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ATTORNEY FOR APPELLANTS

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IN THE  
COURT OF APPEALS OF INDIANA

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B.M. and R.M.,

*Appellants,*

v.

A.J. by Child's Next Friend, R.J.,

*Appellee.*

April 29, 2022

Court of Appeals Case No.  
21A-PO-2290

Appeal from the Lawrence Circuit  
Court

The Honorable Nathan Nikirk,  
Judge

Trial Court Cause Nos.  
47C01-2109-PO-1062  
47C01-2109-PO-1063

**Brown, Judge.**

[1] B.M. and R.M. appeal the trial court’s orders of protection and claim they were denied due process and the evidence is insufficient to support the orders. We reverse and remand.

### ***Facts and Procedural History***

[2] On September 13, 2021, A.J., by next friend R.J.,<sup>1</sup> filed a petition for an order for protection against B.M. in cause number 47C01-2109-PO-1062 (“Cause No. 62”) and a petition for an order for protection against R.M. in cause number 47C01-2109-PO-1063 (“Cause No. 63”).

[3] On September 24, 2021, the court held a hearing on both petitions. At the start of the hearing, the court asked “[a]re you [B.M.],” B.M. answered affirmatively, and the court stated: “Okay. Turn around, scoot up to the table. Sit like you’re in the courtroom.” Transcript Volume II at 4. The court stated: “I’ll warn everybody before we get started, I am not in a good mood today. I was up all night dealing with a child abuse case, and I’m here this morning at 8:30 a.m. on this nonsense.” *Id.* at 5.

[4] A.J.’s counsel called A.J. as a witness. A.J. testified that she was seventeen years old and a junior in high school. She testified that she and B.M. had been in school together since middle school and that she noticed his stalking activity in sixth grade. She testified that “it originally started because we were in our science class and I didn’t have a partner, and I asked [B.M.] if he wanted to be

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<sup>1</sup> R.J. is A.J.’s father.

my partner,” “since sixth grade, I notice him consistently at my locker, following me. Every period he would be there,” and “[s]eventh grade, during my lunch table, his table would be right next to mine. He would stare at me while he would eat. If I dumped my tray, he also dumped his tray.” *Id.* at 6. She testified B.M.’s behavior “got worse as we got older.” *Id.*

[5] She testified “freshman year he memorized my whole schedule,” “[t]he only period we had together was lunch,” “[s]ame thing, if I got my tray, he would also get it. If I dumped my tray, he would dump his tray,” and “I would go out a different door, and he would still follow me. I’d turn around and go back, and he would still follow me.” *Id.* at 7. When asked if, during her freshman year, she made a report to the school, she testified:

Yes. . . . Freshman year I let my parents know. And for a few days, they’re like, just see how it goes, like kind of continue. And then we talked to a guidance counselor and a principal, and they continued to notice it on the video cameras. And then they would tell me to take different routes and they would be waiting for me.

One day in particular, I took the longest route to get to my class, and he was in his classroom, and he came out, and he ran at me, and he came right in my face and breathed really heavy. And my biggest fear is that, as we get older, it gets worse and it gets more aggressive, and I feel like he wants to hurt me, and I feel like he would have pleasure in it.

*Id.* The following exchange occurred:

[A.J.’s Counsel]: At any point during that freshman year did he -- did he touch you or throw things at you or -- or anything along those lines?

[A.J.]: So during eighth grade, we had assigned seats, and we were sat across the room, but he would sit behind me every day, and he would play with my hair and smell my hair and breathe on my neck really heavy. It was almost like I was his little minnow and he was a shark trying to get me, and I felt so small compared to him.

[K.M.]: He asked you for ninth grade, not eighth grade.<sup>[2]</sup>

[A.J.'s Counsel]: Objection.

Court: Sir, do you -- do you think you're welcome to just say anything you want? You will sit there and shut your mouth.

[K.M.]: Yes, sir.

Court: That or you're going to be out of here or across the street in the county jail being held in contempt. This isn't TV.

[K.M.]: Yes, sir.

