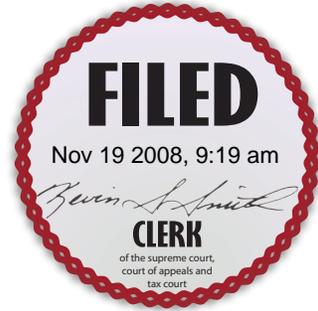


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF:
The Adoption of A.S., a Child.

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No. 45A03-0805-CV-262

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
The Honorable Katherine Garza Bishko, Referee
Cause No. 45D06-0704-AD-72

November 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Raquel Nelson appeals the trial court's grant of adoption of her minor daughter, A.S., in favor of the appellee-petitioner, A.S.'s stepmother (Stepmother). Specifically, Nelson argues that Stepmother failed to establish by clear and convincing evidence that Nelson's consent to the adoption was not required because she had abandoned A.S. and that the adoption was in A.S.'s best interest. Finding no error, we affirm the judgment of the trial court.

FACTS

On May 15, 2000, A.S. was born to Raquel Nelson and Father. Father established paternity over A.S. and subsequently married Stepmother. Nelson exercised physical custody of A.S. from the time of A.S.'s birth until Nelson moved to California in September 2005. At that time, Nelson transferred custody to Father because he objected to her leaving the state with A.S. Nelson returned to Indiana from California approximately two weeks later; however, she did not request custody of A.S. Following a hearing on November 17, 2005, Father and Stepmother were granted custody of A.S. Nelson was granted visitation with A.S., but she was not ordered to pay support.

Even though Nelson exercised her visitation rights for seven months, her visits with A.S. ceased in April 2006. On April 16, 2007, Stepmother filed a petition for the adoption of A.S. Nelson was served with an amended petition and notice of adoption on June 19, 2007, at a hearing where Nelson requested additional visitation with A.S. Father's counsel reported to the trial court that Nelson asked for visitation in the paternity court, but the paternity court had referred the matter to the adoption court.

At a subsequent adoption hearing on August 8, 2007, Nelson appeared and orally contested the adoption. The trial court appointed legal counsel for Nelson at that time. Thereafter, on August 17, 2007, Stepmother's counsel filed the notice of adoption and affidavit of service with the trial court showing that Nelson was served with the notice of adoption on June 19, 2007.

On September 11, 2007, a third hearing took place, in which the trial court took the issue of whether Nelson had timely filed a motion to contest the adoption under advisement. Although the trial court requested the parties to submit briefs on the issue, none were filed. However, the trial court subsequently allowed Nelson until December 7, 2007, to file a written motion to contest the adoption. Nelson filed a brief on December 6.

After further hearings, the trial court determined on February 15, 2008, that Nelson's consent to the adoption was not necessary because the evidence established that she had abandoned A.S. for at least six months prior to the filing of the adoption petition and had failed "without justifiable cause" to communicate significantly with A.S for at least one year.

Appellant's App. p. 34, Tr. p. 115. Thereafter, the trial court entered the following findings of fact and conclusions of law:

17. On November 17, 2005, the Court heard evidence on the Modification Petition. Both Mother and Father were present. The Court found and ordered the following, in pertinent part:

[T]here is a substantial change of circumstances in that Mother's life is unstable at this time. Mother is pregnant and without a job; without a home of her own; mother left the minor child with father in order to follow her boyfriend to California; mother voluntarily signed an agreement giving custody of [A.S.] to father; mother has made poor choices for herself and her unborn child, in that she is consuming

alcohol while she is pregnant; and mother's actions have been against the best interest of [A.S.].

The Court finds it is in the best interest of [A.S.] to grant custody to father. The Court finds father has a stable job and a stable home and marriage.

The Court finds it is in the best interest of the minor child for Mother to have visitation pursuant to the Indiana Parenting Time Guidelines.

18. Mother did exercise her visitation rights approximately six (6) times between October 2005 and April 2006. However, since April 2006, Mother has not visited with the minor child. Mother has not had phone contact with the minor child since May 2006.

...

20. Mother has always known the address of the minor child. The Father and Step-Mother did change their phone numbers in June 2006, and did not notify the Mother. However, Mother has known their address. Further, Attorney Dittrich was Father's attorney during both the Paternity and Adoption actions.

21. Mother never filed a Citation or Modification in the Paternity action to alert the Court that she was not receiving visitation or was encountering any problems with the Father or Step-Mother.

22. Mother stated in court that she did not contact the minor child because she did not want to have a confrontation with the Step-Mother. This was based on an incident that occurred in 2004 when Mother and Step-Mother had a minor confrontation at a bar. Despite this minor incident, Mother did not have a problem exercising visitation in early 2006.

23. Further, Mother stated that she never sent any mail to the child because she did not think that the minor child would receive it. However, there was no indication that Father or Step-Mother would destroy or sequester letters that the Mother sent because Mother never sent anything.

24. Mother lacks any legitimate reasons for not visiting or communicating with the minor child. There was never any indication that Father or Step-Mother would resist visitation or communication between the Mother and the minor child. In fact, Step-Mother invited Mother to have more visitation than what the Court ordered if Mother exercised the additional visitations at Father and Step-Mother's home.

25. Mother admitted in open court that she has done “nothing” since May 2006, and that there was “no excuse” for her actions.

26. Mother has not seen or communicated with the minor child since May 2006. Mother has not sent any presents or cards to the minor child during that time period. Mother has not paid any child support since the November 17, 2005 Order modifying custody.

