

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brett Miller,
Appellant,

v.

Jessica Miller,
Appellee.

January 29, 2021

Court of Appeals Case No.
20A-DR-1588

Appeal from the Crawford Circuit
Court

The Honorable Sabrina R. Bell,
Judge

Trial Court Cause No.
13C01-1411-DR-62

Brown, Judge.

- [1] Brett Miller (“Father”) appeals the trial court’s order providing that Jessica Miller (“Mother”) have primary physical custody of H.M. and G.M. We remand.

Facts and Procedural History

- [2] On December 27, 2016, the court ordered that Mother have sole legal custody and primary physical custody of the parties’ children, H.M., born in 2011, and G.M., born in 2013. The court ordered that Father have parenting time as the parties agree but no less than that described by the Parenting Time Guidelines.
- [3] On April 3, 2018, Father filed a petition to modify custody. On June 25, 2018, Guardian ad litem Gloria Rahman (“GAL Rahman”) filed a report recommending that the parties have joint legal custody. On August 14, 2018, GAL Rahman filed an update to her report but stated that her recommendations from her prior report remained.
- [4] On November 27, 2018, the parties filed an agreement providing in part for joint legal and joint physical custody. On November 29, 2018, the court entered an order approving the parties’ agreement.
- [5] On February 26, 2019, Father filed a “Petition to Modify Child Support” which alleged that the children returned from Mother’s parenting time with bed bug bites, Mother failed to give H.M.’s medication, and H.M. returned from Mother’s care with a busted lip caused by Mother. Appellant’s Appendix Volume II at 50 (capitalization omitted). Father’s petition requested that the court order the guardian ad litem to investigate and that a hearing be set on the

petition. He also alleged that there had been a continuing and substantial change of circumstances warranting a change of custody.

[6] On March 19, 2019, Mother filed a Petition to Modify alleging the court's prior order provided Father certain parenting time and that the substantial distance between the parents' residences and coordination of transportation had become difficult causing unexpected tension between the parties.

[7] On April 23, 2019, Mother filed an Emergency Petition for Writ of Assistance alleging that Father failed to return the children and requested the court order enforcement of the existing orders by having law enforcement assist her in retrieving them. That same day, the court entered an order directing the parties to supply it with information regarding an investigation done by the Dubois County Department of Child Services ("DCS").

[8] On April 25, 2019, GAL Rahman filed a report indicating that DCS had not removed either child from Mother's care, DCS had put a safety plan in place, and such plan did not modify the current physical and legal custody orders. She also stated that the current orders should remain in effect until the conclusion of the DCS investigation or until changed by a DCS proceeding.

- [9] On April 29, 2019, the court held a hearing and discussed an agreement of the parties.¹ The court reminded both parties that they were to comply with all court orders unless instructed by DCS to not return a child home. Father's counsel indicated that he would prepare an order.
- [10] On May 21, 2019, Mother filed a Motion to Enter Order for April 29, 2019 Hearing, which alleged that Father's counsel had failed to furnish a proposed order to the court and asserted that a proposed order prepared by Mother's counsel was attached. That same day, Father filed an Objection to Motion and Order of Entry and Request for Attorney's Fees.
- [11] On May 22, 2019, Mother filed a Petition for Citation of Contempt alleging that Father had filed protective orders against her on May 16, 2019, and refused to make the children available for her to exercise her parenting time. That same day, the court granted Mother's May 21, 2019 motion and adopted "the written motion attached hereto as the agreement of the parties." Appellant's Appendix Volume II at 78. The court's order states that it adopted "the terms of the Informal Adjustment previously provided to the parties as an ORDER of this court." *Id.* at 79.

¹ During direct examination, when asked if he had received a copy of "IA," "that's something DCS has provided to you," and "[y]ou'll provide me a copy so I could submit to the Court under seal," Father answered affirmatively. Transcript Volume II at 8. The record does not contain a copy of the informal adjustment.

