ATTORNEYS FOR APPELLANT

Hannah L. England
Paul J. Watts
Watts Law Office, P.C.
Spencer, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Christopher Ray Bixler,
Appellant,

v.

Spring Nicole Delano,
Appellee.

March 22, 2022

Court of Appeals Case No. 21A-JP-2054

Appeal from the Owen Circuit Court

The Honorable Kelsey B. Hanlon, Judge

Trial Court Cause No. 60C02-1603-JP-66

Brown, Judge.

[1] Christopher Bixler ("Father") appeals the denial of his motion for relief from judgment which requested that the trial court set aside its order modifying custody, parenting time, and child support. He contends the order was entered in his absence and without notice. We reverse and remand.

Facts and Procedural History

[2] On July 8, 2021, Spring Delano ("Mother") filed a letter with the trial court expressing concern for her and Father's child ("Child"), and the court, in its order and an entry in the chronological cases summary ("CCS"), stated that it would construe the letter as a motion to modify custody, parenting time, and child support and set the matter for a hearing. On August 16, 2021, the court held a hearing at which Mother appeared, *pro se*, and Father did not appear. The court stated that it had attempted to notify Father of the proceedings, but that the correspondence had been returned as undeliverable as addressed because Father had not provided an updated address, and the court continued with the hearing.[1]

[3] Mother testified that she had not spoken to Father in eight months, she had "pictures of where he, where everyone says he's lived," but that she did not know where Father currently lived. Transcript Volume I at 4. Mother stated that "[n]o one can find him. DCS can't find him in Monroe or Owen, we've

[1] An entry in the CCS dated April 16, 2019, states: "Christopher Bixler files Change of Address, same being 2201 W. Fullerton Pike, Bloomington, IN 46403." Appellant's Appendix Volume II at 8 (italics omitted). A CCS entry dated July 27, 2021, states: "Documents returned undelivered to Petition at 2201 W. Fullerton Pike, Bloomington, with notation from post office, 'undeliverable as addressed'." *Id.* at 10 (italics omitted).

seen him parked in certain places, have little birdies of where he is and DCS can never find him." *Id.* at 5. Mother alleged neglect of the Child by Father, poor living conditions, an inability to exercise her parenting time due to her inability to locate Father and Child, and she ultimately requested custody. The court ordered that Mother "shall be awarded legal and physical custody," "Petitioner Father shall have parenting time with the Child only at such times . . . as Mother approves," and "Father shall pay support for the benefit of [Child] in the sum of $46.00 per week . . . ." Appellant's Appendix Volume II at 18.

[4] On August 25, 2021, Father's attorney filed an appearance because Father's previous attorney had withdrawn from the case on February 4, 2019. On August 26, 2021, Father filed a motion for relief from judgment. On September 7, 2021, the court held a hearing. Father testified that he had been at a new address for seven or eight months after a hectic eviction, he never received a copy of Mother's July 8, 2021 filing, Mother knew of his relocation and the new address, he would have contested Mother's motion, and he had not learned about the trial court's order modifying custody, parenting time, and child support until after it was entered. When asked if he had filed a notice of relocation with the court he said: "No, not immediately. It was kind of a toss up . . . ." Transcript Volume II at 27.

[5] Mother testified that she had tried to send her initial letter to Father. When asked what address she "put on there," Mother stated: "The 29 – the Leonard Spring one, the one he told me he wasn't living at." *Id.* at 34. When asked when Father told her he wasn't living there, she answered: "Before." *Id.*

Mother then stated, "I knew he was living there but he told me he wasn't living there. That's why I kept going there." *Id.* at 35. She agreed with the statement that she knew of four addresses at which Father might have been living, but she did not send a copy of her letter to those locations because she did not "have their addresses[,] [she] just [knew] the places," and she never saw Father after filing her letter. *Id.*

[6] On September 8, 2021, the court entered an order denying Father's motion for relief from judgment which stated: "Attempts were made to provide Father with Notice, including sending Notice to the address maintained on file with the Court." Appellant's Appendix Volume II at 23.

Discussion

[7] Before addressing Father's arguments, we note that Mother did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes prima facie error. *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). Prima facie is defined as "at first sight, on first appearance, or on the face of it." *Graziani v. D & R Const.*, 39 N.E.3d 688, 690 (Ind. Ct. App. 2015). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002).

[8] Father argues the trial court erred in denying his motion for relief from judgment and that he did not attend the August 16, 2021 hearing because he did not receive notice.

[9] Ind. Trial Rule 60(B) provides:

> On motion and upon such terms as are just the court may relieve a party . . . from an entry of default, final order, or final judgment, including a judgment by default for the following reasons:
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> (1) mistake, surprise, or excusable neglect;
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> * * * * *
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> (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
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> * * * * *
>
> (6) the judgment is void;
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> * * * * *
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> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense . . . .

[10] Relief from judgment under Ind. Trial Rule 60 is an equitable remedy within the trial court's discretion. *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 72 (Ind. 2006). Child custody proceedings implicate the fundamental relationship between parent and child, so procedural due process must be

provided to protect the substantive rights of the parties. *Bowman v. Bowman*, 686 N.E.2d 921, 924 (Ind. Ct. App. 1997) (citing *Brown v. Brown*, 463 N.E.2d 310, 313 (Ind. Ct. App. 1984)). Due process requires notice of certain proceedings after the initiation of a lawsuit. *Moore v. Terre Haute First Nat'l Bank*, 582 N.E.2d 474, 478 (Ind. Ct. App. 1991), *reh'g denied*. "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Munster v. Groce*, 829 N.E.2d 52, 58 (Ind. Ct. App. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950)). "'[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Id.* (quoting *Mullane*, 339 U.S. at 315, 70 S. Ct. at 657). In *Mullane*, the Supreme Court indicated that "although it is acceptable in some instances to proceed with a lawsuit by using a service method that is unlikely to give actual notice to an interested party, this is only the case if that party's whereabouts cannot reasonably and in the exercise of due diligence be ascertained." *Id.* (citing *Mullane*, 339 U.S. at 317, 70 S. Ct. at 658-659). Furthermore, this Court has held that "[u]nclaimed service is insufficient to establish a reasonable probability that the defendant received adequate notice and to confer personal jurisdiction." *Id.* at 59. "Additionally, Ind. Trial Rule 4.1(A)(1), which allows for service by certified mail, requires that a return receipt must show receipt of the letter in order for service to be effective." *Id.*

[11] The record reveals that Mother submitted a letter to the court on July 8, 2021, a July 27, 2021 CCS entry indicated "Documents returned undelivered to Petition at 2201 W. Fullerton Pike, Bloomington, with notation from post office, 'undeliverable as addressed,'" there were no further attempts to notify Father, and Father testified that he did not receive notice of the hearing. Appellant's Appendix Volume II at 10. Further, Mother testified that she knew about the conditions in which the Child was living, offered photographs of Father's alleged current housing situation, stated that she received updates of the Child's condition from Father's family and her family, had "little birdies of where he is," and knew of four addresses at which Father and Child might live. Transcript Volume I at 5. Father's motion for relief from judgment alleged that he has a meritorious defense to Mother's claims and argued he should be allowed to present those defenses at a hearing. At the hearing on Father's motion, his attorney argued that Mother had omitted crucial information at the previous hearing which the court would have considered in making its determination, and Father testified that he would have contested the request to change custody. Under the circumstances and in light of the record, we conclude that Father has demonstrated prima facie error.

[12] Accordingly, we reverse and remand to the trial court for an evidentiary hearing on Mother's request to modify custody, parenting time, and child support.

[13] Reversed and remanded.

May, J., and Pyle, J., concur.