



In the Missouri Court of Appeals Eastern District

DIVISION IV

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|-------------------|---|-------------------------------|
| KAREN M. BROWN, |) | No. ED98353 |
| |) | |
| Respondent, |) | Appeal from the Circuit Court |
| |) | of St. Charles County |
| vs. |) | |
| |) | Honorable Ted Clint House |
| ANTHONY T. BROWN, |) | |
| |) | |
| Appellant. |) | FILED: December 26, 2012 |

Introduction

Anthony Brown (“Father”) appeals from the judgment of the trial court ordering that he and Karen Brown (“Mother”) pay Christine Miller Hendrix (“Hendrix”) for her services as guardian ad litem. Hendrix sought payment of fees for time she spent preparing an appellate brief she filed in response to an appeal filed by Father from the trial court’s judgment. Father argues the trial court lacked authority to order the payment of guardian ad litem fees for Hendrix’s involvement in the appellate proceedings. Father further alleges that the trial court erred because Hendrix failed to produce evidence that she earned reasonable guardian ad litem fees for performing necessary services for the benefit of the minor children. Because no legal authority exists permitting the trial court to appoint Hendrix to participate in Father’s appeal of the trial court’s judgment relating to child custody, or order payment of Hendrix’s fees for same,

we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

Factual and Procedural History

Hendrix was appointed guardian ad litem for the minor children under Section 452.423¹ in connection with post-dissolution child custody proceedings between Father and Mother. Hendrix was appointed by the trial court after Mother alleged abuse or neglect of the children by Father. In January 2011, the trial court entered a judgment ordering Father to pay child support, court costs, and guardian ad litem fees. Father filed a notice of appeal of that judgment in March 2011.

In September 2011, in response to Father's notice of appeal, Hendrix filed a "Motion to Secure Costs on Appeal" with the trial court. In her motion, Hendrix asked the trial court to order Father or Mother, jointly or severally, to pay her \$5,000 so that she could draft an appellate brief in connection with Father's appeal. Hendrix asserted she felt "compelled to file a responsive brief in the Court of Appeals" because Father's notice of appeal set forth issues involving the minor children and her role as guardian ad litem. Hendrix stated her intention was to address Father's claim that the trial court erred by accepting the guardian ad litem's custody recommendations and allocating the guardian ad litem fees. Hendrix claimed that such undertaking would "require significant amounts of time to fully research and brief, plus additional time expended on additional matters including compliance with briefing and filing rules, oral argument, etc."

The trial court granted Hendrix's motion and ordered Father and Mother to each advance \$2,500 to Hendrix. Father sought a writ of prohibition with this Court to prohibit the trial court

¹ All statutory references to RSMo. Cum. Supp. (2007) unless otherwise noted.

from entering the order granting Hendrix's motion to secure costs, which was denied. The Missouri Supreme Court also denied Father's motion for writ of prohibition.

Neither party to the appeal paid Hendrix as ordered by the trial court. Hendrix then filed another motion with the trial court asking the court to order payment of \$4,698 for 26.10 hours of "legal services rendered, and anticipated to be rendered" at the court-ordered guardian ad litem rate of \$180 per hour. At a hearing on the matter, Hendrix submitted a revised statement of her fees, which increased the total to \$6,228 for 34.60 hours of work. In its Judgment and Order, the trial court granted Hendrix's motion and authorized her to disburse \$2,500 from her trust account. The trial court further ordered Mother to pay Hendrix \$2,500 and Father to pay Hendrix the remaining \$1,228. Father now appeals that judgment.

Points on Appeal

Father presents two points on appeal. Father first argues that the trial court erred in ordering the parties to pay Hendrix for the actions taken by Hendrix in Father's appeal of the trial court's judgment. Father submits that the trial court erred in ordering payment of such fees because the guardian ad litem appointed for the trial court proceedings has no legal authority to participate in Father's appeal from the trial court's judgment. In his second point on appeal, Father alleges that, even if we find that Hendrix was authorized to participate in Father's appeal, the trial court erred in ordering payment of her fees because the judgment is not supported by substantial evidence that Hendrix earned reasonable guardian ad litem fees while rendering necessary services for the benefit of the minor children.