- [12] On August 12, 2019, the court entered an order concluding that the matters would be consolidated under the dissolution cause number and dismissed the protective orders under separate cause numbers. On October 15, 2019, GAL Rahman filed an updated report recommending that Mother have legal custody subject to certain conditions.
- [13] On May 18, 2020, Mother filed a Notice of Intent to Move to Madison, Indiana, to be closer to family and employment opportunities. Mother proposed that the current parenting time schedule be followed and attached a proposed schedule for when the school year began. On June 1, 2020, Father filed a response objecting to Mother's relocation and moving the court to modify the previous order of child custody and parenting time.
- [14] On July 17, 2020, GAL Rahman filed an updated report recommending the court award Father temporary primary physical custody with several provisions and conditions.
- [15] On July 28, 2020, the court held a hearing to address Mother's notice to relocate and Father's objection and motion to modify custody and parenting time. Mother, Father, a home-based caseworker, H.M.'s third grade teacher from the previous year, and a social worker at the Northeast Dubois County School Corporation who saw H.M. once a week or every other week during the last school year, testified. GAL Rahman testified that she filed a report in July recommending the children remain with Father and that, while she was "not 100 percent behind that recommendation," she stood behind it. Transcript

Volume II at 177. She also testified that she thought Father had more stability and structure in his household.

[16] The trial court stated in part:

I think after hearing the evidence, all the calls to DCS and the police have, literally, interfered with her job, with her life in general, and with the relationship of her children. You need to think about that. That every time you place a call or someone else places a call, the impact that has on your children when DCS and law enforcement show up to your house, and/or her house. And the effect that that has on them mentally and emotionally. You need to think about that.

I don't think, based upon the evidence and testimony that I've seen here today – and I agree with Ms. Rahman's report – I don't think that you foster or promote a relationship between your children and their mother. I don't see that, and that needs to change.

You are hurting your children by doing that. You are hurting your children by disrespecting their mother. And the best thing that you guys can do for your children is to learn how to co-parent and learn how to get along for the sake of your children.

Id. at 189.

[17] On July 30, 2020, the court entered an Order on Father's Motion to Modify Custody and Parenting Time, Mother's Notice to Relocate, and Mother's Petition for Contempt Citation. The order states:

1. [Father] and [Mother] shall have joint, legal custody of the minor children, [G.M.] and [H.M.].

2. Upon a finding by the Court, that the GAL and both parties acknowledged that the majority of the conflict and litigation began after the parties agreed to joint physical custody, the Court now grants the Mother, primary physical custody.

3. The Mother may relocate and enroll the children in the Jefferson County School Corporation in Madison, Indiana.

4. To prepare for this change, Mother shall initiate services before school starts with the school to help the children transition; services such as school counselors, teacher's aides, tutoring etc. similar to the services the children now receive through the North East Dubois School System.

5. The children are used to two nights a week with the Father. Due to the distance as well as the burden on the children to leave that early from the Father's house for school, Father's parenting time will occur on the weekends from the time the children are out of school on Friday until 6:00 p.m. on Sunday.

6. The Court finds that the children are bonded to their father, step-mother, paternal grandparents, and the community in which Father lives, and this bond and Father's influence in the children's lives will remain strong, even without the mid-week visit. Even so, to make up that time, Father will have three weekends a month from the time the children are let out of school on Friday, until Sunday at 6:00 p.m.

7. Transportation will occur per the IPTG, so that Father or paternal grandparents may pick the children up directly from school on his weekends. The parties may agree to meet half way due to the distance. In the event conflict arises, parties shall follow the IPTG.

8. The parties shall follow the Holiday Parenting Time Schedule per the IPTG, except that Mother should always have at least one weekend a month.

9. The parties shall follow the IPTG for extended parenting time regarding summer vacation.

10. The parties are encouraged to agree as much as possible, and in the event of conflict follow the IPTG as it relates to parenting time.

11. The parties shall not speak negatively about each other to the children or in front of the children or speak to the children regarding adult issues.

12. The Father will continue to take the children to their appointments and extra-[curricular] activities even if not in his community. Mother will avoid scheduling appointments for the children in their new, local community during Father's parenting time.

13. [H.M.] shall continue to meet virtually with Life Spring Counselor, Kelly Vanmeter, to ensure consistency and stability during this time of transition.

14. Mother shall take advantage of Community Partners and Ireland Home Based Services in her new location, Madison, Indiana.

15. The Mother and Father shall engage in and complete communication counseling or a similar program to learn to communicate better regarding the children.

16. When [H.M.'s] therapist deems appropriate, family therapy between the parents and [H.M.] shall be utilized.

17. Neither parent shall put the children in the middle or relay messages through the children. The parties shall utilize a communication notebook with information for the other parent regarding the children when exchanging the children.

18. The Mother shall have liberal phone contact with the children when they are not with her, or Father is exercising parenting time. Father shall be allowed a mid-week phone call to

the children on Wednesday evenings. Neither party shall interfere with the other parent's phone call.