*Id.* at 7-8. A.J. testified: "And then, one day in particular, he threw a pencil down my shirt. I told him to stop, and I snapped it, and then throughout freshman year, he would just get as close to me as he could. I noticed whenever I was alone, he would be a lot closer to me than versus when I had friends." *Id.* at 8. She indicated she informed the vice principal and a counselor. When asked "did anything change after -- after you worked with them," A.J. testified "after they talked to him and it was taken care of, the next day he ran at me, and he called me a whore, and then since then, I hadn't seen him." *Id.* at 9.

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<sup>2</sup> The appellants' brief indicates K.M. is the father of B.M. and R.M.

[6] A.J. testified:

And then sophomore year, . . . we had hybrid. . . . Like, I wouldn't see him. But then this year it's gotten a lot worse . . . since we both have our licenses, he drives circles around my car. He'll be waiting whenever I walk out of school. My friends have noticed it. One day in particular, we went to Denny's, and we went there . . . [B.M.] and [R.M.] never went into Denny's. And I came out and I was making plans with my friends . . . and I went to their car, and I got out of my car, and I noticed them -- they weren't even parked, but they were in between Denny's and Steak n' Shake. And they were waiting for me, and they were pointing at me and revving up their engine and laughing. And so I got in my car, and I asked [friends] to follow me home.

And then as I reversed, I came out, and they pulled right behind me. I don't completely remember how I even got there. I was really shaky, but I ended up . . . at the stoplight, and I was going to turn left . . . . And they were in the right lane to turn right, and they had their windows down, and they were just staring at me and breathing really heavy. And I looked at them, and I yelled, and I said stop following me, and then [B.M.] just smiled and said, I'm not following you, and drove off.

*Id.* at 10-11. A.J. indicated the incident occurred a couple of weeks earlier.

[7] A.J. indicated B.M. would drive his vehicle in circles around her while she was in her vehicle in the parking lot. She testified "if I had [] math tutoring and I would be at school till 4:00, they would still be there. They would even leave school and drive parking lots around the circle and then wait until I pulled out and pull right in front of me so I have to slam on my brakes." *Id.* at 11. She indicated this had been going on since the beginning of the school year. When asked how she felt, A.J. testified "I'm scared, especially the way he looks,"

“[h]e looks like he wants to hurt me, like he wants to kill me, and he’d have pleasure in it,” “like, whenever he hits me, it’s not, like, a direct hit,” “[o]ne day I drove into school, and he happened to be right behind me, and he pulled up -- he reversed really fast, and I reversed my car, and then I was like, okay, maybe, you know -- and then he did it again,” “[h]e drove forward and reversed again and tried to hit my car,” and “it was fast, and it was sudden, and it was aggressive.” *Id.* at 12. She testified she used to be excited to attend school and now she is nervous and scared. She stated she told B.M. to leave her alone more than once.

[8] A.J.’s counsel indicated he had no further questions. The following exchange occurred:

Court: [B.M.], you’re an adult. Do you have any questions for [A.J.]?

[B.M.]: No.

Court: Sir, your other child, [R.M.], is a minor. I’m going to allow you to ask any questions on his behalf of [A.J.]. You’ll get a chance to give me your side of this. Do you have any questions for her?

[K.M.]: I’m not an attorney, sir, and my attorney could not be here.

Court: That’s not what I asked you.

[K.M.]: Oh. I don’t --

Court: Do you have any questions?

[K.M.]: I don’t know what to ask her.

Court: Okay. [A.J.], you can have a seat.

*Id.* at 16.

[9] A.J.'s counsel called R.J. as a witness. R.J. testified that he was A.J.'s father, he was a conservation officer, and, after the incident where B.M. ran at A.J. at school, he went to B.M. and R.M.'s house, asked to speak with their parents, sat at their kitchen table, and explained the daily stalking. He indicated B.M. did not deny anything and B.M. and R.M.'s parents led him to believe they wanted to take care of it and it would stop. He stated he was in uniform but spoke to B.M. and R.M.'s parents as a father. He testified that, after the incident at Denny's, he went to B.M. and R.M.'s house a second time, he was not in uniform, he spoke to their parents, and B.M. and R.M.'s father said "my boys will be boys," "[t]his is America," and "[y]our girl's just going to have to get over it." *Id.* at 19.