Standards of Review

Our review of a trial court's judgment is governed by Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Hihn v. Hihn, 235 S.W.3d 64, 67 (Mo. App. E.D. 2007). This standard of

review requires us to affirm the judgment of the trial court unless there is no substantial evidence to support it, it is against the weight of the evidence, or the trial court erroneously declared or applied the law. Id.

This Court reviews an award of guardian ad litem fees in a child custody or child support case for an abuse of discretion. Wightman v. Wightman, 295 S.W.3d 183, 192 (Mo. App. E.D. 2009).

Discussion

This appeal presents the following case of first impression: Does a guardian ad litem appointed in a child custody proceeding under Section 452.423 have the authority to unilaterally interject herself into an appeal from a trial court judgment, and does the trial court have the authority to order the parties to pay the guardian ad litem's appellate-related fees? While we are aware of appellate proceedings in which a guardian ad litem has participated, we are not aware of any cases addressing the legal authority or right of a guardian ad litem to participate in an appeal from a Section 452.423 child custody proceeding, or the trial court's authority to order a party to the appeal to pay the guardian ad litem's appellate-related fees.

Father's primary focus in his appeal is Hendrix's lack of authority to continue her role as guardian ad litem beyond the trial proceedings for which she was appointed, and to interject herself into Father's appeal from the trial court's judgment and disposition of the child custody issues.

In construing a statute, we must presume nothing that is not expressed. Allcorn v. Tap Enterprises, Inc., 277 S.W.3d 823, 828 (Mo. App. S.D. 2009) (citing 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008)). A statute is operative only on matters affirmatively pointed out by its terms, and to cases that fall fairly within its letter. Id. (citing 3 Sutherland Statutory

Construction § 58:2 (6th ed. 2008)). The clear, plain, and obvious meaning of the language should be used, and the statute should not be applied to situations or parties not clearly within its provisions. Id.

Section 452.423 enumerates the duties of a guardian ad litem in child custody proceedings. Under Subsection 3, the guardian ad litem shall:

- 1) Be the legal representative of the child at the hearing, and may examine, cross-examine, subpoena witnesses and offer testimony;
- 2) Prior to the hearing, conduct all necessary interviews with persons having contact with or knowledge of the child in order to ascertain the child's wishes, feelings, attachments and attitudes. If appropriate, the child should be interviewed;
- 3) Request the juvenile officer to cause a petition to be filed in the juvenile division of the circuit court if the guardian ad litem believes the child alleged to be abused or neglected is in danger.

Section 452.423.3. The statute does not provide authority for the guardian ad litem to represent the interests of the children on appeal. See Section 452.423. Rather, the guardian ad litem's role is limited to performing duties at the trial court level.

The legislature did, however, contemplate the participation of a guardian ad litem in appellate review in other contexts and proceedings. For example, in an action to terminate parental rights, a guardian ad litem is expressly authorized to initiate an appeal of any disposition that he or she determines to be adverse to the best interests of the child. Section 211.462.3(1), RSMo. Cum. Supp. (2012). Similarly, in cases involving adoption and foster care, specific statutory authority is granted to a guardian ad litem to initiate an appeal of any disposition that he or she determines to be adverse to the interests of the party he or she represents. Section 453.025.4(2), RSMo. Cum. Supp. (2012). In contrast to these two statutes, we note the absence

of any authority granted to the guardian ad litem appointed under Section 453.423 to appeal the trial court's disposition of child custody issues.

“It is well settled, in interpreting a statute, that the legislature is presumed to have acted intentionally when it includes language in one section of a statute, but omits it from another.” Denbow v. State, 309 S.W.3d 831, 835 (Mo. App. W.D. 2010) (quoting State v. Bass, 81 S.W.3d 595, 604 (Mo. App. W.D. 2002)). Such exclusion of particular language is “powerful evidence of legislative intent.” Id.; see also Whitelaw v. Dir. of Revenue, 73 S.W.3d 731, 735 (Mo. App. E.D. 2002). The legislature's omission of a clause granting a guardian ad litem authority to appeal the disposition of a child custody matter, in contrast to the legislature's express grant of authority for a guardian ad litem to appeal in termination of parental rights or adoption cases, is persuasive authority that the legislature did not intend to empower the guardian ad litem to appeal dispositions of child custody matters under Section 453.423.

