Missouri Court of Appeals

Southern District

Division Two

IN THE INTEREST OF: BREANNA LYNN SUTTON, INDIVIDUALLY AND BY HER NEXT FRIEND, RALPH RAYMOND SUTTON, AND RALPH RAYMOND SUTTON, INDIVIDUALLY, Petitioner-Respondent, vs. ERIN NICOLE MCCOLLUM, Respondent-Appellant.	)	No. SD32021 **Filed: August 21, 2013**

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY

Honorable David G. Warren, Associate Circuit Judge

AFFIRMED

Erin Nicole McCollum ("Mother") appeals the trial court's judgment in a paternity action awarding sole legal custody and sole physical custody of the parties' minor child ("Child") to Ralph Raymond Sutton ("Father"). Her five points on appeal are without merit, and we affirm the trial court's judgment.

Standard of Review

In a court-tried case, we "must affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law." ***Noland-Vance v. Vance***, 321 S.W.3d 398, 402 (Mo. App. S.D. 2010). "In assessing the sufficiency of the evidence, we examine the evidence and the reasonable inferences derived therefrom in the light most favorable to the judgment." ***Id.*** "On appeal, we defer to the trial court's credibility determination." ***Id.*** "On the other hand, '[w]eight of the evidence refers to weight in probative value, not quantity or the amount of evidence.'" ***Houston v. Crider***, 317 S.W.3d 178, 186 (Mo. App. S.D. 2010). "An appellate court exercises extreme caution in considering whether a judgment should be set aside on the ground that it is against the weight of the evidence and will do so only upon a firm belief that the judgment was wrong." ***Noland-Vance***, 321 S.W.3d at 402-03 (quoting ***Simpson v. Strong***, 234 S.W.3d 567, 578 (Mo. App. S.D. 2007)).

Furthermore, "a trial court is vested with considerable discretion in determining custody questions[.]" ***Noland-Vance***, 321 S.W.3d at 403. "Only where the trial court's ruling is clearly against the logic of the circumstances or is arbitrary or unreasonable will an abuse of discretion be found." ***Hoffman v. Hoffman***, 870 S.W.2d 480, 483 (Mo. App. E.D. 1994).

Factual and Procedural Background

Mother and Father are both in the U.S. Army. The two began dating while both were assigned to Fort Bragg, North Carolina, during the summer of 2007. Mother

discovered she was pregnant in April 2008. Father ended the relationship shortly thereafter.

After the breakup, Mother moved to Marceline, Missouri. Father moved to Fort Leonard Wood, Missouri, in early October 2008. Child was born in St. Louis, Missouri, in late 2008. Shortly after Child was born, Father filed a paternity action. Father and Stepmother married in August 2010. Father and Stepmother moved back to North Carolina in November 2010. Mother moved to Kansas City, Missouri.

The parties stipulated to the appointment of the guardian ad litem preceding the trial. After a four-day hearing, the trial court granted sole legal custody and sole physical custody of Child to Father. Mother appeals.

Discussion

Mother raises five points on appeal. Specifically, she argues: (1) the trial court erred in awarding custody to Father and in ordering Stepmother would exercise Father's "custody/visitation" if Father were deployed; (2) the trial court erred in entering a custody order that separated Child from Mother's son from a previous relationship, the Child's half-brother; (3) the trial court erred in applying the Section 452.375.2 best interest factors in a paternity case; (4) the trial court misapplied the Section 452.375.2 best interest factors; and (5) the trial court erred in relying on the testimony of the guardian ad litem because the guardian ad litem was biased against Mother. For ease of analysis, we address Mother's legal arguments before addressing her factual arguments. Thus, we address Mother's points in the following order: Point I, Point III, Point V, and finally Points II and IV.

Point I: Deployment Provision

In her first point, Mother claims the trial court's decision was contrary to the law because it awarded custody to a non-parent even though Mother was a fit and suitable parent. We decline to address this argument because Mother invited the error about which she complains.

The following additional facts are relevant to our disposition of this point. After the hearings were concluded, the trial court circulated a proposed judgment for comments from the parties. Mother's attorney replied, sending the trial court a list of comments and proposed changes. Included in the list was a notation that both parties were "military and subject to deployments. What happens in this situation?" The copy of the letter in the legal file had the word "granted" written next to this concern.

