

MEMORANDUM DECISION

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ATTORNEYS FOR APPELLANT

Bryan L. Ciyou
Alexander N. Moseley
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Katherine A. Harmon,
Carmel, Indiana

IN THE COURT OF APPEALS OF INDIANA

In Re the Paternity of K.A.;
Daniel Asher,
Appellant-Petitioner,

v.

Jaclyn Dillon,
Appellee-Respondent.

September 22, 2021

Court of Appeals Case No.
21A-JP-106

Appeal from the Marion Circuit
Court Paternity Division

The Honorable Sheryl L. Lynch,
Judge

The Honorable Laura M. Gaskill,
Magistrate

Trial Court Cause No.
49C01-1907-JP-028392

Tavitas, Judge.

Case Summary

- [1] Following a paternity determination regarding K.A. (the “Child”), Daniel Asher (“Father”) appeals the trial court’s denial of his petition for joint legal custody of the Child. Father maintains that the trial court’s grant of sole legal custody to Jaclyn Dillon (“Mother”) is clearly erroneous. The record, however, supports the trial court’s finding that the parties’ acrimonious dynamic has rendered joint legal custody untenable and not in the Child’s best interest. Thus, we affirm.

Issue

- [2] The sole issue on appeal is whether the trial court clearly erred in awarding sole legal custody of the Child to Mother.

Facts

- [3] Mother and Father’s romantic relationship produced the Child, who was born out of wedlock in December 2014. During the parties’ relationship, Father was the household breadwinner. Mother was mostly a stay-at-home parent, served as the Child’s primary caregiver, and bore most of the responsibility for the Child’s medical and educational needs. In addition to the Child, the parties’ household included Mother’s prior-born child, R.¹ The Child and R. are closely

¹ During the parties’ relationship, R. believed that Father was his biological parent. After the parties’ relationship ended, Father initially exercised parenting time with the Child and R. simultaneously; however, Father began to suspect that Mother was using R. to spy on his household. Father subsequently urged Mother to tell R. that Father was not his biological father. Mother complied, and Father has since ceased exercising parenting time with R. *See* Tr. Vol. II p. 56.

bonded and are accustomed to seeing each other daily. The parties lived in Father's Indianapolis home until their relationship ended in July 2019.

Thereafter, Mother, the Child, and R. moved to Monrovia to live with the maternal grandparents.²

[4] On July 15, 2019, Father filed a verified petition to establish paternity and requested sole legal custody and primary physical custody of the Child. Mother filed a verified counter-petition to establish paternity, parenting time, and child support on August 8, 2019, wherein she too sought sole legal custody and primary physical custody of the Child. After the trial court conducted a preliminary hearing on the parties' petitions on October 2, 2019, the court entered its preliminary order the following day.

[5] In the Preliminary Order on Establishing Paternity, the trial court preliminarily awarded primary physical custody and sole legal custody of the Child to Mother; designated Father's parenting time; and ordered Father to pay weekly child support of \$117.00 to Mother. The preliminary order also provided in part as follows:

18. Evidence was presented that the parties have had issues communicating since separating. Father maintains there has been conflict during parenting time exchanges, that Mother has interfered with the Father's telephone communication with the child, and Mother has restricted Father's access to the child's

² Maternal grandparents' residence is located approximately fifty minutes away from Father's residence.

preschool. The parties have started communicating through the [Our Family Wizard] application.

Father's App. Vol. II pp. 58-59. On June 26, 2020, court-appointed³ guardian ad litem Tara Rabiola ("GAL Rabiola") filed her report with the trial court, including her recommendation that the parties should share joint legal custody with assistance from a parenting coordinator to resolve their disputes.

[6] The trial court conducted the three-part final hearing on July 6, 7, and 26, 2020. The final hearing addressed the following pending petitions and motions: (1) Father's petition to establish paternity; (2) Mother's counter-petition to establish paternity, parenting time, and child support; (3) Father's motion to compel Mother's production of bank statements; (4) two motions for rule to show cause filed by Father; and (5) a motion for rule to show cause filed by Mother.

[7] The pending motions pertained to the parties' ongoing disputes regarding: school choice for the Child; alleged denial of access to the Child's medical and preschool information; extra-curricular activities and religious affiliation of the Child; alleged interference with or denial of in-person and/or telephonic parenting time; the Child's and Mother's allegedly inappropriate attire for videotelephone calls; inflexibility regarding schedule changes; alleged inappropriate conduct of paternal grandmother and/or her friends with the Child; Mother's alleged taking of cash from the parties' safe near the end of the

³ The trial court appointed a guardian ad litem ("GAL") on February 26, 2020.

relationship and whether the monies could be deemed child support payments; alleged disparagement on social media; and inappropriate discussions with the Child and/or R. about the litigation.

