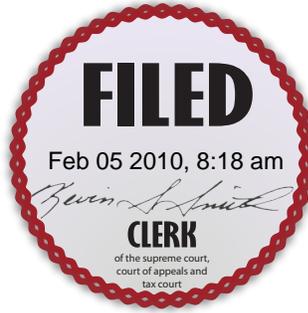


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ROBERT A. HARPER
Carlisle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT A. HARPER,)	
)	
Appellant,)	
)	
vs.)	No. 20A05-0911-CV-648
)	
LISA J. HARPER,)	
)	
Appellee.)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable David C. Bonfiglio, Judge
Cause No. 20D06-0407-DR-398

February 5, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

R.A.H. (“Father”), *pro se*, appeals from the denial of his petition for reinstatement of his parent-child visitation privileges.

We affirm.

ISSUES

1. Whether the trial court was required to appoint counsel after Father demonstrated that he was indigent.
2. Whether Indiana Code section 31-17-4-2, governing modification, denial, or restriction of parenting time privileges, is unconstitutionally vague.
3. Whether the trial court manifestly abused its discretion in denying Father’s petition for reinstatement of parent-child visitation privileges.
4. Whether the trial court abused its discretion by failing to provide additional assistance when requested by Father.

FACTS

Father and L.J.H. (“Mother”) married in 1995, and A.A. was born to the marriage on April 4, 1996. In 1999, Mother filed a petition for dissolution of marriage while Father was incarcerated for a drug-related offense. On March 30, 1999, Mother filed a petition for provisional order. The trial court conducted a hearing on May 3, 1999. In granting Mother’s petition for provisional order, the court awarded her legal and physical custody of A.A., pending hearing on Mother’s right to refuse visitation to Father. The parties were divorced in June of 1999; however, the trial court declined to enter a parent-child visitation order until Father was released from prison.

On September 3, 1999, after his release from prison, Father filed a petition to establish visitation. On December 6, 1999, the trial court ordered him to schedule three maximum-level supervised visitations through the Elkhart Child Abuse Protection Services (“CAPS”). It also ordered CAPS to file written reports and recommendations regarding the possibility of a permanent visitation arrangement.¹ Father’s visitation resumed in September of 2000. In March of 2001, he moved for unsupervised visitation. By agreement of the parties, visitation was modified to allow Father to visit with A.A. at his parents’ (“paternal grandparents”) residence.

On October 4, 2001, Father was convicted of murdering a rival drug dealer and was sentenced to sixty-five years in prison. Initially, Mother took A.A. to visit Father at the state prison; however, she terminated the visits in April of 2002, after observing a marked decline in A.A.’s behavior and outlook. On July 21, 2003, Father filed a petition for modification of visitation. On August 13, 2003, Mother filed a motion to suspend visitation, which was granted, pending a hearing.

On August 22, 2003, Father moved to dismiss Mother’s motion to suspend visitation, which was denied. On August 27, 2003, Father filed a response to Mother’s motion to suspend visitation. On December 2, 2003, Father moved for final judgment. On December 12, 2003, Mother moved for an evidentiary hearing. The trial court ordered Father and Mother to tender their respective positions on the visitation issue. On

¹ According to the CCS, CAPS filed visitation reports on the following dates: in 2000, September 20, October 12, October 24, 2000, November 17, November 21, and December 11; in 2001, January 16, January 22, February 13, March 5, 2001, March 30, April 4, 2001, and April 20, 2001. Father has not included any of the CAPS reports in his Appendix.

January 5, 2004, Father filed his proposal regarding reinstatement of visitation privileges. On January 15, 2004, Mother filed her proposal for visitation. On February 3, 2004, Mother filed a motion to terminate visitation. On March 8, 2004, the trial court conducted a hearing. On May 7, 2004, Father filed a Trial Rule 53.1 motion to remove the case from the trial court.² Father also filed a motion for modification of visitation and establishment of parent-child communication, a memorandum in support thereof, and a motion to transport Father to the hearing. On May 27, 2004, Father filed a motion for change of judge; which was granted. On July 2, 2004, the case was transferred to Elkhart Superior Court 6.³ On August 3, 2004, Father filed a motion for summary judgment regarding visitation and parent-child communication privileges. On August 26, 2004, Mother filed a response to Father's motion for summary judgment.

