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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001601-ME

C.M.K., BIOLOGICAL FATHER OF K.M.S. APPELLANT

v. APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE TIMOTHY FEELEY, JUDGE
ACTION NO. 06-AD-00008

CABINET FOR HEALTH AND FAMILY SERVICES; THE TRIMBLE COUNTY ATTORNEY; K.M.S. (MINOR CHILD); AND THE BIOLOGICAL MOTHER, A.S. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,[1] SPECIAL JUDGE.

NICKELL, JUDGE: C.M.K. (Father) has appealed from the May 8, 2007, order of the Trimble Family Court which terminated his parental rights to K.M.S.,[2] (Child) his biological daughter. For the following reasons, we affirm.

[1] Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

[2] Pursuant to the policy of this court, in order to protect the privacy of minor children, we refer to them only by their initials.

Child was born on October 16, 1999, to A.M.S. (Mother). The child's birth certificate listed C.L.S. as her father. Mother and C.L.S. married on May 25, 2000, and resided with the child in Trimble County, Kentucky. At some point, Mother and Child moved to Taylor County, Kentucky, to live with the maternal grandmother, C.A. In late 2001, shortly after Father was released from prison, paternity testing revealed Father was actually the biological father of Child.

On April 19, 2002, C.A. petitioned the Taylor Circuit Court to grant her custody of Child. Following a hearing held on July 9, 2002, the Taylor Circuit Court entered an order on August 2, 2002, declaring C.A. to be the *de facto* custodian of Child, ordering C.A. to share joint custody of the child with Father, and setting a visitation schedule. On January 27, 2003, the Taylor Circuit Court entered an order awarding Father custody and granting C.A. visitation.

On November 3, 2003, after learning Father was again incarcerated, C.A. filed a motion for custody of the child, which was granted by the Taylor Circuit Court by order entered December 3, 2003. N.M., the paternal grandmother, was awarded visitation with the child. Sometime in early 2005, C.A. moved to Florida and left Child with another of her daughters, R.D., who resided in Trimble County, Kentucky. Mother was released from prison about the same time and sought to regain custody of the minor child, although she did not do so through the courts.[3] Her attempts were unsuccessful.

[3] The record does not reflect what steps she actually took in seeking to regain custody of the child.

On April 18, 2005, R.D. filed a dependency, abuse and neglect petition in the Trimble Circuit Court, alleging Child was dependent because C.A. had moved out of state and left the child with her. The Trimble Circuit Court held a temporary custody hearing attended by R.D. and Mother and awarded R.D. temporary custody of the child who was then residing in Trimble County and was enrolled in the Trimble County Head Start program.

On March 15, 2005, Father and N.M. jointly filed a motion in the Taylor Circuit Court to have C.A. found to be in contempt for her failure to allow visitation with the child. On April 25, 2005, the Taylor Circuit Court entered an order awarding Father and N.M. temporary custody of the child, although no such request had been made. Following entry of this order, the Taylor Circuit Court held no further hearings and entered no further substantive orders regarding the child.

Following the entry of the conflicting custody orders, the two judges conferred and decided to transfer the Taylor Circuit Court action to Trimble County, because the child was then residing there and none of the parties were residing in Taylor County.[4] On May 3, 2005, an order was entered transferring the Taylor Circuit Court action to Trimble County. After the record was transmitted to Trimble Circuit Court, no further action was taken in the Taylor County matter.

[4] The record does not contain any explanation of the authority upon which the judges relied in making their decision to transfer the Taylor County action.

On May 31, 2005, the dependency action filed in Trimble County was merged with the earlier custody matter.

On June 14, 2005, the Cabinet for Health and Family Services ("Cabinet") filed a petition for dependency, abuse and neglect, alleging Child was both dependent and neglected. Father was listed on the petition as the child's father, but his address was listed as "unknown." Father was made aware of the matter during a meeting with Heather Waldridge ("Waldridge"), the social worker assigned to the case. On June 20, 2005, following an emergency custody hearing attended by Mother and N.M., the trial court entered an order awarding temporary custody of the child to the Cabinet. An adjudication hearing was held on July 25, 2005, wherein the trial court found Child to be a neglected child pursuant to the definition set forth in KRS[5] 600.020 and ordered her to remain in foster care.

On December 12, 2005, the trial court conducted a disposition hearing. C.A. and N.M. attended, but Mother and Father were both incarcerated at that time and were unable to attend. The court found the child to have had a tumultuous life and to have suffered greatly from the numerous home placements and great instability. The court then committed Child to the care of the Cabinet where she remains.