[8] First, GAL Rabiola testified at-length regarding the rancor between the parties and her recommendation that they could share joint legal custody with the assistance of a parenting coordinator or if they underwent coparenting counseling. Next, Father testified that, since their breakup, the parties clashed, among other things, regarding: (1) Mother's alleged denial of Father's access to the Child's medical, dental, and school information; (2) Mother's alleged interference with Father's telephonic parenting time; (3) parenting time exchanges; (4) extra-curricular activities; (5) additional parenting time; (6) Mother's out-of-state travel with the Child; (7) Father's decision to stop exercising parenting time with R.; and (8) paternal grandmother's suitability⁴ as a babysitter for the Child.

[9] In her testimony, Mother conceded the parties are frequently at odds and communicate poorly with one another. *See* Tr. Vol. ⁵ IV p. 32. Mother testified regarding the various topics over which the parties disagreed including:

⁴ Mother and paternal grandmother have a hostile relationship. Also, following an unsubstantiated allegation against paternal grandmother regarding R., Father and paternal grandmother entered a Department of Child Services' safety plan under which Father was not to allow paternal grandmother to be left alone with the Child.

⁵ Each of the three transcript volumes is marked "Vol. II of II." For purposes of this decision, we have renumbered these volumes consecutively by date and refer to them herein as follows: July 6, 2020 hearing volume ("Tr. Vol. II"); July 7, 2020 hearing volume ("Tr. Vol. III"); and July 27, 2020 hearing volume ("Tr. Vol. IV").

(1) extra-curricular activities; (2) school choice; (3) religious affiliation; (4) third parties' access to or involvement with the Child; (5) alleged interference with telephonic parenting time; and (6) the denial of additional parenting time.

Additionally, Mother testified that she was the Child's primary caregiver during the parties' relationship, bore primary responsibility for scheduling and transporting the Child to appointments, and stayed at home with the Child when the Child was ill. Mother testified further that the Child and R. are exceedingly close, "are used to being together all the time[,]” and have been adversely affected by the reduction in their time together as a result of the parties' separation and Father's discontinuation of parenting time with R. Tr. Vol. III p. 20.

[10] Mother also testified that she had accepted a teacher's aide position at a Monrovia community school, and she proposed enrolling the Child in the same school for kindergarten, which would eliminate the need for before- or afterschool care and related costs. Mother testified further that R. would attend the same school as the Child and would have the same academic and holiday schedule as the Child, which might not be the case if the Child attended a different school. Lastly, Mother testified that several of her family members worked in the school district and could lend support to Mother as needed.

[11] In its Final Order on Establishing Paternity, entered on December 29, 2020, the trial court entered sua sponte extensive findings, including in pertinent part the following findings regarding child custody and parenting time:

32. A substantial amount of evidence was presented demonstrating the parties' present inability to communicate and effectively co-parent.

* * * * *

47. The Court has considered each of the factors outlined in IC 31-14-13-2 and I.C. 31-14-13-23.

48. The Court has considered the child's age and sex.

49. The Court has considered Mother's wishes. Mother requests sole legal and primary physical custody, and that Father receive parenting time pursuant to the IPTGLS [Indiana Parenting Time Guidelines] (including the possibility of a Sunday overnight and mid-week parenting time as outlined in the Court's preliminary order).

50. The Court has considered Father's wishes. Father requests that the parties share joint legal custody and that Father be awarded primary physical custody. Father requests that Mother receive parenting time pursuant to the IPTGLS (similar to the schedule Father would exercise if Mother was awarded custody).

51. The [C]hild's specific wishes are unknown. However, the Court notes that it is to give less weight to the [C]hild's wishes if the [C]hild is under the age of 14.

52. The Court has considered the interaction and interrelationship between the [C]hild and each parent. While Mother has served as the [C]hild's primary caregiver, the [C]hild

is equally comfortable with both parents and at both parents' homes as confirmed by the GAL.

53. The Court is particularly mindful of the [C]hild's close and bonded relationship with Mother's prior born child, R[.] The [C]hild has a positive relationship with R[.] and is accustomed to substantial contact with R[.]

