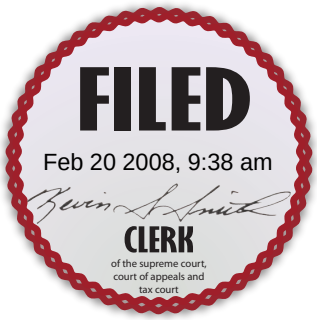

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL PAGE,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 34A04-0707-CV-365
	)	
ANNETTE HAHN,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Douglas A. Tate, Judge
Cause No. 34D03-0703-PO-2

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Michael Page appeals the trial court's order granting a permanent order of protection to Annette Hahn on behalf of R.P., the parties' son. Page raises three issues, which we consolidate and restate as:

I. Whether the trial court erroneously concluded that Howard County was the proper court to determine Hahn's petition; and

II. Whether the trial court erred when it granted Hahn's petition for a permanent order of protection.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Page and Hahn were divorced in Howard Superior Court under cause number 34D03-9402-DR-24. One child was born of the marriage, R.P., who was born in 1992. Hahn was granted custody of R.P., and Page had visitation rights.

In 2006, James Hahn ("James"), Hahn's second husband, was working on R.P.'s computer when he discovered some pictures that he found disturbing. Two depicted the silhouette of a boy, believed to be R.P., behind a shower curtain, and several showed a young girl, handcuffed and tied to a bed with a boy licking whipped cream off of her exposed stomach. On February 26, 2007, Hahn filed a petition on behalf of R.P. for an order of protection against Page in Grant County. At that time, Hahn resided in Grant County, Page resided in Delaware County, and the alleged misconduct occurred in Delaware County. On the same date, a judge from Grant County entered an order denying Hahn's petition and indicated that Hahn needed to file her emergency petition through Howard County because of a pending case regarding visitation in that court. *Pet'r's Ex.* 5; *Appellant's App*. at 102.

Thereafter, on February 28, 2007, Hahn filed a subsequent petition for an Ex Parte Order of Protection in Howard County, which was granted, and the matter was set for a hearing. The petition was subsequently transferred to Howard Superior Court III, in which the visitation case was pending. Hahn's petition alleged that Page had committed a sex offense against R.P. and contained the following two specific allegations: (1) Page "[t]ook some photos of [R.P.] in shower"; and (2) Page "[t]ook several photos of 14 [year] old female handcuffed and tied to a bed while a boy licked what appeared to be whipped cream from her stomach." *Appellant's App*. at 25.

A hearing was held on Hahn's petition on April 10, 2007. At the conclusion of Hahn's evidence, Page moved for judgment on the evidence, which was denied by the trial court. The trial court granted Hahn's petition for permanent order of protection. Page filed a motion to correct errors, which was denied by the trial court. Page now appeals.

DISCUSSION AND DECISION

We initially note that Hahn has failed to file an appellee's brief. In such a situation, we will not undertake the burden of developing arguments for Hahn. *Cox v. Cantrell*, 866 N.E.2d 798, 810 (Ind. Ct. App. 2007), *trans. denied*. We apply a less stringent standard of review, and we may reverse the trial court's decision if the appellant can establish *prima facie* error. *Id*. *Prima facie* means "at first sight, on first appearance, or on the face of it." *Id.*

I. Jurisdiction

Page argues that the trial court lacked jurisdiction over the parties and could not grant the order of protection. He contends that, under IC 34-26-5-4(b), a petition for an order of protection must be filed in the county in which either the petitioner resides, the respondent resides, or the domestic or family violence occurred. He asserts that, because Hahn lives in Grant County, he lives in Delaware County, and the alleged incident occurred in Delaware County, Howard County was not the proper county to determine the petition.