On April 3, 2006, Father and N.M. filed a joint petition requesting reconsideration of the decision placing the child in the Cabinet's care, and requesting that N.M. regain custody. On August 21, 2006, Father informed the

[5] Kentucky Revised Statutes.

court in a written motion he had been released from incarceration and was seeking visitation with his child. N.M. joined in the motion and requested increased and unsupervised visitation. A hearing was held on the motions on November 13, 2006. Father was again unable to attend as he was being detained for violating his parole. Following the hearing, the court denied the motions.

On November 9, 2006, the Cabinet filed a petition for involuntary termination of parental rights against Mother, C.L.S., and Father. A trial was held on April 30, 2007, with Mother and Father being present[6] and represented by counsel. At the opening of the hearing, Father made an oral motion challenging the court's "venue jurisdiction" because the Taylor Circuit Court case had been pending when the instant action was filed. No statute or case law was cited in support of the challenge. In overruling the motion, the trial court stated the child resided in Trimble County at the time the action was filed and thus venue and jurisdiction were proper. The trial court further noted the matter had been pending in his court for a substantial amount of time. The trial on the merits then proceeded.

The court heard testimony from Waldridge; Vivian Levin ("Levin"), the child's therapist; Tracy Beckett, the foster mother; Mother;[7] and Father.

[6] C.L.S. did not appear at the trial. However, prior to that date, he executed an affidavit voluntarily terminating any parental rights he had or might have had to Child by virtue of his name being placed upon her birth certificate.

[7] Mother is not a party to this action and her testimony is irrelevant to this appeal. Therefore, we will limit our discussion of her statements to those necessary to render our opinion.

Waldridge testified regarding the procedural history leading up to the Cabinet's involvement with this family and ultimately being awarded custody of the child. Certified copies of earlier proceedings were introduced into evidence without objection, including the July 25, 2005, order finding Child to have been neglected.

Waldridge further testified about the case treatment plan she had prepared as well as the numerous efforts made by the Cabinet to reunify the child with her parents, most of which were not completed due to the parents' incarceration, drug use, or other factors. She discussed the parents' failure to provide child support or other financial assistance during the period of the child's commitment to the Cabinet. She also testified regarding the parents' failure to provide food, clothing, shelter, care or other support for the child, and stated Father had seen the child only once during the period of commitment. Waldridge then discussed the various criminal convictions related to each parent and the corresponding periods of incarceration resulting from same. Certified copies of their convictions were admitted into evidence without objection. She stated Child had been in the Cabinet's care for more than fifteen of the most recent twenty-two months preceding the filing of the petition for termination of parental rights. Finally, in Waldridge's professional opinion, termination of parental rights was necessary to protect the interests of the child.

Levin testified as to the dramatic improvement Child had made in the two years since being placed in the Cabinet's care. She stated she had been the child's principal therapist for the majority of that time and described, in detail, the

results of the therapy sessions. She testified Child had gone from being guarded, anxious and manipulative to "an articulate, self-assured and bright child." She stated Child would not likely experience any problems if her parents' rights were terminated due to them being "out of her life." It was her professional opinion that Child had a bright future if she was to be allowed to remain in a stable, predictable and caring environment.

Beckett testified to the changes she had observed in Child since she had come into her home. The nightmares, bed wetting and self-mutilation Child suffered from when she entered the home had all subsided. She further testified Father had visited only one time since August 2005.

Father testified regarding his periods of incarceration and the reasons for same. He stated he had exercised as much visitation as possible during the periods of time he was not incarcerated. He admitted he had been in some form of detention for three of the five years immediately preceding the trial date. He testified regarding his employment history, which was sporadic due to his numerous periods of incarceration. He admitted he failed to abide by the terms of Waldridge's case treatment plan, and stated he attended only one of the parenting classes he was requested to complete. Although he provided no documentation in support of his assertion, he claimed he attended AA and NA meetings as well as a substance abuse program while he was in prison.

