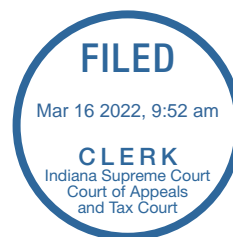


## MEMORANDUM DECISION

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.



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ATTORNEY FOR APPELLANT

Matthew J. McGovern  
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## IN THE COURT OF APPEALS OF INDIANA

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Brett Miller,  
*Appellant-Petitioner,*

v.

Jessica Miller,  
*Appellee-Respondent.*

March 16, 2022

Court of Appeals Case No.  
21A-DR-2311

Appeal from the Crawford Circuit  
Court

The Honorable Sabrina R. Bell,  
Judge

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

**Bailey, Judge.**

## Case Summary

- [1] Brett Miller (“Father”) appealed an order granting Jessica Miller (“Mother”) the primary physical custody of their two children (“Children”) and this Court remanded for the trial court’s entry of findings based upon its consideration of statutory factors, any substantial change in circumstances, and the best interests of Children. The order entered on remand, although partially compliant, again fails to include findings regarding the best interests of Children and does not permit meaningful appellate review. Father appeals the order, framing his issue as that of insufficiency of the evidence rather than procedural error, and he asks that we order the primary physical custody of Children awarded to him. We decline to substitute our opinion for that of a family law judge who can assess the credibility and demeanor of the witnesses. Given the absence of particularized findings necessary to evaluate the propriety of the order, and the significant lapse of time after custody evidence was heard, we remand for a new child custody hearing.

## Facts and Procedural History

- [2] The facts underlying this appeal are recited in *Miller v. Miller*, No. 20A-DR-1588, slip op. at 1-3, (Ind. Ct. App. Jan. 29, 2021):

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.

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.

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.

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.

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.

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”).

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.

On April 29, 2019, the court held a hearing and discussed an agreement of the parties. 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.

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.

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.

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.

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.

On July 17, 2020, GAL Rahman filed an updated report recommending the court award Father temporary primary physical custody with several provisions and conditions.

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.

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.

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.

[3] Father appealed the July 30, 2020, order, which maintained joint legal custody of Children, awarded Mother primary physical custody, declared Father in contempt of court for interfering with Mother's parenting time, and ordered that Father pay Mother's attorney's fees. Father raised the issue of whether the trial court abused its discretion by ordering that Mother have primary physical custody of Children. In relevant part, Father argued that the trial court made no findings regarding the best interests of Children. *Miller*, slip op. at 3. The *Miller* panel agreed with Father's assessment and remanded the matter, explaining:

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 [v. Steele]*, 51 N.E.3d at 127 [Ind. 2016].

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*).

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”).

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.

*Miller*, slip op. at 5.

[4] Approximately four months later, Father filed a motion in the trial court requesting that the GAL update her findings and recommendation; the motion was summarily granted. On July 1, 2021, the trial court judge who presided at the custody hearing recused herself, without written explanation. Twenty days later, a special judge was appointed. Thereafter, Father filed his “Motion to Reissue Findings of July 28, 2020.” (App. Vol. II, pg. 162.)

[5] On July 23, 2021, the special judge ordered the parties to mediation and set the matter for a November hearing. One month later, the special judge again ordered the parties to mediation but vacated the November hearing date. The order stated that, if mediation were to prove unsuccessful, the parties would have the choice of agreeing that the special judge enter findings upon the evidence presented in July of 2020, or “retry all pending matters.” (*Id.* at 165.) On September 20, 2021, the original presiding trial court judge issued an Order



on Remand, awarding Mother the primary physical custody of Children and finding Father in contempt of court.<sup>1</sup> Father now appeals.

## Discussion and Decision

- [6] At the outset, we note that Mother did not file an appellate brief in this matter. We do not develop arguments on behalf of an appellee who failed to file a brief and we may reverse an order if the appellant establishes prima facie error. *Prater v. Wineland*, 160 N.E.3d 540, 542-3 (Ind. Ct. App. 2020). In this instance, prima facie error means error at first sight or error on the face of it. *Id.* at 543. However, even in light of this relaxed standard, we still have the obligation to correctly apply the law to the facts of record to determine whether reversal or remand is required. *Id.*
- [7] Here, the Order on Remand is partially compliant with the directive of this Court. The order identifies substantial changes in circumstances since the prior custody order adopting the parents' agreement to joint custody – specifically, increased parental conflict arising in the co-parenting arrangement and Mother's desire to relocate. The order includes conclusory language to the effect that the trial court judge considered statutory factors. However, apart from recognition that Children are bonded to both parents and some extended

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<sup>1</sup> Neither Father nor Mother objected to the original presiding trial court judge exercising jurisdiction over the matter subsequent to her recusal nor did either party allege any lack of compliance with Indiana Trial Rule 79(I), applicable to discontinuation of service or unavailability of a special judge.

family members, discussion of facts relative to the statutory factors is largely omitted. There are no findings explicitly addressing Children’s best interests. Had there been relevant and substantial findings from which we could discern the trial court’s determination of best interests, we may have affirmed the custody order. *See In re Paternity of M.P.M.W.*, 908 N.E.2d at 1208-09.

However, as Father points out, the majority of the factual statements actually anticipate favorable outcomes from the change of custody. That is, the trial court largely focuses upon leveling the playing field as to unequal resources and expresses hopes that, once Mother’s relocation affords her greater family support and reprieve from Father’s unwarranted interference, increased stability in her home will be the result.

[8] Father characterizes the statements as “not findings of fact but a set of speculations.” Appellant’s Brief at 23. According to Father, this makes it apparent that the trial court lacked a basis upon which to award the primary physical custody of Children to Mother. He argues that the appropriate relief from this Court is an order that he instead be awarded primary physical custody. Although we agree with Father that his appeal has identified prima facie error, we must disagree with his proposed outcome.

[9] On appeal, we afford trial courts a great deal of deference in family law matters because of their opportunity for extended face-to-face interactions with the parties. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Trial judges are able to assess the credibility and character of the parties involved, and they are thus in a superior position to resolve a best interests dispute. *Id.* We, unlike a trial

court, are not positioned to hear pertinent custody evidence and make factual determinations from that evidence. Moreover, in part attributable to the trial court's delays and order of mediation in this particular case, there has been a lapse of time approaching two years since the evidentiary hearing was conducted. Thus, even if we were inclined to remand a second time for necessary findings, the evidence as to the best interests of Children in their prior circumstances is now stale. Given these unique circumstances, we remand for a custody hearing.

## Conclusion

[10] Father has demonstrated prima facie error. We remand for proceedings consistent with this opinion.

[11] Remanded.

Mathias, J., and Altice, J., concur.