

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:

STEVEN L. ROBBINS
Michigan City, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE PATERNITY OF E.S.W.,)
STEVEN L. ROBBINS, father,)

Appellant-Petitioner,)

vs.)

REBECCA J. SHADWICK, f/k/a REBECCA J.)
WHITED,)

Appellee-Respondent.)

No. 79A02-0609-JV-842

APPEAL FROM THE TIPPECANOE COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79D03-9909-JP-168

July 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Steven L. Robbins appeals the termination of his parental rights with respect to his minor child, E.S.W. Robbins presents the following restated issue for review: Did the trial court err in concluding Robbins's consent was not required in order to grant an adoption petition involving E.S.W.?

We affirm.

We note that our recitation of facts is drawn primarily from the Chronological Case Summary (CCS) for the case filed in Tippecanoe Superior Court No. 3 under cause number 79D03-9909-JP-168 (the paternity case), and from such other sources in the appellate materials (e.g., correspondence, court rulings, etc.) from which facts may be gleaned. We are forced to do so because Robbins's pro se brief not only lacks a "fact" section, but also suffers the same shortcomings that many pro se briefs do, e.g., lack of clarity, failure to provide relevant facts, lack of cogent legal argument, etc. These shortcomings are compounded in this case because the appellee chose not to file a brief. Thus, we stress at the outset that our understanding of what occurred before this appeal was initiated may be imperfect, as Robbins has not provided us with a clear record in that regard. With that caveat in mind, we proceed to the merits of Robbins's appeal.

The facts favorable to the judgment are that on July 14, 1998, E.S.W. was born to Robbins and Rebecca Whited, who were not married. Rebecca telephoned Robbins and informed him of the birth and asked him to file a paternity affidavit. He indicated he would do so, but never did. On September 29, 1999, the Tippecanoe County Prosecutor's

Office filed a verified petition to establish paternity with respect to E.S.W., and a summons was issued directing Robbins to appear.

Although Rebecca had spoken with Robbins by phone, she did not know where he was staying and the sheriff was unable to locate Robbins, as the house at his last known address was empty when service was attempted. The CCS for this case, i.e., the paternity case, reflects that the matter was postponed several times, presumably while the Prosecutor's Office attempted to locate Robbins in order to serve him with notice of the paternity proceeding. According to the CCS, the last continuance in the paternity case was granted on April 28, 2000, after which it appears the Prosecutor's Office took no further action in the matter. There was, however, sporadic contact between Robbins and Rebecca, as well as Robbins and E.S.W., for the next year or so.

Robbins stayed at Rebecca's house for two or three days in February 1999. He left to go to Chicago on February 24. Rebecca and E.S.W. attended Robbins's parents' anniversary celebration in the spring of 2000, but Robbins was not there. In fact, it appears from the record that Rebecca did not see or hear from Robbins again until December 2001. At that time, Rebecca permitted Robbins to take E.S.W. for a day-long visit. Thereafter, Rebecca spoke with Robbins on the telephone in the early spring of 2002, and did not see or hear from him again until the adoption case was filed in 2004. For reasons not clear from the record, Robbins was incarcerated beginning in June 2002 and he remained incarcerated at the time of the adoption hearing on March 12, 2004. It is not clear whether Robbins is currently incarcerated, but we note he indicated at the

March 12 adoption hearing that he was at that time still in jail and awaiting sentencing for a murder conviction.

At some point after April 2000, but before March 2004, Rebecca married William Shadwick. On March 12, 2004, in the Tippecanoe Circuit Court under cause number 79C01-0403-AD-008, Shadwick filed a petition to adopt E.S.W. Notice of the adoption proceeding was served upon Robbins on March 24, 2004. On April 20, 2004, Robbins filed in the Tippecanoe Circuit Court two petitions to establish paternity of E.S.W, one of them captioned “Voluntary Petition to Establish Paternity of Child and Provide for its Support.” Both petitions bore the cause number of the adoption case. On September 21, 2004, a hearing was conducted in the adoption proceeding to determine whether Robbins’s consent was required. Following that hearing, the court issued the following order, dated September 21, 2004:

Hearing is conducted on the issue of the necessity of the alleged father’s consent to the petition for adoption.