“To cite the silence of the statute, however, does not end the inquiry.” State ex rel. Rowland Group, Inc. v. Koehr, 831 S.W.2d 930, 931 (Mo. banc 1992). The rules of statutory construction require that we reasonably interpret the statute with the legislative objective in mind. Id.

In a proceeding for child custody, the trial court has broad discretion to award custody in accordance with the best interests of the children. Dunkle v. Dunkle, 158 S.W.3d 823, 833 (Mo. App. E.D. 2005). Indeed, what is in the best interests of the children is the overriding concern of the trial court when considering child custody issues. Where child abuse or neglect is alleged, the trial court must appoint a guardian ad litem to represent the best interests of the children and to advocate objectively on their behalf. See Section 452.423.2. The purpose behind appointing a guardian ad litem in custody matters is to fill a void created by the inherently biased interests of

parents who are fighting for custody of their children. State ex rel. Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo. App. E.D. 1993).

Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the ‘best interests of the child,’ has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents. Unhampered by the *ex parte* and other restrictions that prevent the court from conducting its own investigation of the facts, the guardian ad litem essentially functions as the court’s investigative agent, charged with the same ultimate standard that must ultimately govern the court’s decision—*i.e.*, the ‘best interests of the child.’

Id. at 384.

In State ex rel. Bird v. Weinstock, this Court explained that the guardian ad litem is an agent or arm of *the trial court*, to which it owes its principal duty of allegiance. Id. at 384. “[U]nder our statutory scheme for adjudication of custody disputes, it is imperative that the guardian ad litem investigate and present its perspective to the trial judge, thereby enabling the court to render a decision in accordance with the statutory standard of ‘best interests of the child.’” Id. at 385. The guardian ad litem serves until the matter is concluded or, if the guardian ad litem fails to perform as required, the trial court judge must discharge the guardian and appoint another. Section 452.423.4; Mo. Sup. Ct. Order of Aug. 29, 2011, “Standards with Comments for Guardians ad Litem in Juvenile and Family Court Division Matters.” Ultimately, it is the responsibility of the trial judge, not the guardian ad litem, to determine the best interests of the child and to award custody of the child in accordance with those interests.

Once the trial court renders its judgment, the duties of the guardian ad litem as provided by the legislature under Section 452.423 are complete. Upon final judgment, an aggrieved party may appeal the trial court’s disposition of the child custody matters to this Court. See Section 512.020. On appeal, this Court reviews the judgment of the trial court to determine whether its

custody determination is supported by substantial evidence. Dunkle, 158 S.W.3d at 832. In doing so, we review the entire record, including the recommendations of the guardian ad litem. See id. at 832-33. Because the guardian ad litem's opinions and recommendations are part of the trial court record, available for this Court's review, the guardian ad litem's continued representation of the best interests of the children on appeal is neither necessary nor authorized.

We further note that while an aggrieved party may appeal the trial court's custody determination, minor children are not parties to their parents' divorce or custody proceedings. See Section 512.020; Rowe v. Rowe, 218 P.3d 887, 890 (Okla. 2009). In the matter at hand, Father was the appellant and Mother was the respondent. As the aggrieved parties, Father and Mother were the only parties allowed by statute to appeal the trial court's judgment. See Section 512.020.²

While Rowe is not binding precedent on this court, we find its analysis instructive. A guardian ad litem is not a party to the proceeding, as he or she is not personally aggrieved by the trial court's judgment. The guardian ad litem has no personal stake in the outcome of the litigation, and he or she is not aggrieved by the trial court's decision to follow or not follow his or her custody recommendations. See Rowe, 218 P.3d at 891. Whether on behalf of the children

