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ATTORNEY FOR APPELLANT:

**JEFFERY LEEPER**  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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JONATHAN YOCUM, )  
 )  
Appellant-Respondent, )  
 )  
vs. ) No. 49A02-1103-PO-351  
 )  
X.Y., By Next Friend, M.Y., )  
 )  
Appellee-Petitioner. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable S.K. Reid, Judge  
The Honorable Kimberly D. Mattingly, Magistrate  
Cause No. 49D14-1101-PO-003607

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**November 30, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAILEY, Judge**

## **Case Summary**

Jonathan Yocum (“Father”) appeals the trial court’s order for protection pursuant to a petition filed by M.Y. (“Mother”) on behalf of their son, X.Y. Father presents a single issue for our review: whether sufficient evidence supports the trial court’s protective order. We reverse.

## **Facts and Procedural History**

Mother and Father were married and lived together with X.Y., who was born in 2006, until they separated in September 2010 and Father moved out. A divorce petition was subsequently filed. The final hearing was scheduled for February 11, 2011.

The same day, the trial court held a contested hearing on an order for protection against Father and in favor of X.Y. The court had issued the order *ex parte* on January 31, 2011, following a petition filed by Mother on X.Y.’s behalf on January 28, 2011. At the hearing, Mother offered only her testimony as evidence. She testified that, starting in December 2010, she had observed changes in X.Y.’s behavior in that he was more aggressive and acted out in ways that demonstrated sexual awareness. Mother also told authorities that X.Y. could spell “sex” (Tr. 25), and testified that when it was time for X.Y. to see his Father, X.Y. would cry, scream, and act extremely terrified. Based upon these observations, as well as statements made to her by Father’s ex-girlfriend, Sabrina Hollingsworth (“Hollingsworth”), and Father’s past practice of showering with X.Y., Mother concluded that Father was molesting X.Y.<sup>1</sup>

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<sup>1</sup> Mother filed two reports with the Marion County Department of Child Services (DCS) on January 6, 2011.

On February 17, 2011, the trial court modified the protective order to allow Father supervised parenting time pursuant to the Indiana Parenting Time Guidelines.<sup>2</sup> Father now appeals.

## **Discussion and Decision**

### Standard of Review

Father challenges the sufficiency of the evidence supporting the trial court's protective order. When reviewing the sufficiency of the evidence supporting an order for protection, we neither reweigh the evidence nor judge the credibility of witnesses. Tisdial v. Young, 925 N.E.2d 783, 785 (Ind. Ct. App. 2010). We consider only the probative evidence and the reasonable inferences supporting the trial court's order. Id.

We also note that Mother did not submit an appellee's brief. When the appellee does not submit a brief, we need not undertake the burden of developing arguments for her. Id. at 784. Rather, we will reverse the trial court's judgment if the appellant presents a case of prima facie error. Id. at 784-85. "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." Id. at 785 (quoting Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006)). If the appellant does not meet this burden, then we will affirm. Id.

### Sufficiency of the Evidence

Father argues that insufficient evidence supports the protective order because there

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DCS investigated but ultimately determined that the allegations were unsubstantiated.

<sup>2</sup> The previous order enjoined Father from committing acts of domestic or family violence or sex offenses against X.Y., harassing, annoying, telephoning, contacting, or directly or indirectly communicating with X.Y., and from visiting X.Y.'s residence or school.

was no evidence presented at the hearing that he committed an act of domestic or family violence or a sex offense. We agree.

Mother sought and the trial court entered its order of protection pursuant the Indiana Civil Protection Order Act (“CPOA”), codified at Indiana Code chapter 34-26-5. The CPOA is construed to promote the protection and safety of all victims of domestic and family violence in a fair, prompt, and effective manner and to prevent future domestic and family violence. Ind. Code § 34-26-5-1. Under the CPOA, a parent, guardian, or other representative may file a petition for a protective order on behalf of a child against either a (1) family or household member who commits an act of domestic or family violence; or (2) person who has committed stalking or a sex offense against the child. I.C. § 34-26-5-2.

“Domestic or family violence” includes the occurrence of at least one of the following acts by a family or household member: attempting to cause, threatening to cause, or causing physical harm to another family or household member; placing a family or household member in fear of physical harm; or causing a family or household member to involuntarily engage in sexual activity by force, threat of force, or duress. I.C. § 34-6-2-34.5. Domestic or family violence also includes the sex offenses listed in Indiana Code chapter 35-42-4. Id. A finding that domestic or family violence has occurred sufficient to justify issuance of protective order means that the respondent represents a credible threat to the safety of a petitioner or a member of the petitioner’s household. I.C. § 34-26-5-9(f). The petitioner must show by a preponderance of the evidence that one of the allegations in her petition is true. Id.; Tons v. Bley, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004).

Here, Mother concluded that Father had committed domestic or family violence from the changes she observed in X.Y.'s behavior. However, she never witnessed any instances of domestic or family violence, and did not introduce evidence otherwise linking X.Y.'s changes in behavior to any specific acts of Father. Mother's petition was partially based upon statements made to her by Hollingsworth, but Hollingsworth did not testify. Maritza Armstrong of DCS testified only that Hollingsworth thought Father was "capable" of molesting X.Y. Tr. 26. Nor did the trial court find Father's practice of bathing with X.Y. to be conclusive because it determined that it was "probably not inappropriate." Tr. 41. Mother testified that X.Y. cried, screamed, and acted extremely terrified when it was time to go to his Father's house, but she did not identify any particular instances where Father had threatened X.Y. or placed him in fear of physical harm.

Although the CPOA is intended to be read broadly, a protective order still requires evidence of an act of domestic or family violence. See Tons, 815 N.E.2d at 510-11 (reversing a protective order as to one petitioner when there was no evidence that the respondent had made any threats or committed any acts of violence against him). There was no such evidence presented here, and mere observations of X.Y.'s behavioral changes or his resistance to visit Father do not permit the fact-finder to reasonably infer that an act of domestic or family violence occurred. Father has thus demonstrated prima facie error, and the protective order must be reversed.<sup>3</sup>

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<sup>3</sup> Although Mother did not meet her burden for a protective order, we observe that Mother may yet pursue a modification or restriction of Father's parenting time if parenting time with Father might endanger X.Y.'s physical health or significantly impair X.Y.'s emotional development. See I.C. § 31-17-4-2.

## **Conclusion**

Mother did not present sufficient evidence that Father committed an act of domestic or family violence or a sex offense as is required under Indiana Code chapter 34-26-5. Father has therefore demonstrated prima facie error. The trial court's order for protection is reversed.

Reversed.

MATHIAS, J., and CRONE, J., concur.