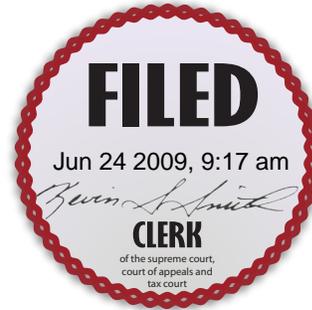


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

**MARK SMALL**  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE THE MARRIAGE OF	)	
JEFFREY R. STEPHENS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 40A04-0810-CV-605
	)	
JESSICA (STEPHENS) PERKINSON,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE JENNINGS CIRCUIT COURT  
The Honorable G. Thomas Gray, Judge  
Cause No. 40C01-9803-DR-057

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**June 24, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Jeffrey Stephens (“Stephens”) filed in Jennings Circuit Court a Petition for Visitation Rights with his minor child, J.S. The trial court denied Stephens’s petition. Stephens appeals and argues that the trial court abused its discretion when it denied his petition. We affirm.

### **Facts and Procedural History**

Facts pertinent to this appeal are found in our court’s resolution of Stephens’s appeal of the trial court’s order denying Stephens’s 2006 petition to modify custody:

In 1998, Jeffrey filed a petition for dissolution from his wife, Jessica Stephens (“Jessica”), and sought sole custody of their minor child, J.S. In April 2000, the trial court entered a dissolution decree and judgment apparently granting Jeffrey and Jessica joint custody. In 2002, Jeffrey and Jessica filed competing petitions to modify custody. In its order, the trial court granted Jessica’s petition and awarded her sole custody of J.S. In support of its order, the trial court explained that:

\* \* \*

During the approximate three months that [Jeffrey] had exclusive possession and control of the child of the parties extreme, negative consequences resulted. The evidence indicates that the child was not cared for. Basic essential elements of nutrition, clothing and hygiene were neglected.

Once [J.S.] was restored to his mother he had regressed in personal development. He would not sleep alone, he would not bathe alone, and he would not even go to the bathroom alone. His initial reaction to his mother was loving which soon was replaced by anger. The statements reportedly made by [J.S.] to his mother lead one to conclude that the basic life experiences [J.S.] had during those three months was an indoctrination of hatred for his mother.

Counseling was started with Melissa V. Newland, MS, NCC, LMHC, with reasonable dispatch following [J.S.’s] restoration to his mother. Ms. Newland’s testimony indicated real and abiding concerns for [J.S.’s] well being and development assuming continued contact with [Jeffrey]. Her report and other documents presented by [Jeffrey] show

[J.S.'s] emotional development will be significantly impaired by continued contact with [Jeffrey].

As a result, the trial court suspended all contact between Jeffrey and J.S.

After receiving a certificate for completing training in positive parenting methods in 2003, and participating in three sessions of counseling with a psychologist in 2005, Jeffrey filed a petition to modify custody, in 2006, claiming that he could better care for J.S. The trial court denied Jeffrey's petition.

Stephens v. Stephens, No. 40A05-0612-CV-711, Slip op. at 1-2 (Ind. Ct. App. May 29, 2007) (record citation and footnote omitted). Our court affirmed the trial court's denial of Stephens's petition to modify custody.

On January 10, 2008, Stephens filed a pro se petition for visitation rights, and shortly thereafter, the trial court appointed pauper counsel. A hearing was scheduled for May 30, 2008, but approximately a week before the scheduled hearing, Stephens filed a pro se petition to hold his attorney in contempt. Stephens's attorney subsequently filed a motion to withdraw appearance, which was granted at the May 30, 2008 hearing. The hearing on Stephens's petition was then continued to July 24, 2008.

On that date, Stephens proceeded pro se. Psychologist Dr. Larry Ewert testified Stephens is "doing better now" and had increased his number of counseling sessions in the past year. Tr. pp. 26-27. He also stated that Stephens "seems to be less depressed" and is "functioning better . . . emotionally, psychologically." Tr. p. 28. After hearing Dr. Ewert's testimony, the trial court denied Stephens's Petition for Visitation Rights. Stephens now appeals. Additional facts will be provided as necessary.

### **Standard of Review**

Initially, we observe that Jessica failed to file an appellee's brief. We will not undertake the burden of developing arguments for the appellee. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Applying a less stringent standard of review, 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. Id.