Following the hearing, on May 8, 2007, the trial court entered a seven-page findings of fact and conclusions of law which ultimately terminated

Mother's and Father's parental rights to the minor child. The court specifically found the Cabinet had carried its burden of proving by clear and convincing evidence that termination was in the best interests of Child, as she was an abused or neglected child pursuant to KRS 600.020(1); the Cabinet had made all reasonable efforts to reunite the family; the parents had abandoned the child for a period or periods in excess of ninety days; the parents had continuously or repeatedly failed or refused to provide essential care for the child, with there being no reasonable expectation of improvement in parental care; for reasons other than poverty alone, the parents had continuously or repeatedly failed to provide essential food, clothing, shelter, medical care and education reasonably necessary, with no reasonable expectation of improvement in the foreseeable future; the child had been in the care of the Cabinet for fifteen of the most recent twenty-two months preceding the filing of the instant action; the Cabinet had provided for the child's physical, mental and emotional needs since removal; and all the grounds for termination set forth in KRS 625.090 had been proven. This appeal followed.

Father raises six allegations of error in urging reversal of the Trimble Circuit Court. First, the trial court erred in assuming jurisdiction of the dependency and termination actions in light of the previously-filed action in Taylor Circuit Court. Second, the trial court erred in making a finding of neglect without giving him proper notice of the hearing and then using such adjudication against him in the termination action. Third, the trial court erred in finding the child was abandoned and using that fact against him in the termination proceeding. Fourth,

the trial court erred in finding he had, for a period of not less than six months, continuously and repeatedly failed or refused to provide essential care and protection for the child. Fifth, the trial court erred in finding he had, for reasons other than poverty alone, continuously or repeatedly failed or refused to provide essential food, clothing, shelter, medical care and education reasonably necessary for the child's well being. Finally, the trial court erred in finding the Cabinet had introduced clear and convincing evidence sufficient to support the termination of his parental rights.

Before we can address the merits of any of Father's claims, we must determine if the errors were properly preserved for appellate review. We are concerned by Father's total disregard of CR[8] 76.12(4)(c)(v) which requires:

> [a]n "ARGUMENT" conforming to the statement of Points and Authorities, *with ample supportive references to the record and citations of authority pertinent to each issue of law* and which shall contain 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*.

(emphasis added). As discussed in *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. 1990), under this rule it is:

> mandatory that an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of the trial judge. This [rule] is designed to save the appellate court the time of canvassing the record in order to determine if the claimed error was properly preserved for appeal.

[8] Kentucky Rules of Civil Procedure.

(quoting 7 Bertelsman and Phillips (sic), *Kentucky Practice*, CR 76.12(4)(c)(iv) [now (v)], Comment 4 (4th ed. 1989 PP)). The *Elwell* court further stated the requirement that briefs contain specific statements regarding preservation "emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review." *Id.* at 48 (quoting *Massie v. Persson*, 726 S.W.2d 448, 452 (Ky.App. 1987)). "The Court of Appeals is one of review and should not be approached as a second opportunity to be heard as a trial court. An issue not timely raised before a trial court cannot be considered as a new argument before this Court." *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky.App. 2006) (quoting *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky.App. 1980)).

Father's opening brief contains one pinpoint citation to the record in regard to the preservation of his first allegation of error. This inclusion of a pinpoint citation regarding preservation is a singular occurrence. The remaining issues presented include no references to the record whatsoever, nor do they include any statements as to whether and how those issues were preserved for appellate review. Further, five of the six arguments Father raises in this appeal offer no citations whatsoever to the record, three of the arguments cite no authority supporting the allegation of error presented, and an additional argument contains only a passing reference to a single statutory provision without any discussion of

its application to the matter at bar. The reply brief is also devoid of adequate references to the record and supporting authority.[9]

Father has also failed to comply with the mandates of CR 76.12(4)(c)(iv) which requires:

> [a] "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, *with ample references to the specific pages of the record, or tape and digital counter number* in the case of untranscribed videotape or audiotape recordings, or date and time in case of all other untranscribed electronic recordings, *supporting each of the statements narrated in the summary*.

(emphasis added). Citations to the record found in Father's statement of the case reference "various video tape recordings and orders" or "video recordings and files" in the four different case numbers from both Taylor and Trimble Counties associated with this minor child. Such blanket citations comport with neither the letter nor the spirit of the rule. They are totally inadequate, if not insulting to this Court.

Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our authority to strike both of Father's briefs for their egregious omissions and flagrant noncompliance. Instead, we shall review the properly raised issues on their merits and then examine the record for manifest injustice as to those issues which are insufficiently raised.

[9] Although the proper preservation of issues was questioned by the Cabinet in its brief, Father failed to cure his omission in his reply brief as authorized and sanctioned by *Hollingsworth v. Hollingsworth*, 798 S.W.2d 145, 147 (Ky.App. 1990).