54. The Court has concerns regarding the interaction and interrelationship between Mother and Father. While is [sic] common that parents in contested custody actions will have disagreements, the evidence presented suggests that the parties have more arguments and/or disputes than is typical. The parties appear to have been unable to control this situation to-date, even despite the [C]hild's counselor noting that it has impacted the [C]hild emotionally to some extent.

55. The Court does not find that the parties are willing and able to communicate and cooperate in advancing the [C]hild's welfare at this time.

56. The [C]hild is well adjusted to her home while in both Mother's care and Father's care.

57. The Court does not have significant concerns regarding the mental or physical health of either party.

58. Insufficient evidence was presented to support a pattern of domestic of [sic] family violence by either party.

Father's App. Vol. II pp. 31-32 (emphasis added). The trial court determined it was in the Child's best interest to award sole legal custody and primary physical custody of the Child to Mother. Father now appeals.

Analysis

- [12] Father argues that “[t]he trial court’s finding[] that it is in the best interests of the [] Child for Mother to ‘be awarded sole legal custody’” is clearly erroneous. Father’s Br. p. 12. Specifically, Father argues that the findings do not support the judgment because: (1) “Mother ‘misused’ and ‘took advantage’ of her role [when the trial court preliminarily granted her sole legal custody]”; (2) “prohibited Father from obtaining information regarding the [] Child”; and (3) “excluded Father from major life events. . . .”⁶ Father’s Br. p. 12.
- [13] The trial court sua sponte entered extensive findings of fact and conclusions thereon.

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.” *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. *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014) (citation omitted). 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.*

Steele-Giri v. Steele, 51 N.E.3d 119, 123-24 (Ind. 2016).

⁶ Father does not appeal the trial court’s findings with respect to child support, parenting time, and attorney fees.

[14] We further note that there is a well-established preference in Indiana for affording substantial deference to trial courts in family law matters. *Matter of Paternity of B. Y.*, 159 N.E.3d 575, 578 (Ind. 2020). “Appellate judges are not to reweigh the evidence nor reassess witness credibility, and the evidence should be viewed most favorably to the judgment.” *Id.* (quoting *Best v. Best*, 941 N.E.2d 499, 503 (Ind. 2011)).

[15] Determinations regarding child custody fall within the trial court’s sound discretion. *Hamilton v. Hamilton*, 103 N.E.3d 690, 695 (Ind. Ct. App. 2018), *trans. denied*. In an initial custody determination, both parents are presumed equally entitled to custody. *Id.* at 694. “Unlike cases where a party is seeking to modify custody, cases involving initial custody determinations bear no presumption for either parent because ‘permanence and stability are considered best for the welfare and happiness of the child.’” *Paternity of B. Y.*, 159 N.E.3d at 578 (quoting *Lamb v. Wenning*, 600 N.E.2d 96, 98 (Ind. 1992)).

[16] Father appeals from the denial of his request for joint legal custody. Indiana Code Section 31-14-13-2 enumerates the factors for legal and physical custody determinations following the determination of paternity and provides as follows:

The court shall determine custody in accordance with the best interests of the child. In determining the child’s best interests, there is not a presumption favoring either parent. The court shall consider all relevant factors, including the following:

(1) The age and sex of the child.

- (2) The wishes of the child's parents.

- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

- (4) The interaction and interrelationship of the child with:
 - (A) the child's parents;

 - (B) the child's siblings; and

 - (C) any other person who may significantly affect the child's best interest.

- (5) The child's adjustment to home, school, and community.

- (6) The mental and physical health of all individuals involved.

- (7) Evidence of a pattern of domestic or family violence by either parent.

- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

[17] Joint legal custody “means that the persons awarded joint custody will share authority and responsibility for the major decisions concerning the child’s upbringing, including the child’s education, health care, and religious

training.” Ind. Code § 31-9-2-67. Indiana Code Section 31-14-13-2.3, governing the award of joint legal custody in paternity proceedings, provides:

(a) In a proceeding to which this chapter applies, the court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child.

(b) An award of joint legal custody under this section does not require an equal division of physical custody of the child.

(c) In determining whether an award of joint legal custody under this section would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint legal custody have agreed to an award of joint legal custody. The court shall also consider:

(1) the fitness and suitability of each of the persons awarded joint legal custody;

(2) *whether the persons awarded joint legal custody are willing and able to communicate and cooperate in advancing the child’s welfare;*

(3) the wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age;

(4) whether the child has established a close and beneficial relationship with both of the persons awarded joint legal custody;

(5) whether the persons awarded joint legal custody:

(A) live in close proximity to each other; and

(B) plan to continue to do so;

(6) the nature of the physical and emotional environment in the home of each of the persons awarded joint legal custody; and

(7) whether there is a pattern of domestic or family violence.