27. Mother has three minor children in addition to the minor child at issue in this adoption: [E.], [J.], and [X.]. Mother consented to the adoption of [E.], age five . . . in September 2005 due to her unstable life at the time. [J.], age thirteen . . . lives with his father. [X.], age three . . . resides with Mother and his maternal grandmother.

CONCLUSIONS OF LAW

4. Step-Mother has proven by clear and convincing evidence that Mother’s consent is not required under IC 31-19-9-8(a)(1) and IC 31-19-9-8(a)(2)(A).

5. Efforts of a custodian to hamper or thwart communication between parent and child are relevant in determining the ability to communicate.

6. The facts presented show that Mother has not seen or communicated with the minor child since May 2006—almost two (2) years—with no justifiable explanation. Father and Step-Mother have done nothing to hamper or thwart communication between Mother and the minor child. Mother has known the location of the minor child and has simply refused to contact the minor child for fear of a potential confrontation. Mother has not filed any contempt citations or Modifications in the Paternity action to alert the Court of any misbehavior on the part of Father or Step-Mother. Mother has admitted that she has done “nothing” and has “no excuse” for her lack of action in seeking visitation or communication with the minor child.

7. Given these facts and circumstances, the Court concludes that Mother has abandoned her child for at least six (6) months prior to the filing of the adoption and has failed without justifiable cause to communicate significantly with the child for at least one (1) year.

Appellant's App. p. 47-51 (internal citations omitted). The trial court proceeded with the adoption hearing on April 1, 2008, and determined that it was in A.S.'s best interest to grant the adoption. Nelson now appeals.

DISCUSSION AND DECISION

I. Standard of Review

When reviewing a 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 court reached an opposite conclusion." In re Adoption of M.A.S., 815 N.E.2d 216, 218 (Ind. Ct. App. 2004). We will neither reweigh the evidence nor assess the credibility of witnesses, but 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. Id. at 218-19.

We also note that Stepmother did not file an appellate brief in this case. When an appellee fails to file a brief, we may reverse the trial court's decision based on a showing of prima facie error. However, we are not required to develop arguments on the appellee's behalf. McKinney v. McKinney, 820 N.E.2d 682, 685 (Ind. Ct. App. 2005). Prima facie error means error at first sight, on first appearance, or on the face of it. Morequity, Inc. v. Keybank, N.A., 773 N.E.2d 308, 311-312 (Ind. Ct. App. 2002).

II. Nelson's Claims

In addressing Nelson's claims that the adoption order must be set aside, we initially set forth the provisions of Indiana Code section 31-19-9-8:

- (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:
 - (1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.
 - (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
 - (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
 - (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

In construing this statute, this court has determined that abandonment is “any conduct by the parent which evinces an intent or settled purpose to forgo all parental duties and to relinquish all parental claims to the child.” In re Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982). Additionally, “[i]f a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent.” I.C. § 31-19-9-8(b).

In this case, the trial court determined that Nelson had abandoned or deserted A.S. for more than six months preceding the filing of the adoption petition. Appellant’s App. p. 53. The evidence at the adoption hearings established that A.S. began living with Father and Stepmother in September of 2005. Tr. p. 57. Although Father and Stepmother eventually moved a short distance away, Nelson knew where the residence was located. Id. at 61. The last time Nelson saw A.S. was in April 2006, and Nelson had not spoken to her daughter

since Mother's Day in 2006. Id. at 25, 54. Moreover, Nelson had not sent any cards, letters, gifts, or money to A.S. Id. at 63, 75.

Although Nelson became involved in a minor altercation with Stepmother at a bar, the incident occurred in 2004. Indeed, Nelson admitted at the hearing that there was "no excuse" for not attempting to contact A.S. or for failing to seek assistance through the courts to enforce her visitation rights. Id. at 102. Also, contrary to Nelson's claims that Father and Stepmother precluded her from exercising her visitation rights, Stepmother had informed Nelson that she could see A.S. beyond the court's "set" visitation schedule as long as Nelson came to their house. Id. at 64. Therefore, the evidence most favorable to the judgment demonstrates that Stepmother did nothing to hamper Nelson from exercising visitation with A.S.

In sum, it is apparent that Nelson is simply asking us to reweigh the evidence, which we will not do. That said, the trial court reasonably concluded that clear and convincing evidence established that Nelson abandoned A.S. pursuant to Indiana Code section 31-19-9-8. Thus, Nelson's consent to the adoption was not required.

Finally, although Nelson contends that the evidence failed to demonstrate that adoption was in A.S.'s best interest, the record shows that Nelson was not employed and had not worked for nearly a year. Id. at 94. On the other hand, Stepmother was employed at a hospital, and she owned her own business. Id. at 117. Father and Stepmother have had custody of A.S. for several years, and they desired to continue raising A.S. Moreover, representatives from The Villages, an adoption organization, "highly recommended" the

adoption and “spoke very well” of Stepmother’s relationship with A.S. Id. at 124. Finally, although Nelson points to Stepmother’s prior felony conviction for carjacking in support of her claim that the adoption was not in A.S.’s best interest, the trial court determined that the five-year-old conviction was not enough to prevent the granting of the adoption. Id. at 125. When considering the above evidence, the trial court could reasonably conclude that adoption was in A.S.’s best interest, and we decline to set the adoption order aside.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.