



Missouri Court of Appeals
Southern District
Division Two

T.J.W., Individually, and)
A.N.M.W., by T.J.W., as next friend,)
)
Respondents,)
) No. SD36296
vs.)
) FILED: December 17, 2020
K.T.,)
)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY

Honorable Kerry G. Rowden, Judge

REVERSED AND REMANDED WITH INSTRUCTIONS

K.T. (“Mother”) appeals the trial court’s judgment awarding T.W. (“Father”) joint legal and physical custody of the parties’ minor child (“Child”). Mother raises four points on appeal, the second of which—challenging the trial court’s failure to make required statutory findings under section 452.375¹—is dispositive. We reverse the judgment, do not reach Mother’s remaining points, and remand the case for further proceedings consistent with this opinion.²

¹ All statutory references are to RSMo Cum.Supp. 2018. All Rule references are to Missouri Court Rules (2020).

² Father filed a motion to dismiss Mother’s appeal or, in the alternative, strike her opening brief on the basis of alleged Rule 84.04 briefing violations. Because the alleged violations, if any, are not substantial enough to hinder our review, Father’s motion is denied.

Factual and Procedural Background

Child was born in July of 2015, and paternity was established through DNA testing. After Child's birth, Father and Mother each petitioned the trial court to resolve disputes concerning Child's custody, visitation, and support.

Following a two-day bench trial of the contested issues, the trial court issued its judgment. In pertinent part, the trial court awarded the parties "Joint Legal and Joint Physical Custody of their child with Mother/Father's address designated as the child's address for educational and mailing purposes subject to the *Court-Ordered Parenting Plan*[".]” The trial court then quoted each of the factors listed under section 452.375.2(1)–(8) and purported to address each factor in the context of this case. The statutory factors and associated factual findings, as set forth in the trial court's judgment *in toto*, are as follows:

1. Sub[division] (1): The wishes of the child's parents as to custody and the proposed parenting plan submitted by both parties. *This is not a factor due to both parents having the same desire.*
2. Sub[division] (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. *This factor weighs heavily in favor of the father as mother denied contact to the father and his family even though the[y] lived less than a ¼ a [sic] mile apart and had been family friends for approximately 20 years. The mother testified that on the one occasion that the father had asked for more time she told the father she wanted to follow the court order and not deviate from it. Her testimony that she wanted the father to have time with the child was not credible in light of the fact that the father was only allowed time with his child after Court hearings.*
3. Sub[division] (3): The interaction and interrelationship of the child with parents, siblings, and any other person who may significantly affect the child's best interests. *Not a factor.*
4. Sub[division] (4): Which parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent. *This factor weighed in favor of the Father.*

5. Sub[division] (5): The child's adjustment to the child's home, school and community. *Not a factor.*
6. Sub[division] (6): The mental and physical health of all individuals involved, including any history of abuse of any individuals involved. *Not a factor.*
7. Sub[division] (7): The intention of either parent to relocate the principal residence of the child. *Not a factor.*
8. Sub[division] (8): The wishes of the child as to the child's custodian. *Not a factor due to the age of the child.*

(Italics added to designate trial court factual findings).

The trial court further made findings and issued an award of child support. On this issue, the trial court stated, *in toto*, the following:

The Court reviews each Form 14 filed by the parties and accepts the Father[']s proposed parenting plan but finds that the Father[']s presumed amount of child support is unjust and inappropriate based upon the parenting time in the *Courts Parenting Plan* and orders child support as follows: \$300 a month until August 11, 2019[,] as set forth [i]n the Parenting Plan.

Thereafter, Mother filed a "Motion to Vacate, Correct, Amend and/or Modify the Judgment" ("motion to amend"). Mother alleged, in pertinent part, that the trial court "failed to make the necessary findings of the relevant factors as to allow meaningful review of the decision" and that "[t]he factors are cursorily addressed with mostly conclusions, without evidentiary support." Mother then went on to identify subdivisions (1), (2), (4), (5), and (6) and listed evidence under each that the trial court's judgment allegedly ignored. In addition, Mother alleged that the trial court erroneously deviated from Form 14 in making its child support determination.

Ninety days later, the motion to amend was deemed overruled. *See* Rule 81.05(a)(2)(A). Mother timely appeals.

Standard of Review

On review of a bench-trying case, this Court will affirm the trial court's judgment, unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or misapplies the law. *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. banc 1976). On appeal, "[t]his Court applies *de novo* review to questions of law decided in court-trying cases." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). "With respect to such questions, "the appellate court reviews the trial court's determination independently, without deference to that court's conclusions.'" *Id.* at 44 (quoting *Moore v. Bi-State Dev. Agency*, 132 S.W.3d 241, 242 (Mo. banc 2004)).

Discussion

We begin with Mother's second point, which is dispositive of this appeal. That point contends:

The trial court erred as a matter of law in issuing equal time, week on-week off *because* it abused its discretion under [section] 452.375, *in that* the court failed to sufficiently detail the specific relevant factors showing the plan was in the best interests of the child and supported the public policy of Missouri and failed to explain the court's reasoning for rejecting both parents' proposals regarding custody and parenting time.^{3]}

To the extent her claim is preserved, we agree with Mother that the trial court erred in failing to make required statutory findings under section 452.375.

