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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001046-ME

GWENDOLYN SMITH OREN — APPELLANT

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 13-CI-00556

RICHARD OREN AND
STEPHANIE OREN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES AND THOMPSON, JUDGES.

DIXON, JUDGE: Gwendolyn Smith Oren appeals from an order of the Shelby Circuit Court granting Richard and Stephanie Oren grandparent visitation. We affirm.

Richard and Stephanie are the paternal grandparents of Z.O. Shortly after the birth of Z.O., the Cabinet removed the baby from the custody of his

parents, Gwendolyn and Richard Oren, Jr., due to domestic violence and other allegations of neglect. Z.O. was ultimately placed in the temporary custody of Richard and Stephanie for five months. Z.O. was returned to Gwendolyn's custody in October 2013; thereafter, Gwendolyn refused to allow Richard and Stephanie to have any visitation with Z.O.[1] Richard and Stephanie filed a petition for grandparent visitation, and the court held a hearing on the matter in April 2014. The court concluded grandparent visitation was in Z.O.'s best interest and awarded Richard and Stephanie visitation one Saturday per month. This appeal followed.

We first note the record on appeal consists only of the written record and does not include a copy of any videotaped proceedings. Pursuant to CR 98(2): "Upon the filing of a notice of appeal, one of the two video recordings, or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal." *See also Smith v. Smith*, 450 S.W.3d 729, 732 (Ky. App. 2014) (failure to request any recordings to be certified precludes them from being part of the appellate record). It was Gwendolyn's responsibility, as the appellant, to ensure that the record on appeal is "sufficient to enable the court to pass on the alleged errors." *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court."

[1] Gwendolyn and Richard Oren, Jr., were eventually divorced by decree entered in April 2014. By that time, Richard Jr. had moved to a different state and did not participate in the grandparent visitation proceedings.

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). Accordingly, we assume the evidence presented at the hearing supports the trial court's decision to grant grandparent visitation to Richard and Stephanie.

Next, we must address the deficiencies contained in Gwendolyn's appellate brief. In her "Statement of the Case," she failed to cite the record to support her narrative statement. CR 76.12(4)(c)(iv). As a result of this error, we are left with Gwendolyn's bare assertions as to the facts and evidence without any way of determining where (or if) this information is actually located in the record. In the "Argument" portion of her brief, Gwendolyn failed to include a statement of preservation for any of her appellate arguments. CR 76.12(4)(c)(v) requires ". . . at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Gwendolyn's arguments relate to procedural errors and the sufficiency of the evidence; however, there is no indication these alleged errors were preserved for appellate review. "The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985). We decline to address these unpreserved claims.

Finally, we review the relevant legal standard for grandparent visitation. Pursuant to KRS 405.021(1), a circuit court "may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue

any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so." In *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004), this Court addressed the application of the grandparent visitation statute, noting:

> We believe that a modified 'best interest' standard can be used in cases where grandparent visitation is sought within the constitutional framework of *Troxel* [*v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)]. What *Troxel* requires us to recognize is that a fit parent has a superior right, constitutionally, to all others in making decisions regarding the raising of his or her children, including who may and may not visit them. A fit parent's decision must be given deference by the courts, and courts considering the issue must presume that a fit parent's decision is in the child's best interest.

Id. at 294. *Vibbert* further established that a grandparent must present clear and convincing evidence that visitation is in the child's best interest, and several factors are relevant to that analysis, including:

> the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; the wishes and preferences of the child.

Id. at 295.

In *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), the Supreme Court approved the *Vibbert* analysis and added as an additional consideration the motivation of the parents and grandparents participating in the visitation action.

Id. at 871. The Court explained that the "grandparent can rebut the presumption that a fit parent acts in the child's best interest by presenting proof that the parent is not actually acting in the child's best interest." *Id*. at 872.

In the case at bar, although we cannot review the testimony from the hearing, we have reviewed the written record. Further, we "must assume that the omitted record supports the decision" to grant visitation to Richard and Stephanie. *Thompson*, 697 S.W.2d at 145. In its order, the trial court set forth the proper legal standards pursuant to *Vibbert* and *Walker*, including the considerations required by the best interest analysis. The court indicated that Gwendolyn's testimony against Richard and Stephanie lacked credibility and appeared to be motivated by spite. The court noted that Z.O. had lived with Richard and Stephanie for the first five months of his life and that they were the most stable people in Z.O.'s immediate family. The court also noted that testimony from Samantha Oerther, the supervisor for the Cabinet's office in Shelby County, indicated that grandparent visitation would be good for Z.O. In granting grandparent visitation, the court concluded that Richard and Stephanie presented clear and convincing proof that Gwendolyn was not actually acting in Z.O.'s best interest when she denied visitation. We are mindful that the trial court was in the best position to assess the credibility of the testimony and evidence presented at the hearing. CR 52.01. After careful consideration, we are not persuaded the court erred by granting grandparent visitation to Richard and Stephanie.

For the reasons stated herein, the judgment of the Shelby Circuit Court is affirmed.

JONES, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Susan M. Meschler
Shelbyville, Kentucky

NO BRIEF FOR APPELLEES