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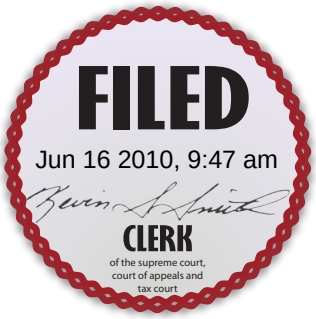

IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF THE PATERNITY OF R.M.	)	
N.C.,	)	
Appellant-Petitioner,	)	
vs.	)	No. 02A03-1001-JP-21
K.M.,	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable Thomas J. Felts, Judge
The Honorable John D. Kitch, III, Hearing Officer
Cause No. 02C01-0510-JP-91

June 16, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, N.C. (Father), appeals the trial court's Order denying his motion for change of venue from the judge pursuant to Indiana Trial Rule 76(B).[1]

We affirm.

ISSUE

Father raises one issue for our review, which we restate as the following: Whether the trial court abused its discretion when it denied his motion to change venue from the judge.

FACTS AND PROCEDURAL HISTORY

On October 7, 2005, Father filed a paternity action and on March 3, 2006, a hearing was held. On that date, the parties entered an agreed entry concerning paternity. Three days later, the trial court issued an Order granting the agreed entry. Between September 2006 and August 2007, Father and K.M. (Mother), filed several motions before the trial court. A hearing was held on those motions on March 18 and 19, 2008. On July 21, 2008, the trial court entered its "Findings of Fact, Conclusions and Orders." (Appellant's App. p. 5).

On October 8, 2008, Father filed, among other things, a motion to modify custody, a motion for change of venue from the judge and a motion to transfer the case to Steuben County based upon a notice filed by Mother that she had moved to Steuben County. A

[1] On May 26, 2010, Father's counsel filed an unverified pleading titled "Notice to Court," stating that a hearing was held in this matter on May 4, 2010, in the Allen Circuit Court, in which Father orally withdrew the motion for change of venue which is the subject of this appeal. For this reason, Father requests the dismissal of this appeal without prejudice. As Father's Notice does not comply with Appellate Rule 34(F) – Verification of Facts Outside the Record on Appeal, we have directed the Clerk of this Court to show Father's Notice filed and proceed to hand down this Memorandum Decision.

hearing was held on November 3, 2009, and was heard by a hearing officer. During the hearing, only the requests for the change of venue from judge and county were addressed. Father moved to amend his motion to change county by acknowledging that Mother and R.M. had moved back to Allen County. Father also argued that the trial judge in the paternity action was biased and prejudiced against him, and he wished to have a change of judge pursuant to T.R. 76(B). On December 9, 2009, the trial court issued an Order, denying Father's petition to transfer the case and his motion for change of judge.

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

We initially note that Mother failed to file an appellees' brief. Where the appellee fails to file a brief on appeal, we may, in our discretion, reverse the trial court's decision if the appellant makes a *prima facie* showing of reversible error. *Johnston v. Johnston*, 825 N.E.2d 958, 962 (Ind. Ct. App. 2005). In this context, *prima facie* error is defined as "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). This rule was established for our protection so that we can be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Johnston*, 825 N.E.2d at 962.

Father argues that the trial court's denial of his motion for change of judge was improper. A ruling on a motion for change of judge rests within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion. *Benton County Remonstrators v. Bd. of Zoning Appeals of Benton County*, 905 N.E.2d 1090, 1096

(Ind. Ct. App. 2009). "An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or where the trial court has misinterpreted the law." *Skeffington v. Bush*, 846 N.E.2d 761, 762-63 (Ind. Ct. App. 2006).

A motion for change of judge is governed by Indiana Trial Rule 76, which provides, in pertinent part, as follows:

> (B) In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the judge. After a final decree is entered in a dissolution of marriage case or paternity case, a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed.
>
> (C) In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for change of judge (or change of venue) *shall be filed not later than ten [10] days after the issues are first closed on the merits*.

(Emphasis added).

As a general rule, once a proper and timely motion for change of judge is filed, the trial judge is divested of jurisdiction to take further action except to grant the change of judge. *Harper v. Boyce*, 809 N.E.2d 344, 346 (Ind. Ct. App. 2004). However, in this case, we find that the motion for change of judge was not timely filed. The trial court entered an Order granting the agreed entry of paternity concerning R.M. on March 6, 2006, thus, requiring a change of judge to be filed within ten days of the trial court's Order. *See* Ind.

Trial Rule 76(B),(C). Father filed his verified motion for change of venue from judge on October 8, 2008, rendering his motion untimely.

Nevertheless, we have previously held that when a party desires a change of venue either from the county or from the judge after the time for an automatic change has expired, that party must show a genuine need for such a change. *Hunter v. Milhous*, 159 Ind.App. 105, 117, 305 N.E.2d 448, 456 (1973), *reh'g denied*. "This need must be directly related to the right to an unbiased trier of fact. A party cannot, upon a mere showing of statutory cause unrelated to the need, demand the right to a change of county or judge." *Id*.

Father now contends that trial judge was biased and prejudiced against him. Specifically, he argues that the judge "gave [Father] only the minimum suggested visitation time, even though [Father] is self-employed which means he can have flexible visitation with his son." (Appellant's Br. p. 6). Additionally, he asserts that even though the trial court found Mother to be in "contempt of the 'right of first refusal' 59 times," the court did not impose punishment or award him make-up time. (Appellant's Br. p. 6).

"Merely asserting bias and prejudice does not make it so. The law presumes that a judge is unbiased and unprejudiced in the matters that come before the judge." *Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). We will not reverse unless the record shows actual bias and prejudice against a party. *Id*. at 1061. Father must show the trial judge's actions or demeanor "crossed the barrier of impartiality" and prejudiced his case. *Id*.

We find that Father has failed to show a genuine need for a change of judge, as the record does not demonstrate actual bias or prejudice against him. It appears that Father is

merely unsatisfied with the trial judge's rulings. We have held that adverse rulings and findings by a trial court does not justify a change of judge when a person believes that the judge has a personal bias or prejudice against them. *Taylor v. State*, 587 N.E.2d 1293, 1303 (Ind. 1992), *reh'g denied*. Consequently, the trial court properly denied his motion for change from the judge.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err when it denied his motion to change venue from the judge.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.