² A brief may also be filed, with leave of court, by an amicus curiae, *i.e.*, "friend of the court." See Mo. R. A. Ct. E.D. Rule 375. Generally, an amicus curiae is one who volunteers or who is appointed to assist the court with a matter of law, as distinguished from a partisan advocate. See City of Kansas City v. Kindle, 446 S.W.2d 807, 818 (Mo. 1969). Where the amicus is not an advisor to the court, but rather is representing private litigants who have a direct interest in the outcome of the case, the amicus must look to the party for which he or she is advocating for compensation. See id. In such a case, the amicus is not entitled to have his or her fee taxed as costs to the parties to the litigation. See id. Here, Hendrix was not appointed by this Court to advise us as to the children's best interests. As discussed above, Hendrix's job was complete when the trial court entered its judgment. Therefore, even if Hendrix had requested leave of this court to submit a brief as an amicus curiae, she was not entitled to receive compensation for her efforts from Father or Mother.

or on his or her own behalf, the guardian ad litem has no legal right to participate in an appeal of the trial court's judgment in a child custody matter.³

As noted previously, we are aware of reported cases where a guardian ad litem has participated in an appeal taken by the parties from a judgment involving child custody issues. See e.g., Francka v. Francka, 951 S.W.2d 685 (Mo. App. S.D. 1997). However, to our knowledge, this appeal is the first to challenge the authority of the guardian ad litem to so act. In this case of first impression, we have found no statute or judicial decision authorizing Hendrix's participation in the appeal filed by Father from the trial court's disposition of child custody issues, or authorizing the trial court to order the parties to pay Hendrix's fees relating to such participation. The lack of authorization in Section 452.423, in contrast to the express grant of authority provided in Sections 453.025 and 211.462, is strongly indicative of the legislature's intent to disallow a guardian ad litem to appeal the disposition of child custody matters. Moreover, the limited role of the guardian ad litem *as an arm of the trial court* further supports this conclusion.

In light of the foregoing considerations, we hold that no legal authority exists allowing Hendrix to participate in Father's appeal of the trial court's disposition of child custody issues between Father and Mother, or requiring payment of her fees by either party. The trial court erred in ordering Father and Mother to pay Hendrix her fees and costs on appeal. Because the court erred in this respect, we need not reach Father's second point regarding the reasonableness of Hendrix's fees.

³ We deem it inconsequential that the guardian ad litem did not initiate this appeal. Regardless of the role the guardian ad litem chose to pursue in the appeal, she lacks authority to so act.

Conclusion

The judgment of the trial court is reversed and remanded. We remand this matter to the trial court with directions for the trial court to take the necessary action to order the guardian ad litem to return to Father and Mother all monies paid to the guardian ad litem or disbursed from the guardian ad litem's trust account for her services rendered in connection with the appeal of the trial court's judgment, and for any other proceedings consistent with this opinion.


Kurt S. Odenwald, Judge

Lawrence E. Mooney, P.J., Concur in separate opinion.
Patricia L. Cohen, J., Concur



**In the Missouri Court of Appeals
Eastern District**

DIVISION FOUR

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| Respondent, |) | Appeal from the Circuit Court |
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| |) | Honorable Ted C. House |
| ANTHONY T. BROWN, |) | |
| |) | |
| Appellant. |) | Filed: December 26, 2012 |

CONCURRING OPINION

In *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. App. E.D. 1993), we held:

“Absent the assistance of a guardian ad litem, the trial court, charged with rendering a decision in the ‘best interests of the child,’ has no practical or effective means to assure itself that all of the requisite information bearing on the question will be brought before it untainted by the parochial interests of the parents.”

The appellate court, like the trial court, profits greatly from the participation of a guardian ad litem whose sole focus is the best interests of the child. And, as the principal opinion acknowledges, a guardian ad litem appointed by a trial court has traditionally been allowed to participate in appellate proceeding in child-custody disputes.

I write separately in the hope that the Supreme Court or the legislature will authorize the participation of guardians ad litem in our appellate courts. I reluctantly concur in the principal opinion.

Lawrence E. Mooney

LAWRENCE E. MOONEY, PRESIDING JUDGE