In the parenting plan adopted with the final judgment, the trial court ordered that Father was to have sole legal custody and sole physical custody of Child. Mother was granted parenting time on alternating holidays, spring break, and for six weeks during summer vacation. If she resided within 250 miles of Father, Mother was also to receive alternating weekends as parenting time, and spring break was included in the alternating holiday schedule. The trial court's parenting plan also included the following provision regarding military deployment:

> In the event that either parent is deployed, the step-parent shall continue the custody/visitation of their spouse. For example, in the event Father is deployed, the minor child shall reside with her step-mother during all periods set out herein to Father. In the event that Mother is deployed, the minor child's step-father shall be entitled to exercise the custodial periods set out herein to Mother.

Mother subsequently filed a motion to reconsider or for a new trial. In that motion she did not raise any argument regarding the deployment provision.

"A party cannot complain on appeal about an alleged error in which that party joined or acquiesced at trial." ***In re Marriage of Angell***, 328 S.W.3d 753, 762 (Mo. App. S.D. 2010) (quoting ***In re Marriage of Gardner***, 973 S.W.2d 116, 126 (Mo. App. S.D. 1998)). That is, "[a] party cannot lead a trial court into error and then employ the error as a source of complaint on appeal." ***Hall v. Hall***, 345 S.W.3d 291, 296 (Mo. App. S.D. 2011) (quoting ***First Bank Centre v. Thompson***, 906 S.W.2d 849, 859 (Mo. App. S.D. 1995)). Appellate courts will not reverse a trial court on the basis of an invited error. *See, e.g.*, ***Angell***, 328 S.W.3d at 762; ***Hall***, 345 S.W.3d at 296; ***Torrey v. Torrey***, 333 S.W.3d 34, 39 (Mo. App. W.D. 2010); ***Roth v. Roth***, 760 S.W.2d 616, 618 (Mo. App. E.D. 1988).

In the present case, Mother asked the trial court to include a provision in the parenting plan to specify who would care for Child in the event the parties were deployed. Then, in her motion for new trial, Mother did not complain about the provision included at her request. The trial court was never given the opportunity to make any changes or corrections to the very point Mother had requested the court include in the order. Mother invited the error about which she now complains.[1]

Mother's first point is denied.

[1] In any event, we do not believe Mother's point is well-taken. Although perhaps inartfully worded, the provision Mother challenges addresses a common problem. In fact, the legislature has recently adopted legislation in this area, giving courts authority to create temporary custody orders to prepare for a parent's deployment and to allow delegation of a deployed parent's visitation. *See* H.B. 148, 97th Gen. Assemb. (Mo. 2013). The statute also allows for an expedited hearing to address the issues raised by a pending deployment. ***Id.***

Point III: Using the Section 452.375.2 Best Interests Factors in a Paternity Action

In her third point, Mother argues the trial court misapplied the law when it used the best interests factors from Section 452.375.2 because this case was a paternity action and not a dissolution action. Mother's argument is without merit.

"Section 452.375 governs the initial award of custody in paternity cases, as well as dissolution cases." ***Day ex rel. Finnern v. Day***, 256 S.W.3d 600, 602 (Mo. App. E.D. 2008). Other litigants have argued that the Section 452.375.2 best interests factors should not control the best interests determination in paternity cases because those factors are listed in the chapter governing dissolutions rather than in the chapter governing paternity actions. *See* ***Edmison ex rel. Edmison v. Clarke***, 988 S.W.2d 604, 611 (Mo. App. W.D. 1999). Missouri courts have rejected that argument. ***Id.*** "[I]n fact, our courts have specifically recognized that the needs and best interests of children are the same whether or not their parents are married[.]" ***Id.***

Mother's third point is denied.

Point V: Bias of the Guardian Ad Litem

In her fifth point, Mother claims the trial court erred in following the recommendation of the guardian ad litem because the guardian ad litem and the psychologist, Dr. Ann Duncan-Hively ("Dr. Duncan-Hively"), were biased. This argument is without merit.

The duties of the guardian ad litem are found in Section 452.423.3. The guardian ad litem is the legal representative of the child. § 452.423.3(1). The guardian ad litem is also required to investigate "in order to ascertain the child's wishes, feelings, attachments

and attitudes." § 452.423.3(2). As stated in ***In re Marriage of Sisk***, 937 S.W.2d 727 (Mo. App. S.D. 1996):

> [t]he role of the guardian ad litem involves more than perfunctory and shadowy duties. The guardian ad litem is supposed to collect testimony, summon witnesses and jealously guard the rights of infants, which is the standard of duty in this state. It is the guardian ad litem's duty to stand in the shoes of the child and to weigh the factors as the child would weigh them if his judgment were mature and he was not of tender years.