(Emphasis added).

[18] This Court has previously held that the second factor—whether the parents are willing and able to cooperate in advancing the child’s welfare—is of particular importance in making legal custody determinations. *J.W. v. M.W.*, 77 N.E.3d 1274, 1278 (Ind. Ct. App. 2017). As this Court has previously found:

Our courts have reiterated that factor (2), whether the parents are willing and able to cooperate in advancing the child’s welfare, is of particular importance in making legal custody determinations. *Julie C. [v. Andrew C.]*, 924 N.E.2d [1249,] 1260 [(Ind. Ct. App. 2010)]; *see also Carmichael [v. Siegel]*, 754 N.E.2d [619,] 635 [(Ind. Ct. App. 2001)] (“One of the key factors to consider when determining whether joint legal custody is appropriate is whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child’s welfare.”). Where “the parties have made child-rearing a battleground, then joint custody is not appropriate.” *Periquet-Febres v. Febres*, 659 N.E.2d 602, 605 (Ind. Ct. App. 1995). “Indeed, to award joint legal custody to individually capable parents who cannot work together is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair

distribution of the child to competing parents.” *Swadner v. Swadner*, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008) (quotation omitted).

Id. (quoting *Milcherska v. Hoerstman*, 56 N.E.3d 634, 641-42 (Ind. Ct. App. 2016)). This Court will reverse a trial court’s grant of joint legal custody when the evidence indicates the joint custody award “constitutes an imposition of an intolerable situation upon two persons who have made child rearing a battleground.” *Swadner*, 897 N.E.2d at 974 (quoting *Aylward v. Aylward*, 592 N.E.2d 1247, 1251 (Ind. Ct. App. 1992)). The primary concern of the courts with respect to legal custody is the welfare of the children and not the wishes of the parents. *Carmichael*, 754 N.E.2d at 635. Our determination of this appeal hinges upon this particularly important second factor.

[19] The record is replete with instances of support for the trial court’s findings and determination that joint legal custody was not in the best interest of the Child due to the parties’ hostile relationship. Mother and Father each conceded that they communicate poorly with another, disagree on virtually everything, and remain embroiled in numerous disputes. The parties argued over school choice, religious affiliation, appropriate caregivers, parenting time exchanges, additional parenting time, extra-curricular activities, and even Mother’s and the Child’s attire during video-telephone calls. Of particular note, Father proposed a parenting time schedule that would limit the Child’s interaction with R., from whom Father is estranged and with whom the Child is extremely close.

[20] Also, the trial court heard extensive testimony from GAL Rabiola regarding the parties' failure to demonstrate improvement in their ability to communicate during her tenure. Although GAL Rabiola testified that she believed that the parties could share joint legal custody with assistance from a parenting coordinator, she characterized the parties' coparenting dynamic as acrimonious, mistrustful, petty, and prioritizing the parties' needs over those of the Child. Tr. Vol. II pp. 21-22, 58, 59, 83. GAL Rabiola testified: ". . .[T]here is a lot of animosity between these parties that frankly has nothing to do with the [C]hild. [] I think that [] certainly carries over into their inability to communicate instead of focusing solely on [the Child], and what is best for her . . ." ⁷ *Id.* at 21.

[21] The instant record amply demonstrates that the parties have made child-rearing a battleground, and the breakdown in their communication has rendered joint custody untenable and not in the best interests of the Child. The trial court's findings in support of its denial of Father's petition for joint legal custody are not clearly erroneous. Moreover, the trial court heard the witnesses, observed their demeanor, and—in its sound discretion—awarded Mother sole legal custody of the Child. Under the circumstances, we decline to second-guess the trial court. Father's contentions on appeal—that Mother "'misused' and 'took

⁷ GAL Rabiola testified further that, although she initially attributed the animosity to "both of the [] [parties[,]]" the source of the animosity "appeared [over time] to be more Father than Mother. . . ." Tr. Vol. II p. 23.

advantage' of her role, prohibited Father from obtaining information . . . and excluded Father from major life events"—are invitations to reweigh the evidence, which we cannot do. *See* Father's Br. p. 12. The trial court did not clearly err in granting sole legal custody to Mother.

Conclusion

[22] The trial court did not clearly err in granting sole legal custody to Mother. We affirm.

[23] Affirmed.

Mathias, J., and Weissmann, J., concur.