Section 452.375.6 provides, in relevant part:

If the parties have not agreed to a custodial arrangement, or the court determines such arrangement is not in the best interest of the child, the court *shall* include a written finding in the judgment or order based on the public policy in subsection 4 of this section and each of the factors listed in subdivisions (1) to (8) of

³ The claim in Mother's point that the trial court "erred as a matter of law" in failing to make findings under section 452.375 is, as confirmed by the standard of review and argument sections of her brief, a claim that the trial court misapplied the law. In reviewing such a claim, the correct standard of review is *de novo*. See *Pearson*, 367 S.W.3d at 43. The claim in Mother's point that the trial court "abused its discretion[.]" which is inconsistent with the applicable standard of review, *supra*, appears to be a superfluous mistake because it is not expounded upon or otherwise addressed in her brief.

subsection 2 of this section detailing the specific relevant factors that made a particular arrangement in the best interest of the child. If a proposed custodial arrangement is rejected by the court, the court *shall* include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement.

(Emphasis added); *see also Buchanan v. Buchanan*, 167 S.W.3d 698, 701 n.3 (Mo. banc 2005) (recognizing that section 452.375.6 puts the burden on the court to issue written findings instead of on the parties as is generally the case under Rule 73.01(c)). In other words, “[s]o long as any issue or sub-issue of custody is subject to contest between the parties and resolution by the court, written findings that include discussion of the applicable factors from section 452.375.2 are required.” *Buchanan*, 167 S.W.3d 701. “While the trial court need not discuss factors that are not relevant, it is required to discuss those that are.” *Davis v. Schmidt*, 210 S.W.3d 494, 503 (Mo.App. 2007).

Here, the record reflects that the parties had not agreed to a custodial arrangement. The trial court, therefore, was required to make findings as to all of the factors in section 452.375 that were relevant to its custody determination. Only the trial court’s findings as to the factors in section 452.375.2(2) and (4), however, have been properly preserved by Mother for appellate review.

In her brief, Mother also challenges the trial court’s failure to make statutory findings addressing the following: (1) the public policy considerations of section 452.375.4; and (2) the latter requirement in section 452.375.6 that “[i]f a proposed custodial arrangement is rejected by the court, the court shall include a written finding in the judgment or order detailing the specific relevant factors resulting in the rejection of such arrangement.” These claims, however, were not previously raised in Mother’s motion to amend and, therefore, are not preserved for appellate review. *See* Rule 78.07(c); *Cule v. Cule*, 457 S.W.3d 858, 863 (Mo.App. 2015) (finding the claim that the trial court failed to make written findings required by section 452.375.6 was

unpreserved because it was not raised in a motion to amend the judgment under Rule 78.07(c)). Further, even though Mother's motion to amend did raise claims concerning the trial court's findings, or lack thereof, under subdivisions (1), (2), (4), (5), and (6) of section 452.375.2, Mother's argument under this point on appeal only addresses the trial court's findings under subdivisions (2) and (4). Accordingly, we deem her claims as to subdivisions (1), (5), and (6) abandoned.

Turning to the two factors at issue, the trial court addressed the former—"[t]he 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"—as follows:

This factor weighs heavily in favor of the father as mother denied contact to the father and his family even though the[y] lived less than a ¼ a [sic] mile apart and had been family friends for approximately 20 years. The mother testified that on the one occasion that the father had asked for more time she told the father she wanted to follow the court order and not deviate from it. Her testimony that she wanted the father to have time with the child was not credible in light of the fact that the father was only allowed time with his child after Court hearings.

As for the latter factor—"[w]hich parent is more likely to allow the child frequent, continuing and meaningful contact with the other parent"—the trial court merely found that "[t]his factor weighed in favor of the Father."

These two factors are significant in that they were the only factors listed under section 452.375.2 that the trial court considered to be relevant to its custody determination. Although the trial court indicated that both factors weighed in favor of Father, it failed, however, to then adequately explain its basis for that conclusion. The trial court provided some discussion, under section 452.375.2(2), that was only applicable to Mother and, more specifically, the likelihood of her allowing Father contact with Child. The trial court failed, however, to make any findings as to Father or, more generally, to "the ability and willingness of parents to actively perform their

functions as mother and father for the needs of the child[.]” Section 452.375.2(2). Furthermore, the trial court’s attempt to address section 452.375.2(4) was wholly deficient in that it provided no discussion whatsoever supporting its conclusion.

“A ‘checklist’ which merely lists the best interest factors enumerated in [section] 452.375.2, and indicates which parent each factor favors, is insufficient to comply with the statutory mandate.” *Hall v. Hall*, 336 S.W.3d 188, 193 (Mo.App. 2011). “The purpose for the statutory requirement to detail the factors is to allow for more meaningful appellate review.” *Huber ex rel. Boothe v. Huber*, 174 S.W.3d 712, 716 (Mo.App. 2005). “The failure to make findings of fact requires reversal and remand under *Buchanan* as the burden is upon the court to issue written findings.” *Id.* at 717 (citing *Buchanan*, 167 S.W.3d at 702). Accordingly, Mother’s second point is granted.

Mother raises three additional points. In those points, she contends that the trial court’s custody determination is not supported by substantial evidence (point 1), is against the weight of the evidence (point 3), and that the trial court’s child support award is against the weight of the evidence (point 4). The absence of adequate written findings as to the factors in section 452.375.2(2) and (4), however, hinders our ability to review sufficiency and weight of the evidence claims that, as is the case here, arise out the trial court’s custodial determination. We, therefore, refrain from reviewing Mother’s points 1, 3, and 4. *See Huber*, 174 S.W.3d at 717 (refraining from reviewing an against-the-weight-of-the-evidence challenge to a custody determination where the trial court failed to make required findings under section 452.375).

Decision

The trial court’s judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

GARY W. LYNCH, J. – OPINION AUTHOR

JEFFREY W. BATES, C.J./P.J. – CONCURS

DON E. BURRELL, J. – CONCURS