On October 19, 2004, the trial court conducted a status hearing on pending matters. Father appeared by telephonic means. During the hearing, the trial court discussed the court's authority to appoint him counsel given his indigent status. Father indicated that he wished to represent himself. The trial court expressed its concerns about self-representation, but advised that if Father changed his mind, he should petition the court for appointment of counsel.

² The matter was referred to the clerk, who determined on May 19, 2004, that the trial court's decision had not been unduly delayed pursuant to Trial Rule 53.1.

³ Also transferred was an adoption case between Father and Mother's new husband, who was attempting to adopt Father's two older children without his consent.

In its order of February 14, 2005, the trial court made extensive findings and conclusions of law, denied Father's petition for modification; and suspended Father's visitation privileges. Subsequently, on March 4, 2005, the trial court terminated Father's parent-child visitation. On April 27, 2005, Father filed a motion for judicially-screened communication with A.A.; which was denied because all issues had been resolved through previous litigation. On August 5, 2005, Father filed a motion to proceed on appeal *in forma pauperis*; which was granted.

On May 18, 2009, Father filed a verified petition for court-appointed counsel and a motion for modification of parent-child visitation; which were denied.⁴ On September 3, 2009, Father filed another petition to reinstate parent-child visitation and memorandum of law; a three-step transition parenting plan; affidavit from himself and his pastor; and a verified petition for court-appointed counsel; which were denied on September 3, 2009. On September 21, 2009, Father filed a motion to correct error; which was denied.

Additional facts will be provided as necessary.

⁴With respect to Father's verified petition for modification of visitation rights, the corresponding CCS entry provides as follows:

The Motion for Modification of Visitation Rights is repetitive. The Court's extensive findings of February 14, 2005 and March 4, 2005 which are now incorporated in this order by reference, demonstrate the extreme violent behavior of [Father] and how those behaviors have severely and adversely affected [A.A.]. There is no justification, based upon these findings, to consider a renewed Motion for Contact with the child.

(App. 16-B).

DECISION

Father argues that the trial court erred in denying his verified petitions for court-appointed counsel because he was indigent. He also argues that Indiana Code section 31-17-4-2 is unconstitutionally vague. Next, he argues that he has established a pattern of changed conditions which the trial court should have considered in determining whether to reinstate his visitation privileges. Lastly, he argues that the court erred in denying his request for “additional assistance” in “facilitating his reunification” with A.A. Br. at 6.

We initially note that Mother has not filed an appellee’s brief. We do not need to develop an argument for her, and we apply a less stringent standard of review in this situation. *In re Guardianship of R.M.M.*, 901 N.E.2d 586, 588 (Ind. Ct. App. 2009). We may reverse the trial court if the appellant establishes *prima facie* error, which is error at first sight, on first appearance, or on the face of it. *Id.*

1. Indigence and Appointment of Counsel

First, Father argues that the trial court erred in denying his May 18, 2009 and September 3, 2009 verified motions for court-appointed counsel. Specifically, he argues that the trial court’s denials “w[ere] contrary to Indiana Code section 34-10-1-2 as he is clearly indigent, and ha[d] been found indigent repeatedly by the Trial Court.” Br. at 12. He cites *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001) for the proposition that the trial court “was required by statute to mandatorily appoint him counsel.” *Id.* We disagree.

A trial court’s determination of whether to grant a request for appointed counsel, pursuant to Indiana Code section 34-10-1, focuses on the applicant’s indigence. I.C. §

34-10-1-1. “An indigent person who does not have sufficient means to . . . defend an action may apply to the court in which the action . . . is pending, for leave to . . . defend as an indigent person.” *Id.*

Before March 26, 2002, Indiana Code section 34-10-1-2 provided as follows:

If the court is satisfied that a person who makes an application described in [I.C. § 34-10-1-1] does not have sufficient means to prosecute or defend the action, the court **shall**:

- (1) admit the applicant to prosecute or defend as an indigent person; and
- (2) assign an attorney to defend or prosecute the cause.

