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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE PATERNITY OF: N.B.,	)	
J.W.,	)	
Appellant-Petitioner,	)	
vs.	)	No. 43A03-0810-JV-516
K.B.,	)	
Appellee-Respondent.	)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0806-JP-251

May 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

J.W. ("Father") appeals the trial court's Order Determining Paternity, Custody and Child Support. On appeal, Father raises two issues, which we restate as: (1) whether the trial court properly refused to appoint Father counsel under Indiana Code section 34-10-1-2; and (2) whether the trial court properly awarded Father visitation in accordance with the Indiana Parenting Time Guidelines. Concluding that the trial court did not err in refusing to appoint Father counsel or in its award of parenting time, we affirm.

Facts and Procedural History

On September 29, 2007, K.B. ("Mother") gave birth to N.B. On June 19, 2008, Mother filed a Verified Petition to Establish Paternity and Motion for Genetic Tests. In her petition, Mother alleged that N.B. was Father's child and was born out of wedlock. At the time Mother filed her petition, Father was incarcerated. On July 8, 2008, Father filed an Affidavit of Indigency in which he alleged that he earned $5.25 per week from his prison labor job and requested waiver of any filing fees or court costs. Father did not request that the trial court appoint him counsel.

The trial court granted Mother's Motion for Genetic Tests, and the parties submitted to paternity testing on July 9, 2008. The paternity test revealed a 99.99% probability that N.B. was Father's child. On September 4, 2008, Father filed his Verified Joint Pleading to Establish Paternity, Custody and Child Support. Father admitted in the pleading that N.B was his son.

The trial court held a hearing on October 3, 2008. Father participated via telephone

and was *pro se*. During the hearing, the results of the paternity test were introduced into evidence. Father testified that he was incarcerated, that he earned approximately $21 per month, and that his projected release date was June 12, 2011. Father indicated that he was willing to pay child support, but the trial court stated that it would not be entering a child support order because Father did not have the ability to pay support at that time. Father requested that the trial court give N.B. Father's surname. After Mother indicated that she had no objection to this, the trial court stated that Father's request to change N.B.'s surname would be granted. Father also requested that while he was incarcerated he be awarded visitation with N.B. pursuant to McCurdy v. McCurdy, 173 Ind. App. 437, 363 N.E.2d 1298 (1977).

The trial court judge then summarized the results of the hearing. He stated that he would be entering an order in which he found that N.B. was Father's child. The order would specify that Father's child support obligation would be zero and that N.B. was to be given Father's surname. The court informed the parties that it would be taking the visitation issue under advisement.

Father then brought up the issue of custody. At one point, Father stated he should be awarded custody of N.B, and the court explained that this was not possible because Father was incarcerated. Father then stated that he was seeking custody for N.B.'s grandparents or aunt, and the trial court informed Father that if those parties sought custody of N.B., they would have to file a petition for custody. Father asked the court if joint custody could be awarded, and the trial court noted that this was not possible under Indiana's paternity

statutes. The following exchange then took place between Father and the court:

> [Father]: Do I have the right for an attorney? Being indigent, do I have the right to have a court appointed attorney?
>
> The Court: For what purpose?
>
> [Father]: For this hearing.
>
> The Court: So what issues remain, [Father]? We have the aspect that you are the father of N.B. We have the last name [W.] We have custody in the mother. I'm taking visitation under advisement. I'm entering a zero order of support at this time. What issue is there that you need an attorney?
>
> [Father]: Modification.
>
> The Court: That's not the purpose presently. If you want to modify, I might consider an appointment at that time, but what is necessary now? You are not in a position to take custody of the child being in Westville, at the Indiana Department of Corrections [sic]. Is that correct? [Father], can you take custody of your child today?
>
> [Father]: No, your honor.

Transcript at 12-13. Despite this exchange, Father formally requested that he be appointed counsel. The trial court denied Father's motion, and the hearing was concluded.

The same day as the hearing, the trial court issued its Order Determining Paternity, Custody and Child Support. In the order, the trial court found that N.B. was Father's son and that N.B. should be given Father's surname. The trial court awarded custody of N.B. to Mother subject to Father's right to parenting time pursuant to the Indiana Parenting Time Guidelines. Father now appeals.

Discussion and Decision

I. Standard of Review

Initially, we note that Mother did not file an appellee's brief. When the appellee fails to submit a brief, we will not undertake the burden of developing an argument on the appellee's behalf. Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). We will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. Id. "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." Id. (citation and quotation marks omitted). Where an appellant does not meet this burden, we will affirm. Id.

II. Appointment of Counsel

Father first argues that the trial court erred in refusing to appoint him counsel. In his July 8, 2008, Affidavit of Indigency, Father alleged that he was indigent. The appointment of counsel for an indigent person who is either prosecuting or defending a civil action is controlled by Indiana Code sections 34-10-1-1 and -2. Indiana Code section 34-10-1-1 provides that "[a]n indigent person who does not have sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as an indigent person."

Prior to 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 section 1 of this chapter 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.

In interpreting this statute, our supreme court concluded:

> The procedure for the trial court to determine when counsel must be appointed is: (1) the litigant is to apply to the trial court for leave to proceed "as an indigent person"; and (2) if the trial court finds that the applicant is both indigent and without sufficient means to prosecute or defend the action, the trial court shall appoint counsel for the applicant.

Sholes v. Sholes, 760 N.E.2d 156, 160 (Ind. 2001). Relying on Sholes, Father argues that the trial court should have appointed him counsel because he applied for leave to proceed as an indigent person when he filed his Affidavit of Indigency and "provided the Court with more than adequate testimony that he lacked sufficient means to prosecute or defend the action." Appellant's Brief at 8.