The trial court did not make special findings; therefore, we review the trial court's decision as a general judgment and, without reweighing the evidence or considering witness credibility, will affirm the judgment if it is sustainable upon any theory consistent with the evidence. See Baxendale v. Raich, 878 N.E.2d 1252, 1257 (Ind. 2008). In addition, we review a trial court's determination of parenting time only for an abuse of discretion. Appolon v. Faught, 796 N.E.2d 297, 299 (Ind. Ct. App. 2003). No abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination. Id.

### **Discussion and Decision**

Pursuant to Indiana Code section 31-17-4-1 (2008), "[a] parent not granted custody of the child is entitled to reasonable parenting time rights unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." An order granting or denying parenting time rights may be modified "whenever modification would serve the best interests of the child. However, the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the

child's physical health or significantly impair the child's emotional development." Ind. Code § 31-17-4-2 (2008).

Relying on Dr. Larry Ewert's testimony, Stephens argues that the trial court abused its discretion when it denied his Petition for Visitation Rights. As we noted above, in 2002, the trial court awarded sole custody of J.S. to Jessica and suspended all contact between Stephens and J.S. Thereafter, Stephens filed a petition to modify custody in 2006, but his petition was denied and that denial was affirmed on appeal. See Stephens, No.40A05-0612-CV-711 at \*5 ( "[T]he record is replete with evidence indicating that it is not in J.S.'s best interests, at this time, to have contact with [Stephens].")

At the hearing on Stephens's 2008 Petition for Visitation Rights, Dr. Ewert testified that Stephens has been his patient for several years and in the year prior to the July 24, 2008 hearing, Dr. Ewert had nine counseling sessions with Stephens. Tr. p. 15.

When asked how Dr. Ewert felt about the "visitation issue," he responded:

Well my opinion remains the same as when you and I first talked about it in 2005, . . . that [Stephens] met the [legal] requirements they had for visitation, that there were some positive factors in your history, in terms of having had visitation with your other, older son. So, it seemed to me you were stable in your housing and that at that point . . . I felt like you had met the requirements that had been set forth for you to resume visitation with your son.

Tr. p. 17.

Dr. Ewert was also asked if Stephens's situation had changed since January 2007, and the doctor responded:

Well, he's been to see me more since then . . . . I don't know anything else. I believe he lives in the same residence. He's in the same, basically has the same status I'm pretty sure with respect to, his life situation, the main thing that was different was that he'd seen me more in that year, this last year than he has previously. He use[d] to come in for a while and when he'd get things taken care of, he'd leave, which is fine I mean, [] a lot of people do that. But I've seen him more this last year and I, almost, it seems to me like he's actually doing better now even though he's had some problems with sleep and meaning his depression is better. Maybe that's because he's been working on it more.

Tr. pp. 26-27. Dr. Ewert testified that Stephens seems to be “functioning better, you know, emotionally, psychologically.” Tr. p. 28.

After hearing Dr. Ewert's testimony and Stephens's arguments, the trial court stated:

The [doctor] has testified here today about your actions with him and that you've been to more counseling. He seems to think that you've settled down a little and become a little more less depressed and frustrated. . . . I've not seen it earlier this year when we had to release your attorney because of the problems that you and he were having in communication and developing your case in this matter. It comes down to the fact that you're still harping on something that's been determined. The Appellate Court has reaffirmed it in its opinion about you and your child and I've not seen anything that has corrected that.

Tr. pp. 35-36. The trial court then concluded: “I find nothing that is sufficient to modify the Court's prior orders in this matter and once again reaffirm the Court's order denying the original petition in this matter, visitation and/or custody of his child.” Tr. p. 36.

Since 2002, Stephens has not had visitation with J.S., and Stephens has challenged the trial court's ruling in that regard through multiple motions including the most recent Petition for Visitation Rights. Dr. Ewert's testimony was the only evidence presented in

support of Stephens's petition.<sup>1</sup> However, from the trial court's statement at the hearing, it appears the trial court did not assign any substantial weight to Dr. Ewert's testimony, and we will not reweigh his testimony on appeal.

Accordingly, we conclude that Stephens failed to establish that modification of the trial court's order denying parenting time was in J.S.'s best interests. The trial court's denial of Stephen's Petition for Visitation Rights is therefore affirmed.

Affirmed.

RILEY, J., and KIRSCH, J., concur.

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<sup>1</sup> Stephens did introduce several exhibits into evidence but those exhibits consist of copies of documents that are all dated prior to the trial court's ruling on Stephens's 2006 petition to modify custody.