[10] R.J. further testified that he had observed dramatic changes in A.J. and she no longer wanted to attend school. He testified "he is always around her. It's [] scary to me to [] realize how much he is actually around her. And that's got to be intentional because they have never spoke," "[t]hey don't speak; they don't share classes," "[t]here's no reason that he would need to be within 100 yards of her on really any given occasion," and "I'm confident that this has never stopped and will escalate. Now that they're driving, [] it worries me. It's gone from an infatuation to an obsession." *Id.* at 19. He said A.J. "has just not been herself," "[w]e just [] want it to stop. We want it to end," "[a]s a concerned parent, I don't have any disregard for anyone, but this is happening, and it's not coincidence," "[i]n my years of experience as a parent, as -- in law enforcement,

things start small,” “[t]his has started small from an early age, and it’s escalated over and over and over and to the point where I don’t know [] the next option.” *Id.* at 20.

[11] The court asked if B.M. had any questions for R.J., and he said “[n]o,” the court asked if K.M. had any questions, and he said “I do.” *Id.* at 20. K.M. asked, “[w]hen you came to our house, were you armed with a deadly weapon,” R.J. replied “[y]es. I’m a conservation officer. My uniform was --,” K.M. asked “[w]ere you there in DNR business,” and R.J. stated “[i]t wasn’t officially DNR business, but I was on duty, yes.” *Id.* at 20-21.

[12] The following exchange occurred:

[A.J.’s counsel]: Objection, Your Honor.

Court: . . . I don’t see the relevance. I don’t care if he came with a bazooka. Call the police if you were threatened by that. I don’t -- that doesn’t concern me today. I’m concerned about the allegations in this protective order. Do you have questions about that?

[K.M.]: I don’t have questions about that.

Court: You’ll get to tell me your position in a moment, sir. You can stand down. [A.J.’s counsel], I don’t need any further witnesses.

[A.J.’s counsel]: Excuse me, Your Honor?

Court: I don’t need any further witnesses.

[A.J.’s counsel]: Okay.

Court: [B.M.], you’re an adult. Raise your right hand. [R.J.], you can have a seat. Just stay where you’re at, [B.M.].



[B.M.]: Okay.

*Id.* at 21.

[13] The court asked B.M. if he touched A.J.'s hair, he answered "I don't remember touching her hair," it asked if he ever smelled her hair, he replied "[n]o. I don't believe so," and the court asked "[d]id you call her a whore," and B.M. answered "[n]o. I don't think so." *Id.* at 22. The court said "[y]ou either did or you didn't," and B.M. stated "[b]ut I don't know." *Id.* The court asked "[a]nything you want to tell me, [B.M.], about the allegations in this petition? This is your time to speak," K.M. began to speak, the court stated "[h]e's an adult. He can tell me what he wants to tell me right now" and "[i]f you have prepared a statement, you can read it," K.M. stated "[a]s he lives under my roof and still at my house and he still goes to school, can I witness for him his . . . ," and the court said "No." *Id.* B.M. stated:

[R.M.] went to the football game with me. After the football game, I went to Steak n' Shake to eat. I paid for my food at 10:37 p.m. I have my bank record to prove the time. I went through the drive-thru. I ate in the parking lot because the dining room closes at 10:00. I have a picture of the dining room hours here. [R.M.'s] bank records show he did not eat at Steak n' Shake. [R.M.] ate at McDonald's later, as his bank record shows.

Upon leaving the parking lot of Steak n' Shake heading for McDonald's, I had to give the Travelall throttle to keep it from stalling. It's a three-speed manual. At the light, directly in front of McDonald's, I pulled up next to a car to go straight. The car was in the left-turn lane. My window was down as it is always in the Travelall, no AC. The car window next to me rolled down, and [A.J.]

initiated a confrontation with me with cuss words and accused me of following her. I told her I wasn't. She cussed more and drove off in a hurry.

A reasonable person would realize a car that is not behind them in the same turn lane is not following them. Just because I am seen by [A.J.] in this small town, just because I share the same high school parking lot does not mean anything. I do not want to know her and could care less. We parked in the same parking lot at school. I could care less about where she parks and do not look for her. After school, a large line develops . . . . Rather than sitting in the line, we drive over to where our friends are parked and hang out sometimes. We get to talking and end up there over an hour.