19. Neither party will call law enforcement or DCS unless it is a true and legitimate concern for the children's safety in the eyes of a disinterested third party.

20. The Father is now found in Contempt of Court for interfering with the Mother's parenting time in the spring of 2019, when the Dubois County DCS was involved. Father shall pay Mother's Attorney's fees in the amount of \$500.00 relative to the filing of the Petition for Contempt Citation. Father shall pay these fees directly to Mother's attorney within 30 days of the date of this Order.

SO ORDERED THIS 30th day of July, 2020.

Appellant's Appendix Volume II at 111-113.

Discussion

[18] The issue is whether the trial court abused its discretion by ordering that Mother have primary physical custody of the children. Father argues that the trial court made no findings regarding the best interests of the children and the evidence demonstrates that ordering him to have full custody is in the children's best interests. He asserts the custody order was designed to improperly punish him given the complete lack of evidence that custody in favor of Mother was in the children's best interests.² Mother argues that Father failed to address the

² Father does not challenge Mother's relocation or the court's finding of contempt.

evidence in the light most favorable to the trial court's decision and his invitation to reweigh the evidence should be declined.

[19] We review custody modifications for an abuse of discretion and have a “preference for granting latitude and deference to our trial judges in family law matters.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). The trial court entered findings of fact in its order granting modification of custody. “Pursuant to Indiana Trial Rule 52(A), the reviewing court will ‘not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.’” *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016) (quoting *D.C. v. J.A.C.*, 977 N.E.2d 951, 953 (Ind. 2012) (internal quotation and citations omitted)). “Where a trial court enters findings *sua sponte*, the appellate court reviews issues covered by the findings with a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment.” *Id.* “Any issue not covered by the findings is reviewed under the general judgment standard, meaning a reviewing court should affirm based on any legal theory supported by the evidence.” *Id.* at 123-124.

[20] The child custody modification statute provides that “[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under section [Ind. Code § 31-17-2-8]” Ind. Code § 31-17-2-21. “[I]n order for the trial court to modify custody, it must find both that: 1) modification is in the best interests of the child; and 2)

there is a substantial change in one or more of the factors enumerated in the custody modification statute.” *Steele-Giri*, 51 N.E.3d at 127.

- [21] To the extent Father argues the trial court’s order was designed solely to punish him, we note that generally cooperation or lack thereof with custody and parenting time orders is not an appropriate basis for modifying custody.

Montgomery v. Montgomery, 59 N.E.3d 343, 350 (Ind. Ct. App. 2016), *trans. denied*. “It is improper to utilize a custody modification to punish a parent for noncompliance with a custody order.” *Id.* (citing *In re Paternity of M.P.M.W.*, 908 N.E.2d 1205, 1208 (Ind. Ct. App. 2009)). “However, ‘[i]f one parent can demonstrate that the other has committed misconduct so egregious that it places a child’s mental and physical welfare at stake, the trial court may modify the custody order.’” *Id.* (quoting *Maddux v. Maddux*, 40 N.E.3d 971, 979 (Ind. Ct. App. 2015) (quoting *Hanson v. Spolnik*, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997), *trans. denied*), *reh’g denied*).

- [22] In light of the trial court’s failure to consider the statutory factors and lack of findings regarding the children’s best interests, coupled with its finding of contempt and comments at the hearing involving Father’s actions, we conclude that remand is necessary. *Cf. In re Paternity of P.R.*, 940 N.E.2d 346, 351 (Ind. Ct. App. 2010) (holding that the trial court’s findings did not explicitly determine that the change of custody was in the best interests of the children but “[n]evertheless, because of the extensive findings, we are able to discern that the trial court determined that it was in the best interests of the children to live with [f]ather”); *In re Paternity of M.P.M.W.*, 908 N.E.2d 1205, 1208-1209 (Ind. Ct.

App. 2009) (observing that, although the trial court included language regarding punishing the mother for violating the trial court's previous order and absconding with M.P.M.W., the trial court also noted factors that led to its decision that a substantial change in circumstances had occurred and that it was in the best interest of M.P.M.W. that the father be awarded custody, listing the factors, and concluding "that the trial court based its decision on proper considerations, and it did not err in its decision to modify custody to [f]ather").

[23] For the foregoing reasons, we remand for the court to consider the statutory factors, any substantial change in circumstances, and the best interests of the children, and to make the necessary findings.

[24] Remanded.

Vaidik, J., and Pyle, J., concur.