(emphasis added).

Father relies heavily upon *Sholes*, wherein our supreme court held that appointment of counsel was mandatory under the statute upon a showing of indigence and lack of sufficient means to prosecute or defend the action. After the *Sholes* decision, however, the Indiana Legislature amended Indiana Code section 34-10-1-2, as follows:

(b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court:

- (1) shall admit the applicant to prosecute or defend as an indigent person; and
- (2) **may**, under exceptional circumstances, assign an attorney to defend or prosecute the cause.

(c) The factors that a court may consider under subsection (b)(2) include the following:

- (1) The likelihood of the applicant prevailing on the merits of the applicant’s claim or defense.
- (2) The applicant’s ability to investigate and present the applicant’s claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

(d) The court **shall** deny an application made under section 1 of this chapter if the court determines any of the following:

- (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
- (2) The applicant is unlikely to prevail on the applicant's claim or defense.

I.C. § 34-10-1-2 (effective March 26, 2002) (emphasis added).

By its amendment, our Legislature has, in effect, changed the trial court's appointment of counsel for indigent applicants from an almost mandatory appointment to a discretionary appointment, where "exceptional circumstances" existed. I.C. § 34-10-1-2(b)(2). The amendment now requires the trial court to deny a request for appointed counsel if the applicant failed to make a diligent effort to obtain counsel or is unlikely to prevail on the claim. I.C. § 34-10-1-2(d).

It is undisputed that Father is indigent and sought court-appointed counsel on two occasions in 2009. The record does, however, support the finding that Father's request for appointed counsel was denied because the trial court determined that he was unlikely to prevail on his claim for reinstatement of parent-child visitation.

At the prior February 14, 2005 hearing on Father's petition for modification, the trial court heard the following evidence: (1) Father abused drugs and alcohol during the parties' marriage and continued to do so even after their divorce. (2) Father also abused Mother physically and emotionally during their marriage. (3) After the marriage ended, Father continued to abuse Mother. On one occasion, he squeezed her throat and lifted her off the ground, strangling her almost to the point of asphyxiation. (4) On another occasion in March 2001, after a court hearing, Father went to Mother's home, barricaded the door, broke furniture and struck her, slashed furniture with a knife, threatened to burn

down her home, and tied her up with duct tape. He also spat in Mother's face and screamed at her so loudly that she temporarily lost her hearing. A.A. witnessed some or all of these events. (5) Apparently, before October 4, 2001, Father had made threats to harm Mother, A.A., and Mother's new husband. (6) Subsequently, on October 4, 2001, Father was convicted of the murder of a rival drug dealer. (7) In September 2002, while in prison, Father broke a fellow inmate's nose.

Additional evidence that the trial court considered came from child psychologist, Dr. Gerald Wengard, who had testified that A.A. exhibited "acting out behaviors" and "ha[d] inappropriate discussions with other children concerning the murder." (App. 25). He testified that A.A. was also disturbed by the nature of Father's offenses and had nightmares about "about [Father] chasing her and taking her away." (App. 25). He also testified that A.A. has attention-deficit hyperactivity disorder ("ADHD") and "an anxiety reaction disorder with some oppositional features and that he [had] seriously considered a diagnosis of post-traumatic stress disorder in regard to the violence that she [had] witnessed in the family home." (App. 25). He testified further that A.A. could vividly recall Father's March 2001 attack on Mother; was "anxious, tense, obsessive, fearful and prone to worry"; and that "further exposure to [Father] would increase [her] anxieties and worsen her identified mental health disorders." (App. 25, 26). He testified that A.A. did not want to visit the prison or to see Father because she is afraid of him. He also testified that in the four years since the CAPS supervised visitation sessions, A.A. was "less stable," "ha[d] identifiable mental health disorders," and that her "mental health [wa]s

more precarious.” (App. 26). As to the stark contrast between the CAPS visits, which A.A. attended with her older half-siblings, and visits to the state prison, Dr. Wengard testified that prison visits “would be significantly different for [A.A.]” in a negative manner. (App. 26).