[A.J.] claims I backed up twice while she was behind me. I do not anything [sic] about this or her in the parking lot claims. The school lot and road are not level. The manual shift Travelall rolls backwards sometimes when it's on a incline until I can get the clutch to take up. We have never had any verbal communication or confrontation in the parking lot or at school in the past year. I do not look or wait for her.

First I want to say, my brother does not -- says he does not even know [A.J.]. His first encounter with her was at the stoplight, and he did not get a good look at her in the dark.

\* \* \* \* \*

[R.M.] is my younger brother, and we ride together, and he likes to be near me sometimes because we are bothers [sic]. [R.M.] was unaware of the situation. . . . No one from the school ever talked to [R.M.], and his lunch period was not changed. . . .

I did not ever engage in any verbal exchange. I wanted to be friends originally and just was trying to be funny or be noticed. Mr. Tanksley and I talked. Mr. Tanksley explained to me that she lodged a complaint against me, and he moved my lunch period. I followed his direction. I do not want anything to do with her.

*Id.* at 23-24.

[14] The court asked K.M. if there was anything he would like to say on behalf of R.M., and K.M. stated:

[R.M.] has a known communications disability that the school has very well documented. My son, you know, was very upset. [R.M.] does not know her. I asked him, he said he does not know what she looks like. [B.M.] said that [he] would simply run up to her trying to get noticed and make eye contact and leave. [R.M.] was not present for this. Sometimes he might have been around if [B.M.] might have looked at her, but [R.M.] doesn't know her. . . .

\* \* \* \* \*

So [B.M.] will -- has stipulated that he liked the girl. He tried to get her attention. He thought he was being funny. He did not intentionally harass her. . . .

*Id.* at 24-25. At K.M.'s request, the court admitted photographs of B.M.'s vehicle and the hours of operation at Steak 'n Shake.

[15] The court asked "[a]nything else, sir," and K.M. stated R.M. "was very terrified by the armed officer coming over when he doesn't even know who this girl is," and the court stated "if you don't want an armed officer coming in your home, don't let him in," K.M. stated "I was frightened," the court stated "[c]all the police," K.M. stated "I can't call the police when he's right in front of me," and the court stated "[m]ost of the time people call the police when someone's right in front of them." *Id.* at 27-28.

[16] The court asked A.J.: “[A.J.], do you believe that this protective order really needs to be against [R.M.]? Do you think if it was against [B.M.] only, it would resolve most of these issues?” *Id.* at 28. A.J. answered: “[R.M.] is more aggressive and scares me more. [B.M.] doesn’t intimidate me, but [R.M.] has -- or sorry. [B.M.] has this extreme power over [R.M.], almost like [R.M.] will follow [B.M.] everywhere, so I’m scared -- I’m fearful if I only get it on [B.M.], then [B.M.] will tell [R.M.] to follow me and to see me in school.” *Id.* The court asked “[d]oes [R.M.] drive,” and K.M. replied affirmatively. *Id.*

[17] The court stated:

Okay. I’ve heard enough. I’m ready to rule. Having reviewed both petitions, the exhibits submitted by you, [K.M.], I am going to grant both petitions at this time.

\* \* \* \* \*

Another thing, when a woman tells you no, that’s it. When they say stop, that’s it. And quite frankly, both of you, if I were this man and this was my daughter, it would have went a hell of a lot further than it did. Anyone called my daughter a whore, there’d be hell to pay for it from me. And this whole nonsense about -- I don’t know if you said it or not, but if you did, I’m going to address it.

This is America; they can say what they want. Fine. And I understand that’s what everybody thinks, but I’ve proven to all of you here this morning that’s not how this country works. I can put restrictions on people. You can’t bring your phone in my courtroom, and I can put people in jail. There are laws in this country. Regardless of what some people in this country might think right now, there are laws, and they will be enforced at least in this courtroom.