Id. at 733 (citations omitted). That is, contrary to Mother's argument, the statute does not require the guardian ad litem to be neutral. Rather the statute requires the guardian ad litem to be the child's representative. § 452.423.3(1). *See also* ***In re Adoption of F.C.***, 274 S.W.3d 478, 486 (Mo. App. S.D. 2008) (applying Section 453.025.4(1)).

As the guardian ad litem was not required to be neutral, the trial judge was entitled to weigh her testimony, including her potential bias and any deficiencies in her source material, the same as the trial judge weighed the testimony of other witnesses. It is the trial court's prerogative to assess the credibility of witnesses and resolve conflicts in the evidence, and we defer to that assessment. *See* ***Noland-Vance***, 321 S.W.3d at 418 n.15.

Mother's fifth point is denied.

Points II & IV: Best Interests Determination

Mother's remaining two points challenge the trial court's application of the best interests factors. In support of her second point, Mother argues "[t]here is no evidence in the record showing that separating the children of [Mother] was in the best interests of the minor child of this action." In support of her fourth point, Mother lists the eight factors and presents the evidence favorable to her position at trial. Both of these arguments are without merit because they ignore our standard of review.

"A claim that there is no substantial evidence to support the judgment or that the judgment is against the weight of the evidence necessarily involves review of the trial court's factual determinations." ***Pearson v. Koster***, 367 S.W.3d 36, 43 (Mo. banc 2012). "A court will overturn a trial court's judgment under these fact-based standards of review only when the court has a firm belief that the judgment is wrong." ***Id.*** We do not find that to be the case.

In determining the best interests of a child, the trial court must consider the following non-exclusive factors:

> (1) The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties;
>
> (2) The needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child;
>
> (3) The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests;
>
> (4) Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent;
>
> (5) The child's adjustment to the child's home, school, and community;
>
> (6) The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. If the court finds that a pattern of domestic violence as defined in [S]ection 455.010 has occurred, and, if the court also finds that awarding custody to the abusive parent is in the best interest of the child, then the court shall enter written findings of fact and conclusions of law. Custody and visitation rights shall be ordered in a manner that best protects the child and any other child or children for whom the parent has custodial or visitation rights, and the parent or other family or household member who is the victim of domestic violence from any further harm;
>
> (7) The intention of either parent to relocate the principal residence of the child; and

(8) The wishes of a child as to the child's custodian.

§ 452.375.2. Furthermore, "the trial court need not give greater weight to certain factors than to others." ***Dunkle v. Dunkle***, 158 S.W.3d 823, 833 (Mo. App. E.D. 2005). "In other words, there is no specific formula for how a trial court must weigh the non-exclusive list of best interest factors under [S]ection 452.375.2 when making its final custody determination." ***Id.***

Here, Mother's argument under these two points entirely ignores large portions of the testimony of Father, Dr. Duncan-Hively, and the guardian ad litem. Father testified he and Mother communicated through emails only because other types of communication led to fights. Father explained Mother was not cooperative with him regarding visitation matters, and he had to go to court every time the temporary custody order lapsed so that he would be able to see Child. Mother told Father she did not want him involved in Child's life.

During the proceedings, the guardian ad litem requested psychological evaluations of the parties. Dr. Duncan-Hively performed the evaluations. Dr. Duncan-Hively testified the parties could not communicate, and believed Father was the more nurturing parent. Dr. Duncan-Hively also observed Child interacting with Mother's son from a previous relationship ("Brother") who was several years older than Child. Dr. Duncan-Hively did not observe a close bond between Child and his half-brother.

The guardian ad litem testified to observing a phone call between Mother and Father in which Mother was "really hostile and really degrading" to Father. Mother told the guardian ad litem Father did not love Child. The guardian ad litem testified Mother was the most rigid and difficult to deal with parent she had ever worked with.

There was also a good deal of evidence that Father's relationship with Child was very positive. Dr. Duncan-Hively stated Child "appear[ed] particularly attached to [Father]." Child was warm and affectionate with Father. In contrast, Dr. Duncan-Hively did not observe Child seek out Mother for comfort and support. The guardian ad litem made similar observations. She testified "[t]here's just a difference between seeing [Child] with [Father] and [Child] with [Mother]."

There is sufficient testimony to support the trial court's findings and determinations regarding Child's best interests which is not mentioned in Mother's arguments. Consequently, her arguments are analytically useless. *See* ***Houston***, 317 S.W.3d at 188-89. Mother's second and fourth points are denied.

Decision

The trial court's judgment is affirmed.

MARY W. SHEFFIELD - OPINION AUTHOR

JEFFREY W. BATES, J. - CONCURS

DON E. BURRELL, C.J. - CONCURS