Before the trial began, Father objected to the trial court's assumption of jurisdiction, which the trial court overruled. We believe this objection, and subsequent ruling, was sufficient to preserve this issue for our review. *See Lanham v. Commonwealth*, 171 S.W.3d 14, 19-21 (Ky. 2004). This is the only allegation of error properly preserved for our review. Although couched as a single argument in his brief, Father's jurisdictional challenge pertains to both the dependency action and the termination action, two separate and distinct matters, which must necessarily be discussed separately.

Pursuant to KRS 610.010(1), the district court of each county has exclusive jurisdiction in dependency, neglect and abuse matters concerning any child living or found within that county. Under KRS 620.027, the circuit and district courts have concurrent jurisdiction over custody and visitation matters where permanent orders are necessary. In the case *sub judice*, C.A. had obtained custody under an order entered by the Taylor Circuit Court. When she left the child to reside with R.D. in Trimble County, the courts of that county obtained concurrent jurisdiction with the Taylor Circuit Court over any subsequent dependency, neglect or abuse matters arising from the abandonment for so long a period as the child resided or was found in Trimble County.

Mother testified she was unaware Father had been named a joint custodian of the child and was unaware of where he resided at the time the dependency action was filed in Trimble County. Although Father argues R.D. and Mother intentionally deceived the courts and engaged in "forum-shopping" in

filing the dependency action, he fails to cite us to any evidence adduced at trial supporting this contention and we are convinced none exists. The trial court was well within its authority to accept jurisdiction over the dependency action concerning a resident child. There being no statutory prohibition or inconsistency in allowing the Trimble Circuit Court to hear the dependency action under the facts presented, we hold there was no error. *Shumaker v. Paxton*, 613 S.W.2d 130 (Ky. 1981) (*abrogated on other grounds by Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004)).

Additionally, Father cites us to KRS Chapter 452, arguing the trial court erred in failing to follow the statutory requirements necessary to effectuate a change of venue. His reliance is misplaced. KRS Chapter 452 deals with changing venue as to pending and active actions which are to be adjudicated by the receiving court. The record clearly reveals the Taylor Circuit Court action was transferred to the Trimble Circuit Court and no further action was taken in that matter. Any error in the transfer was harmless, at best. Further, Father did not make a timely objection to the transfer of the matter once he learned of same as well as the grounds for a challenge. Just as it is improper to delay the filing of an application to transfer, it is also improper to delay objecting to same. *See Pierce v. Crisp*, 267 Ky. 420, 102 S.W.2d 386 (1937). *See also Paducah Gulf RR Co. v. Adams*, 8 Ky.Opin. 100 (1874). It is axiomatic that Father cannot now be heard to complain as he failed to make a timely objection to the transfer and made an appearance in the Trimble Circuit Court action following the transfer. *Saunders v.*

Gale, 8 Ky.Opin. 500 (1875), *Vinsen v. Lockard*, 70 Ky. 458 (1870). Nevertheless, we are unable to discern any violation of due process or any other substantive right from the record before us.

In relation to the termination action, KRS 625.050(2) provides that petitions for involuntary termination of parental rights be filed in the circuit court of (a) the county of residence of either parent or where they may be found, (b) the county in which any juvenile court action involving the child, if any, has been filed, or (c) the county of the affected child's residence. The termination action herein was filed in Trimble County while a dependency action was pending in the courts of that county and had been pending in excess of eighteen months. Further, Child was a resident of Trimble County and was enrolled in the Head Start program of that county at the time the instant action was filed. Therefore, the trial court correctly determined jurisdiction and venue for the termination proceeding were properly vested in the Trimble Circuit Court. There was no error.

Finally, as to the remaining arguments presented in this appeal, pursuant to *Elwell, supra*, we have undertaken an overall review of this lengthy record and, finding no manifest injustice, decline to address the issues which were not presented in accordance with CR 76.12. That decision notwithstanding, our review of the record indicates none of these issues were properly preserved for our

consideration.[10] Therefore, for the foregoing reasons, the judgment of the Trimble Circuit Court is affirmed.

THOMPSON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES:

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[10] We note Father was represented by separate counsel at trial and on appeal. Trial counsel's failure to properly raise the issues now complained of in the trial court may explain the deficiencies we have seen in this appeal. However, appellate counsel could have informed us of the fact that none of the issues had been preserved and requested our palpable error review pursuant to CR 10.26. He failed to do so and we will not undertake such a review *sua sponte*.