Page is correct that IC 34-26-5-4 requires that a petition be filed in one of the above stated locations. However, IC 34-26-5-6(4) states that if a petitioner for an ex parte order of protection also has a pending case that involves the respondent or a child of the respondent and petitioner, the court in which the petition was filed shall immediately determine the ex parte petition and then transfer the matter to the court where the other case is pending. This statute is consistent with our Supreme Court's holding in *State ex rel. Meade v. Marshall Super. Ct. II*, 644 N.E.2d 87 (Ind. 1994), where it concluded that when "an action is pending before a court of competent jurisdiction, other courts must defer to that court's extant authority over the case." *Id*. at 88. In that case, our Supreme Court determined that "[t]he Superior Court must defer to the authority [of the Circuit Court] because . . . [the] petition affects the same subject which is under the jurisdiction of the Circuit Court: the circumstances under which Meade could exercise her visitation rights." *Id*. at 89.

The same reasoning applies in the present case. Here, at the time when Hahn filed her petition for an order of protection, there was a pending case in Howard County that involved both the respondent, Page, and the child of the petitioner and respondent, R.P. Hahn's petition affected the same subject matter as the pending case in Howard County, which were

the circumstances under which Page could exercise his visitation rights. We therefore conclude that it was proper to transfer Hahn's petition to Howard Superior Court III, where the other case was pending.

II. Grant of Petition

Page contends that the trial court erred in granting Hahn's petition for an order of protection because sufficient evidence was not presented to support the grant of such an order. He specifically asserts that insufficient evidence was presented to prove that Page committed a sex offense against R.P. Our legislature has dictated that the Indiana Civil Protection Order Act shall be construed to promote the: (1) protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and (2) prevention of future domestic and family violence. *Aiken v. Stanley*, 816 N.E.2d 427, 430 (Ind. Ct. App. 2004) (citing *Parkhurst v. Van Winkle*, 786 N.E.2d 1159, 1160 (Ind. Ct. App. 2003); IC 34-26-5-1). IC 34-26-5-2(b) provides that "[a] parent . . . may file a petition for an order for protection on behalf of a child against a: (1) family or household member who commits an act of domestic or family violence; or (2) person who has committed stalking under IC 35-45-10-5 or a sex offense under IC 35-42-4 against a child." Under IC 34-6-2-34.5, domestic or family violence includes stalking or a sex offense whether or not the offense is committed by a family or household member.

Here, the trial court determined that Page had committed the sex offense of child exploitation against R.P. IC 35-42-4-4(b) provides that a person who knowingly or intentionally photographs or creates a digitized image of any performance or incident that

includes sexual conduct by a child under eighteen years of age commits child exploitation. "Sexual conduct" is defined as:

> sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.

IC 35-42-4-4(a). The trial court found that the fact that Page was present and participated in the taking of pictures of R.P. in the shower[1] rose to the level of child exploitation because the pictures coupled with the pictures of the girl on the bed led to the belief that the intent of the photographs was to arouse the sexual desires of another. *Appellant's App*. at 48-49. We do not agree.

The evidence presented showed that these photographs were found on R.P.'s computer and on a CD in R.P.'s backpack, and two were of the silhouette of a nude boy, believed to be R.P., behind a shower curtain. The following testimony was given by a friend of Page's and the mother of the girl depicted in some of the photographs regarding the photographs:

> Trial Court: Do you know anything about the photos of the person that's purported to be in the shower?
>
> Witness: I think I was there that day, I think it was just more goofing around, I think that's [R.P.].
>
> Trial Court: Do you know who took the photo?

[1] The trial court did not make any finding regarding the photographs of the girl on the bed. Hahn was required to prove that Page had committed a sex offense against R.P., and, while we do not condone the taking of these inappropriate photographs, they are not evidence of a sex offense committed against R.P.

Witness: I think, I hate to say for sure, but I think [Page] did, I mean.

Trial Court: Was he at least present?

Witness: Was?

Trial Court: [Page] present when that photo was taken?

Witness: Yes.

Tr. at 35-36. R.P. did not testify at the hearing, and Hahn did not present any evidence that the photos were intended to satisfy or arouse the sexual desires of any person. Although the photographs were inappropriate and crude, no evidence was presented that the photographs depicted any "sexual conduct" as defined in IC 35-42-4-4 or that Page committed a sex offense against R.P. Page has established that the trial court committed *prima facie* error when it granted Hahn's petition for a permanent order of protection. Accordingly, we reverse the order granting the order of protection.

Affirmed in part and reversed in part.

RILEY, J., and MAY, J., concur.