The Court finds that Steven L. Robbins, the alleged father, has failed, without justifiable cause, to communicate significantly with the minor child for more than six months^[1] prior to the filing of the petition.

That Steven L. Robbins has not established his paternity of the minor child by court proceeding or by executing a paternity affidavit.

Accordingly, the Court finds that the consent of Steven L. Robbins to the adoption of the minor child is not required. Steven L. Robbins has filed herein, on April 20th, 2004, two petitions to establish paternity of the

¹ It appears the trial court was commingling two separate subsections of I.C. § 31-19-9-8. Under subsection (a)(1) consent is not required if the parent abandons or deserts the child for at least six months. Under subsection (a)(2)(A), consent is not required if the parent fails without justifiable cause to significantly communicate for a period of one year. The trial court clearly intended to apply the latter provision, but inadvertently cited the time period set out in the former provision. The applicable period of non-communication is one year, not six months.

minor child. The Court having determined that a paternity action is now pending between these parties in Superior Court #3 under cause number 79D03-9909-JP-168, now transfers said petitions to Superior Court #3. The Circuit Court advises Superior Court #3 that it is anticipated that an adoption will be finalized herein in less than one month. The Circuit Court further advises Superior Court #3 that Mr. Robbins is presently located at the Marion County Jail.

Appellant's Appendix at 21-22 (footnote supplied). On November 24, 2004, the adoption petition was granted.

On June 8, 2005, Robbins filed another petition to establish paternity, this one in the paternity case in Superior Court No. 3. Rebecca submitted a motion to dismiss the paternity action. On August 23, 2005, Robbins submitted yet another verified petition to establish paternity, again under the paternity case's cause number. The Superior Court ruled that it would treat Robbins's June 8 and August 23 petitions as motions to set aside the adoption decree and issued the following order on October 31, 2005:

1. Any defect in service of process in the adoption case upon the putative father were not prejudicial to him given that he actually appeared in a full evidentiary hearing in which the Circuit Court determined that the consent of the putative father was not necessary to proceeding with the adoption notwithstanding the pending paternity proceeding given the putative father's failure to communicate in any meaningful way with the child for a period exceeding six months prior to the filing of the adoption proceeding. The purpose of service of process is to give a party notice of a proceeding so that the party has an opportunity to be heard. The purpose was achieved in this matter.

2. The adoption proceeding was finalized on November 24, 2004 establishing the legal paternity of this child in someone other than the putative father herein. No timely action to appeal that decision was taken by the putative father, Steven L. Robbins. This Court has no authority at this point in time to hear the Verified Petition to Establish Paternity nor

does this Court have any authority to review an order of the Tippecanoe Circuit Court.

The Court grants the Mother's Motion to Dismiss Paternity Action and hereby dismisses all the Verified Petition [sic] to Establish Paternity as filed herein on August 23, 2005, the Motion to Establishment of Paternity filed June 8, 2005, and the motions attempting to attack the adoption decree filed herein on August 18 and 23, 2005 with prejudice.

Appellant's Appendix at 5. Robbins challenges the ruling of the Superior Court dismissing his paternity petitions.

As a preliminary matter, we note that Rebecca has not filed an appellee's brief. When the appellee fails to submit a brief, we do not undertake the burden of developing the appellee's arguments. *Gabbard v. Dennis*, 821 N.E.2d 441 (Ind. Ct. App. 2005). Accordingly, we apply a less stringent standard of review, and may reverse when the appellant establishes prima facie error. *Id.* In this context, "prima facie error" is error "at first sight, on first appearance, or on the face of it." *Id.* at 444 (quoting *Johnson County Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind. Ct. App. 1985)).