Guardian ad litem Raatz had testified that it was not in A.A.’s best interest to visit Father in prison. She testified that A.A. was exceedingly emotionally needy, immature, and lacking in boundaries. She testified further that if A.A. “d[id] not receive professional assistance and/or if she [wa]s exposed to further traumas, such as visiting [Father],” she would be at high risk for clinical depression. (App. 26). She testified that A.A.’s behaviors “indicate[d] that she has experienced the traumas that she reports” and has not been coached or “implant[ed] with false memories.” (App. 26). She also testified that A.A. had become very emotional in recounting to a previous GAL her fear of Father’s not being physically restrained during prison visits. Raatz testified that Mother had been intimidated into allowing A.A. to attend five prison visits, having been “threatened . . . that [Father’s] contacts outside of prison would harm her.” (App. 27).

Domestic abuse counselor Beth Floyd had testified that abusers like Father “go to great lengths to have power and control over their victims [by using] children . . . to exercise that control.” (App. 27). She testified that it is “not unusual or unexpected that [Mother] would still try to please [Father] while he was in prison by bringing [A.A.] to visit him . . . [because] a victim of long term physical and emotional abuse would have a strong and high need to continue to keep the perpetrator happy in order to avoid

retribution.” (App. 28). She testified that A.A. is disturbed by the fact that Father killed someone with a golf club, and is angry that the trial courts “will not listen to her” and “does not want to have contact with [Father].” (App. 28). She testified that A.A. would be “further traumatized” and could suffer flashbacks of Father’s violence if required to visit him. (App. 28).

After the February 14, 2005 hearing, the trial court concluded, in part, the following:

[A.A.] is a fragile child and . . . to expose her to her father in any setting, . . . would worsen her condition. If the father was not in prison for murder, the extensive, long term physical and emotional abuse in the home which the child experienced would justify not allowing the father to visit the child. [A.A.] could lapse into further and deeper emotional trauma, depression, and post traumatic stress disorder if she is exposed to her father. [U]pon seeing the father, the child remembers the violence he perpetrated on the mother and the murder the father committed. The same are emotionally damaging to her and she is experiencing problems with school work, problems with social relationships and she is a very fragile child who need[s] to have intensive assistance and care.

The possible damage to the child’s physical condition is that the father could, in fact, physically harm her. He is capable of great rage, as he has demonstrated in the past. That is, he has murdered an individual with a club, broke another inmate’s nose while in prison, nearly strangled [Mother] and has used broken furniture against the mother. . . .[I]n a prison visiting room, without physical restraint, the child cannot be totally protected from [Father’s] outbursts.

(App. 31).

Given Father’s demonstrated pattern of domestic violence, history of violent criminal behavior, drug and alcohol abuse, and the ill-effects on A.A.’s mental health and social well-being, the record supports the trial court’s finding that, despite Father’s

claimed personal reforms, his request for appointed counsel was denied because the trial court determined that it was unlikely that he would prevail on his claim for reinstated parent-child visitation privileges. Under the circumstances, we cannot say that the court erred in denying Father's requests for court-appointed counsel.

2. Indiana Code section 31-17-4-2

Father argues that Indiana Code section 31-17-4-2 is unconstitutionally vague. Specifically, he argues that absent an express requirement that, in cases dealing with restriction of parenting time, trial courts must consider the "best interests of the child" statutory factors⁵ that they are required consider in child custody cases, the statute fails to "set[] forth a measuring stick" and gives trial courts "too broad a field of how to interpret a child's best interest[s]." Br. at 14. He argues that the statute provides a loophole for courts to dispense "vindictive justice with the absolute authority to enforce a suspension of parenting time . . . regardless of the parent's reformation" and, thereby, violates the Indiana Constitution's prohibitions against excessive punishment and penalties and vindictive justice. *Id.* We cannot agree.

