply to noncustodial parents, because “only noncustodial parents actually make support payments pursuant to the terms of a court order.” *See Petersen v. Burton*, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007).

At the name change hearing, Mother testified that she is “the sole provider physically, emotionally, financially, every way,” (tr. 11); that Father has written “four letters in two years with a year lapsed [sic] in between one and the other,” (tr. 12); that Father’s family has no involvement in T.’s life; that T. will be an adult by Father’s earliest possible release date; and that she has another child in her household who bears her surname. (See Tr. 11) (“[If] I do all the work for 18 years, . . . [T.] should have the same name as me.”). Father, on the other hand, testified that T. is his “only son” and denied Mother’s claims that neither he nor his family is significantly involved in T.’s life. (Tr. 19). He also testified that he exercised his parenting time “up until [he] got arrested” when T. was approximately thirteen months old; but admitted that as of the hearing date, he had not seen T. in approximately sixteen months. (Tr. 24).

Father’s reference to T. being his “only son,” evinces his desire to perpetuate his family name. In *Paternity of M.O.B.*, the trial court ordered that the child should bear the father’s surname. 627 N.E.2d at 1317. On appeal, in arguing that the name change was in the child’s best interests, the father argued that his surname “was an honorable name which he would ‘truly like’ to have ‘carried on.’” *Id.* at 1319. In reversing the trial court, we concluded that the father had “clearly failed to sustain his burden of proof that a name change was in the best interests of his children.” *Id.* Likewise, in *Garrison v. Knauss*, 637 N.E.2d 160, 161 (Ind. Ct. App. 1994), we found that father’s testimony that it was in the best interests of his children to have his surname “for-just for-that paternal feeling

that they are my children” reflected the father’s own paternal desires instead of the children’s best interest.” *Id.*

Here, the juvenile court was in the best position to evaluate Father’s sincerity and level of commitment. *See Redd v. Redd*, 901 N.E.2d 545, 549 (Ind. Ct. App. 2009) (“We generally give considerable deference to the trial court’s findings in family law matters because the trial court is in the best position to become acquainted with the relationship between parents and their children.”). We cannot say that it erred in concluding that changing T.’s surname to that of Mother was in T.’s best interests, where it considered Father’s “complete lack of involvement in the child’s life, Father’s long-term incarceration, and the consistency of the last name of [A.] for other members of Mother’s household (i.e., Mother and her other child).” (Order 1-2). We find no reversible error.

2. Bias/Failure to Recuse

Next, Father argues that the juvenile court judge erred in failing to recuse himself from the hearing on the name change. Specifically, he argues that the judge had commented at his criminal sentencing hearing that given Father’s drug addiction, it might be in T.’s best interests if Father was incarcerated. Father maintains that the judge’s remark gave rise to a conflict of interest, for which the judge should have recused himself. He writes, “[E]vidence presented at the fathers [sic] trial may have created doubt, and interference, effecting [sic] the judgement [sic] and ability to keep an open mind as to what kind of father [Father] is and not an indivisual [sic] by drawing conclusions based on the fathers [sic] trial.” Br. at 13.

A party's success on a claim of bias and prejudice hinges on its ability to make a plain showing that unfairness and prejudice existed and controlled the result. *M.S. ex rel. Newman v. K.R.*, 871 N.E.2d 303, 314 (Ind. Ct. App. 2007). “[W]hile a trial judge has the discretion to disqualify himself or herself whenever any semblance of judicial bias or prejudice arises, disqualification is not required unless actual prejudice or bias exists.” *Cook v. State*, 612 N.E.2d 1085, 1087 (Ind. Ct. App. 1993). “A judge is presumed unbiased and unprejudiced, and to rebut the presumption, the defendant must establish from the judge's conduct actual bias or prejudice which places the defendant in jeopardy.” *Id.* at 1088. Such bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him. *Carter v. Knox County Office of Family & Children*, 761 N.E.2d 431, 435 (Ind. Ct. App. 2001). Prejudice must be shown by the judge's trial conduct; it cannot be inferred from his subjective views. *Id.*

At the hearing, the following exchange occurred between Father and the judge:

[FATHER]: And there is one thing I'd like to state on the record too. On April the 8th of 2009, when you sentenced me to a term of 30 years, you told me that it might be in my son's best interest that I be incarcerated due to my drug addiction. And I didn't, I didn't want a conflict to be in this case if that would consider [sic] a conflict.

[JUDGE]: No, it's not a conflict. And I think that's probably out of context. I suspicion [sic] and I don't recall specifically but [your] indicating [or] trying to use having a child as a mitigating circumstance. And I probably indicated to you, as I have a number of others, that if you choose to participate in drug activity that it'd be better off not to be around a child. That's, you know, when people try to use that as a mitigating factor when they elect to participate in various activity even regardless the

fact they have a child. I, I generally don't look at that as a mitigating circumstance. And I expect that's what my comment was. Because I make that [comment] to a number of people in that situation that if, you know, you continue to make decisions like that that the child [would] be better off without that influence in their life. You may make a change. I don't know. That's not a factor in this case and I don't believe that's a conflict in hearing this case[.]

(Tr. 30-31).

Father has not carried his burden. We discern no error in the juvenile court's denial of Father's motion to recuse. Based on the judge's remarks during the name change proceeding, we do not believe that an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the juvenile court's impartiality. *See Carter*, 761 N.E.2d at 435 ("The mere fact that a party has appeared before a certain judge in a prior action or the judge has gained knowledge of the party by participating in other actions does not establish the existence of bias or prejudice."). The juvenile court judge did not err in declining Father's invitation to recuse himself.

Affirmed.

NAJAM, J., and BAILEY, J., concur.