Ind. Code Ann. § 31-19-9-1 (West, PREMISE through 2006 Second Regular Session), provides, in pertinent part, that a petition to adopt a child who is less than eighteen years old may be granted only if written consent to the adoption has been executed by the mother of a child born out of wedlock and the father of a child whose paternity has been established. I.C. § 31-19-9-8(a)(2) states, in pertinent part, that the consent required under section 1 is not required from: "A parent of a child in the custody of another person if for a period of at least one (1) year the parent ... fails without

justifiable cause to communicate significantly with the child when able to do so[.]” The trial court in the instant case determined that Robbins’s consent was not required because the above exception applied, i.e., Robbins did not meaningfully communicate with E.S.W. for at least one year prior to the filing of the adoption petition.

Robbins first claims that the trial court should be reversed because his due process rights were violated when he did not receive notice of the adoption proceeding, as required by I.C. § 31-19-4-1 (West, PREMISE through 2006 Second Regular Session). Procedural due process includes the right to notice and an opportunity to be heard. *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940 (Ind. Ct. App. 2006). A party is denied due process when he or she is denied the opportunity to argue his case to the trial court after that court has determined it would hear argument. *Id.* “This is particularly true for service of process and other such notice of initial pleadings, but it is also true of proceedings within a lawsuit.” *Id.* at 948.

In the instant case, the adoption petition was granted on November 24, 2004, which was after the September 21, 2004 hearing at which Robbins appeared and argued that his consent was required. Thus, even assuming for the sake of argument that there was a technical deficiency in the notice sent by Shadwick, Robbins was apprised of the proceeding, wrote letters to the court, appeared at the hearing, and offered argument. In view of the facts that he appeared and submitted evidence, his claim of due process violation is unavailing. *See Nextel West Corp. v. Indiana Utility Regulatory Comm’n*, 831 N.E.2d 134 (Ind. Ct. App. 2005), *trans. denied*.

We now turn to the main claim in Robbins's appeal, which is that the trial court erred in granting the petition to adopt because Robbins's consent was required but not given. We have set out the appropriate standard of review as follows:

When reviewing the trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. We will not reweigh the evidence, but instead will examine the evidence most favorable to the trial court's decision together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. We note that a petitioner for adoption without parental consent bears the burden of proving the statutory criteria for dispensing with such consent in Indiana Code Section 31-19-9-8(a)(2) by clear, cogent, and indubitable evidence. If the evidence most favorable to the judgment clearly, cogently, and indubitably establishes one of the criteria for granting adoption without parental consent and, thereby, for the termination of parental rights without consent, we will affirm the judgment. Finally, the decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption. *Id.*

McElvain v. Hite, 800 N.E.2d 947, 948-49 (Ind. Ct. App. 2003) (internal citations omitted).

The trial court granted Shadwick's adoption petition. Robbins offers frankly confusing arguments in support of his claim that the trial court erred in doing so. The central issue, however, is whether Robbins's consent was required by law. If it was not, with no other legal frailty identified by Robbins, then the granting of the adoption petition was proper. The applicable standard for required consent is found in I.C. § 31-19-9-8(a)(2), which provides consent is not required if, for a period of at least one year, the parent fails without justifiable cause to communicate significantly with the child when the parent is able to do so. The evidence on that question was that Robbins

communicated with E.S.W. in December 2001, and then ceased attempts at contact with E.S.W. until the early spring of 2004 – a period of more than two years. At the September 21, 2004 hearing, he claimed that he called Rebecca “twice a week” in the spring of 2002, *Transcript* at 3, and asked to speak by phone with E.S.W., but Rebecca would not allow him to do so. Rebecca admitted that she spoke with Robbins by phone during that period of time, but denied that he asked to speak with or visit E.S.W. We are aware that Robbins has been continually incarcerated since June 2002. Although this would certainly have curtailed the opportunity for face-to-face visitation, it did not foreclose the possibility of phone calls, cards and letters, and sending gifts through the mail. Rebecca testified that Robbins did not send letters or gifts to E.S.W. after the spring of 2002.

Accepting Rebecca’s testimony as true, the evidence was sufficient to prove that, although he was able to do so, Robbins did not have significant communication with E.S.W. for at least one year immediately preceding the filing of the adoption petition, and therefore did not trigger the requirement of consent under I.C. § 31-19-9-8(a)(2). The trial court did not err in so ruling.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.