However, in 2002, Indiana Code section 34-10-1-2 was amended and the relevant portion of the statute now reads 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.

We recognized this amendment in Sims v. Ivens, 774 N.E.2d 1015, 1018 n.1 (Ind. Ct. App. 2002). Because Sholes was interpreting the pre-2002 version of Indiana Code section 34-10-1-2 and because we are required to apply the current version of that statute, the portion of Sholes that Father relies on to support his position is not controlling.

Under Indiana Code section 34-10-1-2(d)(1), the trial court shall deny an application for the appointment of counsel where the applicant fails to make a diligent effort to obtain an attorney before filing the application. Here, there is no evidence in the record that Father made a diligent effort to obtain an attorney. Based on this, the trial court properly denied Father's request for the appointment of counsel. See Smith v. Harris, 861 N.E.2d 384, 386 (Ind. Ct. App. 2007) (holding that the trial court did not err in declining to appoint counsel where Appellant presented no evidence that he made a diligent effort to obtain an attorney), trans. denied.

Additionally, we note that the issues in this case included paternity, custody, child support, and visitation. Prior to the October 3, 2008, hearing, Father admitted in his Verified Joint Pleading to Establish Paternity, Custody and Child Support that N.B was his son. Thus, paternity was not a contested issue. Father also admitted in his Affidavit of Indigency that he

was incarcerated and earned approximately twenty-one dollars per month. Because Father was incarcerated, the trial court could not have awarded him custody. Additionally, because N.B. was born out of wedlock, the trial court was statutorily obligated to give sole legal custody of N.B. to Mother. See Ind. Code § 31-14-13-1. Given Father's low income, child support was not likely to be a significant issue. With regard to visitation, under Indiana Code section 31-14-14-1, Father, as the non-custodial parent, was entitled to reasonable parenting time. Thus, the issues in this case were either not contested by Father or were controlled by statute. This case, then, was not so complex that Father could not present his claims and defenses without an attorney. See Ind. Code § 34-10-1-2(c)(2). As such, we cannot say that the trial court erred in denying Father's request for the appointment of counsel.

III. Parenting Time

Father next argues that the trial court erred in awarding him parenting time in accordance with the Indiana Parenting Time Guidelines. Rulings on visitation issues are reviewed for abuse of discretion. Duncan v. Duncan, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), trans. denied. "No abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination." Id. Indiana recognizes that a parent's right to visit his or her child is a precious privilege that should be enjoyed by noncustodial parents. Id. As a result, a noncustodial parent is generally entitled to reasonable visitation rights. Ind. Code § 31-14-14-1.

Father contends that while he is incarcerated, the trial court should have awarded him visitation with N.B. pursuant to McCurdy. In that case, Barbara McCurdy ("Barbara") filed

for divorce from her husband Max McCurdy ("Max"). At the time Barbara filed for divorce, Max was in jail awaiting trial on one count of kidnapping and four counts of rape. Barbara's divorce petition was granted, and she was awarded custody of the children while Max was given reasonable visitation rights. Thereafter, Max pled guilty to the charges against him and was sentenced to the state prison in Michigan City. Barbara refused to allow the children to visit Max in prison. Max then petitioned the trial court to modify the dissolution decree and compel Barbara to bring the children to visit him in prison on a regular basis. The trial court denied Max's petition.

On appeal, we reversed. McCurdy, 363 N.E.2d at 1301. We concluded that a parent should not be denied visitation with his or her children for an extended period of time solely because he or she is imprisoned. Id. We directed the trial court to "modify the dissolution of marriage decree by compelling Barbara to allow the children to occasionally visit Max in prison." Id. In modifying the decree, we indicated that the trial court "should attempt to space the times of visitation in such a way and at such intervals that the normal lives of the children will not be overly disrupted." Id.

McCurdy is distinguishable. In McCurdy, paternity was not an issue. When Max and Barbara divorced, Max was awarded reasonable visitation rights. Despite Max's visitation rights, Barbara refused to allow the children to visit Max in prison. Here, paternity was an issue and it was not established until the trial court issued its order on October 3, 2008. Father testified at the October 3, 2008, hearing that Mother ignored his requests that she bring N.B. to visit him in prison. Mother, however, was not obligated to take N.B. to visit

Father because at that time paternity had not been established, and consequently, Father had no right to visitation with N.B. Now that paternity has been established and Father has been awarded parenting time, there is no evidence that Mother will deny Father his right to visit with N.B. by refusing to allow N.B. to visit Father in prison. If Mother refuses to allow N.B. to visit Father while he is incarcerated, then Father may seek relief from the trial court.

The trial court's October 3, 2008, order awards Father parenting time and in no way bars Father from having visitation with N.B. while he is incarcerated. Father argues that the trial court should have compelled Mother to transport N.B. to see Father in prison. However, not even McCurdy required this. In McCurdy, we instructed the trial court to "modify the dissolution of marriage decree by compelling Barbara to allow the children to occasionally visit Max in prison." 363 N.E.2d at 1301. Thus, Barbara was compelled to allow the children to visit with Max, but she was not required to transport the children to the prison. The trial court has granted Father parenting time with N.B. If Father wishes to exercise that parenting time while he is incarcerated, it is his responsibility to arrange and coordinate such visits. Therefore, we conclude that the trial court did not abuse its discretion by awarding Father visitation with N.B. in accordance with the Indiana Parenting Time Guidelines.

Conclusion

The trial court properly refused to grant Father's request for the appointment of counsel. The trial court also did not abuse its discretion by awarding Father visitation with N.B. in accordance with the Indiana Parenting Time Guidelines. Therefore, we affirm the trial court's Order Determining Paternity, Custody and Child Support.

Affirmed.

DARDEN, J., and BAILEY, J., concur.