Our standard of review for alleged constitutional violations is well-settled:

We presume that the statute is valid and place a heavy burden on the challenger, who must clearly overcome that presumption. All reasonable doubts must be resolved in favor of the statute's constitutionality. We review the constitutionality of statutes with the understanding that our General Assembly has wide latitude in determining public policy. We do not substitute our beliefs as to the wisdom of a particular statute for those of the Legislature, a more politically responsive branch of government.

⁵ I.C. § 31-17-2-8.

As such, “[a] statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies.”

Gibson v. Indiana Dept. of Correction, 899 N.E.2d 40, 49 (Ind. Ct. App. 2008) (some internal citations and quotations omitted).

“[V]agueness challenges to statutes that do not involve the First Amendment freedoms must be examined in light of the particular facts of the case at hand.” *Wells v. State*, 848 N.E.2d 1133, 1146 (Ind. Ct. App. 2006). *See Boyd v. State*, 889 N.E.2d 321, 323-24 (Ind. Ct. App. 2008) (“[A] statute is void for vagueness only if it is vague as applied to the precise circumstances of the present case.”).

Indiana Code section 31-17-4-2 provides as follows:

The court may modify an order granting or denying parenting time rights whenever modification would serve the best interests of the child. However, the court shall not restrict a parent’s parenting time rights unless the court finds that the parenting time might endanger the child’s physical health or significantly impair the child’s emotional development.

Father correctly asserts that in determining whether to restrict parenting time pursuant to Indiana Code section 31-17-4-2, trial courts are not required to consider the Indiana Code section 31-17-2-8 statutory factors. *See Shady v. Shady*, 858 N.E.2d 128, 140 (Ind. Ct. App. 2006) (“Whatever the value of a trial court considering the factors listed in Indiana Code section 31-17-2-8, if any, in making a parenting time determination, it is clear that such is not required.”). We are not persuaded, however, that Indiana Code section 31-17-4-2 is unconstitutionally vague as applied to Father in a manner that it is either (1) “contrary to the child’s best interest”; or (2) in a manner that

constitutes “cruel and unusual punishment” for “previously-irresponsible” parents who have since reformed their behavior. Br. at 14.

Indiana Code section 31-17-4-2 cannot reasonably be said to ignore the best interests of the child, when, on its face, it requires trial courts to determine, before restricting parenting time, whether granting parenting privileges would endanger the child’s physical health or emotional development. Logically, a consideration of the best interest of the child is inherent in such a determination. Nor do we find that the statute punishes Father, and other “previously-irresponsible” parents to the point of being cruel and unusual punishment. Nothing in this statute impedes a reformed parent from enjoying visitation with his or her child, provided that he or she can establish that such is in the best interest of the child and will pose no harm to the child’s physical health or emotional development.

Here, after hearing significant testimony regarding Father’s history of manipulation; physical and mental violence towards Mother, some of which was witnessed by A.A.; his record of violent, criminal behavior; and the GAL and child psychologist’s recommendations against reinstatement of visitation for fear that such would be detrimental to A.A.’s already fragile mental health, the trial court concluded that reinstatement of parent-child visitation might further endanger A.A.’s emotional development and denied Father’s petition. Father has not overcome his heavy burden of proof; accordingly, we find no constitutional violation.

3. Failure to Consider Changed Circumstances in Determination of A.A.'s Best Interests

Father also argues that he has made sufficient personal changes to warrant reinstatement of his parenting time with A.A., and that the trial court erred in failing to properly weigh said changes⁶ in its determination of what was in A.A.'s best interests.

When we review a case where a trial court has entered findings of facts and conclusions thereon, we will not set aside the judgment of the trial court unless it is clearly erroneous. A trial court's findings, conclusions, and judgment are considered to be clearly erroneous only if a review of the whole record leads us to a definite and firm conviction that a mistake has been made. In reviewing findings made by the trial court, we neither reweigh the evidence nor judge the credibility of witnesses. Instead, we consider only the evidence and reasonable inferences drawn therefrom which support the judgment.