I'm, generally speaking, a pretty easy person to get along with. Now, I'm not one of these fools that runs around and just laughs at everything and puts everything on Facebook and acts like the whole world's just wonderful all the time. But this pisses me off. I got a whole courtroom full of teenagers that ought to be in school right now, including the two of you. I've got hearings set all day today -- all day on my docket -- regarding child abuse, neglect, divorce, terrible things. This is easily preventable.

She said no, that's it. That's it. . . . I don't know if your dad said this or not, but this whole thing about boys will be boys . . . the whole mentality of boys will boys, do you know what that ends up with? You end up across the street in front of Judge Plummer, who's a hell of a lot meaner than me.

I do not have time for this stuff. I have been here all week, all week, longer hours than I'm supposed to be here. I was up till 3:00 a.m. on the phone last night with the Department of Child Services and the state police over a child who had had the hell beat out of him.

I don't believe you. You are following her. You did touch her hair. And I guarantee [] you called her a whore. And you know how I know you called her a whore? Because when I asked you, you said no. Then I pressed you, and you said I don't know -- I'm -- I don't know if I did or not; I don't remember. . . .

\* \* \* \* \*

And what I will tell you, young men, if it's not demonstrated enough in my tone here today and advancing this case on my docket to 8:30 on a Friday morning, you two so much as flash your lights at her when she's driving away, you engage her at school, you call her any more names, I will reconvene this hearing, and you, young men, will go across the street to the county jail because you're an adult. . . . I will not put up with this. Is that clear?

*Id.* at 28-31. B.M. and R.M. answered affirmatively.

[18] The trial court issued orders for protection in Cause Nos. 62 and 63 providing that B.M. and R.M. were enjoined from threatening to commit or committing acts of stalking or harassment against A.J. and were prohibited from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with A.J.<sup>3</sup>

### *Discussion*

[19] B.M. and R.M. argue the trial court denied them a fair and impartial hearing and due process. They assert the judge did not remain impartial, told K.M. to “sit there and shut your mouth” when he attempted to object which effectively silenced them from making any further objections, restricted their right to cross-examine R.J., “crossed the line from impartial judge to advocate for A.J. in his questioning of B.M. in his attempt to discredit and impeach the witness,” and concluded the evidence without inquiring whether they had additional witnesses or evidence. Appellants’ Brief at 16, 18. They further argue the record is devoid of evidence that R.M. stalked or harassed A.J. and that A.J.’s testimony that B.M. would tell R.M. to follow her was entirely speculation. They also contend that the evidence was insufficient to show B.M. stalked or harassed A.J. and that B.M. provided an explanation for being at Steak ‘n Shake and for the reason his vehicle rolls back and has to be revved.

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<sup>3</sup> R.M. filed a notice of appeal under cause number 21A-PO-2304, and B.M. filed a notice of appeal under cause number 21A-PO-2290. This Court issued an order consolidating cause number 21A-PO-2304 under cause number 21A-PO-2290 and providing that all further filings be made under cause number 21A-PO-2290.

- [20] We note that A.J. did not file an appellee’s brief. When an appellee fails to submit a brief, we may in our discretion reverse the trial court’s decision if the appellant makes a *prima facie* showing of reversible error. *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002). *Prima facie* error is “an error at first sight, on first appearance, or on the face of it.” *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). 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*, 782 N.E.2d at 366.
- [21] Ind. Code § 34-26-5-2(b) provides that “[a] person who is or has been subjected to harassment may file a petition for an order for protection against a person who has committed repeated acts of harassment against the petitioner.” Ind. Code § 34-6-2-51.5 defines harassment for purposes of Ind. Code §§ 34-26-5 as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing impermissible contact: (1) that would cause a reasonable person to suffer emotional distress; and (2) that actually causes the victim to suffer emotional distress.”
- [22] “Under our traditional two-tiered standard of review, *see* Ind. Trial Rule 52(A), we ask whether the evidence supports the trial court’s findings and whether its findings support the judgment.” *S.H. v. D.W.*, 139 N.E.3d 214, 220-221 (Ind. 2020). In deference to the trial court’s proximity to the issues, we disturb the order only where there is no evidence supporting the findings or the findings fail to support the order. *Fox v. Bonam*, 45 N.E.3d 794, 798 (Ind. Ct. App. 2015).

