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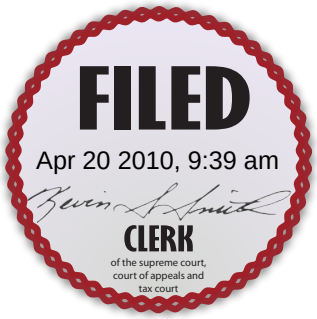

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IN THE
COURT OF APPEALS OF INDIANA

K.J.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 46A03-0909-CV-411
	)	
C.J.,	)	
	)	
Appelle.	)	

APPEAL FROM THE LAPORTE CIRCUIT COURT
The Honorable Thomas Alevizos, Judge
The Honorable Thomas Pawloski, Magistrate
Cause No. 46C01-0906-PO-247

April 20, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

K.J. (Father) appeals from the trial court's decision to issue a protective order against him and in favor of his daughter, C.J. (Daughter). The dispositive issue presented in this appeal is: Was Father denied a fair hearing on the trial court's decision to issue a protective order?

We reverse and remand.

Our ability to present the factual background in this appeal is hindered by the parties' agreement to argue the matter to the trial court in summary fashion. What we can glean from the record is that on June 23, 2009, Daughter sought a protective order against Father and alleged that she and her children were the victims of stalking by Father. The trial court issued an Ex Parte Order of Protection on behalf of Daughter. Father requested a hearing on the protective order on July 1, 2009. The hearing was held on August 4, 2009, at which time the trial court administered oaths to both Father and Daughter. Father was asked to proceed first and to present his argument in summary fashion. Father agreed to proceed in that manner. Daughter, who was not represented by counsel, presented her argument, and the trial court determined the protective order should remain in place for two years. No direct examination or cross-examination occurred. Father now appeals.

As an initial matter we note that Daughter has not filed an appellee's brief. In that situation we do not take on the burden of developing arguments for the appellee. *Butrum v. Roman*, 803 N.E.2d 1139 (Ind. Ct. App. 2004). We may reverse the trial court if the appellant establishes prima facie error. *Id*. "Prima facie error is defined as 'at first sight, on

first appearance, or on the face of it.'" *Willard v. Peak,* 834 N.E.2d 220, 223 (Ind. Ct. App. 2005).

The Indiana Civil Protection Order Act (the Act) is codified at Ind. Code Ann. § 34-26-5 *et seq*. (West, Westlaw current through 2009 1st Special Sess.). The Act provides that where the trial court issues a protection order ex parte, provides relief under section 9(b), and a party requests a hearing, as was the case here, the court shall set a date for a hearing on the petition. I.C. § 34-26-5-10 (West, Westlaw current through 2009 1st Special Sess.). Such hearing must be held not more than thirty days after the request for a hearing is filed, unless continued by the court for good cause shown. I.C. § 34-26-5-10(a)(1).

Father contends that the trial court deprived him of due process under federal and state law by failing to provide him with the opportunity to call witnesses and present evidence, or cross-examine or rebut statements made by Daughter. It is well settled, however, that the requirements of due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Essany v. Bower*, 790 N.E.2d 148 (Ind. Ct. App. 2003). Since Father's argument is better characterized as an attack on the procedure employed during the hearing, we review Father's claim to determine whether he was denied a fair hearing.

Early in the hearing after the trial court administered oaths to Father and Daughter, the following exchange occurred:

> THE COURT: On June 23, an Exparte Protection Order was issued, was served on [Father] on the 24th of June. He filed his request for a hearing on July 1, so it was filed in a timely fashion. Ms Menne?

MS. MENNE: Yes.

THE COURT: Proceed.

MS. MENNE: Okay. In summary fashion, Judge? Is - -

THE COURT: How do you want to do it?

MS. MENNE: Summary fashion works for me.

THE COURT: Okay.

Transcript at 4. We have held that a party may not take advantage of an error that he commits, invites, or which is the natural consequence of his own neglect or misconduct. *Batterman v. Bender*, 809 N.E.2d 410 (Ind. Ct. App. 2004). Invited error is not subject to appellate review. *Id*. We do not believe that counsel's question about proceeding in summary fashion qualifies as invited error here. Father's counsel proceeded to summarize the argument and then attempted to lodge a hearsay objection during Daughter's testimony/argument. Counsel's suggestion appears to have been an attempt to accommodate a *pro se* litigant, more than an attempt to abandon the possibility of conducting cross-examination or the presentation of evidence.

Although not defined by statute, we have interpreted the Act's provision for a hearing to mean "that the petitioner, and the respondent, if present, [are] permitted to call witnesses at those hearings." *Essany v. Bower*, 790 N.E.2d at 152.

Here, Father requested a hearing regarding the Ex Parte Protective Order, and the trial court set the matter for a hearing. The trial court administered oaths to Father and Daughter, but then had the parties present their arguments in summary fashion. At the conclusion of the

argument made by counsel for Father, the trial court allowed Daughter, *pro se*, to present her argument. When counsel for Father attempted to make a hearsay objection, the following transpired:

> MS. MENNE: Judge, there's not a witness here to attest to that. I appreciate her testimony.
>
> THE COURT: I'd appreciate it if you don't interrupt. I gave her a chance to talk after you, Ms. Menne.
>
> MS. MENNE: I apologize.
>
> THE COURT: Thank you. Go ahead.

Transcript at 9.

At the conclusion of Daughter's argument the trial court stated the following:

> THE COURT: I'm going to leave that Order in place. You've got a problem and I think right now you should understand your daughter wants nothing to do with you. Plain and simple as that. And, I can't make her want to see you. Sad situation but that's the only thing I can say. Thank you.

Id. at 10.

In the present situation, Father's counsel was not allowed to object to portions of Daughter's argument, which could be considered evidence, as she appeared *pro se*. Father did not testify, nor was he afforded the opportunity to agree or disagree about the accuracy of the factual account in his counsel's argument. Indeed, we cannot pass on the sufficiency of the evidence here because no evidence was formally introduced.

One definition of a hearing is "a proceeding of relative formality held in order to determine issues of fact or law in which evidence is presented and witnesses are heard." *Hunt v. Shettle*, 452 N.E.2d 1045, 1050 (Ind. Ct. App. 1983). In *Essany*, we noted that I.C. §

34-26-5-16 (West, Westlaw current through 2009 1st Special Sess.), a statute addressing the fees and costs associated with protection orders, provides that fees for filing, service of process, witnesses, or subpoenas may not be charged for a proceeding seeking relief from or enforcement of a protection order. Consequently, the Act contemplates a hearing at which witnesses may be compelled to testify on the subject of a protective order and prohibits the assessment of fees and costs for those things in order to achieve that end. We conclude that the hearing in this case was not the type of fair hearing provided for by the Act and remand to the trial court for a new hearing.

Judgment reversed and remanded.

KIRSCH, J., and ROBB, J., concur.