In re J.Q., 836 N.E.2d 961, 966 (Ind. Ct. App. 2005) (internal citations omitted).

Indiana Code section 31-27-4-1 provides that a noncustodial parent is entitled to reasonable visitation rights "unless the court finds, after a hearing, that visitation by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." I.C. § 31-27-4-1 (emphasis added). Here, the trial court made extensive findings and conclusions in its order of February 14, 2005, which are discussed in detail above. Stated simply, however, the trial court found therein that given

⁶ As evidence that he is a reformed individual, Father cites his four and a half years of sobriety, reformed non-violent lifestyle, 18 government classes of rehabilitation, stable housing and work pattern, voluntarily paying support every month, undergoing counseling, and displaying enough growth in his community to become both a deacon in his church and a volunteer in the state's Mental Health Department. Also, [A.A.]'s present mature age, wishes, and current stability in order to properly give foremost consideration to her best interest[s].

Br. at 20.

Father's history of violent criminal behavior, abuse, threatening, and manipulation of Mother, and demonstrated anger control problems, coupled with the recommendations of the GAL and child psychologist, reinstatement of his parent-child visitation privileges would be detrimental to A.A.'s mental, emotional, and social well-being. Father's present argument that he is a reformed individual amounts to an invitation that we reweigh the evidence, which we cannot do. We find no clear error.

4. Failure to Assist

Lastly, Father argues that the trial court erred in ignoring his request for additional assistance in reestablishing his parent-child relationship with A.A. He argues that "[i]f the Trial Court felt [that his] changes were inadequate to facilitate reunification, then in order to protect [A.A.]'s best interest[,] it was required to respond to his request for 'additional assistance' and give him sufficient instruction." Br. at 24.

Father asserts that he filed a letter⁷ with the trial court on June 3, 2009, wherein he requested "additional assistance" with "facilitating reunification" with A.A. Br. at 23, 24. The trial court's CCS entry of June 3, 2009 states, "Respondent files letter. Same is not a former [sic] pleading. No response is appropriate." (App. 16-B). The court's CCS entry appears to contain a typographical error; we suspect that the court reporter intended to note that Father's letter was not a "formal" pleading.

Father contends that the trial court's failure to respond to his letter was error, and further, that the court was obligated to assist him in effecting his desired reunification

⁷ Father has not included the letter in his Appendix.

with A.A. In support of his contention, he cites our decision in *Prince v. Dep't of Child Servs.*, 861 N.E.2d 1223 (Ind. Ct. App. 2007). *Prince* involved a drug-addicted mother of five, whose children were declared children in need of services after she left them at home alone, while she went out drinking and using drugs. When her parental relationship with her children was terminated, she attempted, on appeal, to lay blame for her inability to achieve and maintain sobriety on the trial court or the ineffectiveness of the court-ordered services. A panel of this court responded as follows:

Responsibility for a parent's failure to achieve and maintain sobriety in a timely fashion belongs solely to the parent. If the parent feels the services ordered by the court are inadequate to facilitate the changes required for reunification with the children, then the onus is on the parent to request additional assistance from the court or the Indiana Department of Child Services.

Id. (emphasis added).

Father seizes upon the above-emphasized language in a futile attempt to blame the trial court for his inability to have his visitation privileges reinstated. The record reveals that reinstatement of prison visits with Father -- a convicted murderer with a history of anger control problems; physical violence, emotional abuse, and manipulation; and drug and alcohol addiction -- was determined by A.A.'s child psychologist and GAL not to be in A.A.'s best interests, and specifically, to pose a significant threat to A.A.'s physical safety and emotional well-being. Inasmuch as Father is attempting to blame others for his present inability to visit with A.A., we are not moved and reject his self-serving

attempt to shift responsibility to the trial court from his own shoulders where it squarely belongs. We find no error.

Affirmed.

KIRSCH, J., and MAY, J., concur.