We do not reweigh evidence or reassess witness credibility, and we consider only the evidence favorable to the trial court's order. *Id.*

[23] Generally stated, due process requires notice, an opportunity to be heard, and an opportunity to confront witnesses. *Melton v. Ind. Athletic Trainers Bd.*, 53 N.E.3d 1210, 1219 (Ind. Ct. App. 2016) (citing *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008)). The opportunity to be heard is a fundamental requirement of due process. *Id.* Further, due process requires a neutral, or unbiased, adjudicatory decisionmaker. *Reynolds v. Capps*, 968 N.E.2d 789, 791 (Ind. Ct. App. 2012).

[24] This Court has stated:

A “trial before an impartial judge is an essential element of due process.” *In re J.K.*, 30 N.E.3d 695, 699 (Ind. 2015) (quoting *Everling v. State*, 929 N.E.2d 1281, 1287 (Ind. 2010)); *see also Rynerson v. City of Franklin*, 669 N.E.2d 964, 967 (Ind. 1996) (A neutral, unbiased, adjudicatory decision maker is a core requirement of due process.). A “biased decision maker [is] constitutionally unacceptable [and] our system of law has always endeavored to prevent even the probability of unfairness.” *Hewitt v. Westfield Washington Sch. Corp.*, 46 N.E.3d 425, 435 (Ind. 2015) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456 (1975)).

We afford trial judges ample “latitude to run the courtroom and maintain discipline and control of the trial.” *J.K.*, 30 N.E.3d at 698 (quoting *Timberlake v. State*, 690 N.E.2d 243, 256 (Ind. 1997)). However, a judge has a “duty to remain impartial and refrain from making unnecessary comments or remarks.” *Id.* at 699 (quoting *Lake Cty. Div. of Family & Children Servs. v. Charlton*, 631 N.E.2d 526, 529 (Ind. Ct. App. 1994)). At all times the trial court “must maintain an impartial manner and refrain from acting as an advocate for either



party.’” *Id.* (quoting *Beatty v. State*, 567 N.E.2d 1134, 1136 (Ind. 1991)). “A violation of due process occurs where a trial judge combines the roles of judge and advocate.” *A.N. v. K.G.*, 3 N.E.3d 989, 995 (Ind. Ct. App. 2014), *aff’d on reh’g*, 10 N.E.3d 1270.

*Harris v. Lafayette LIHTC, LP*, 85 N.E.3d 871, 878 (Ind. Ct. App. 2017).

[25] Here, the trial court made comments throughout the hearing that were improper. At the beginning of the hearing, the court stated “I’ll warn everybody before we get started, I am not in a good mood today” and “I’m here this morning at 8:30 a.m. on this nonsense.” Transcript Volume II at 5. When K.M. attempted to clarify that a question by A.J.’s counsel related to ninth grade, the court stated “[y]ou will sit there and shut your mouth” or would be “out of here or across the street in the county jail.” *Id.* at 8. The court stated “I don’t care if he came with a bazooka.” *Id.* at 21. The court took control of the hearing and called B.M. as a witness. After it heard testimony, the court stated: “Okay. I’ve heard enough. I’m ready to rule,” “if I were this man and this was my daughter, it would have went a hell of a lot further than it did. Anyone called my daughter a whore, there’d be hell to pay for it from me,” and “this pisses me off.” *Id.* at 28-29. Our reading of the transcript of the proceedings leads us to the conclusion that B.M. and R.M. have made a *prima facie* showing that the trial court failed to preside over the hearing as a neutral, impartial decision maker in violation of B.M. and R.M.’s due process rights. We are mindful of the pressures and stresses on trial courts. Despite these pressures, judges are expected to adhere to the Judicial Canons and treat litigants and their counsel with civility. While the trial court may have ultimately reached

the proper result, it must reach that decision in the correct way.

[26] We reverse and remand for a new hearing before a different judicial officer and order that, pending the hearing, there be no contact between A.J. and B.M. and between A.J. and R.M.

[27] Reversed and remanded.

Pyle, J., concurs.

May, J., concurs in result without opinion.