RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000108-ME

J.R., BIOLOGICAL FATHER — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 07-J-00045

CABINET FOR HEALTH AND FAMILY SERVICES, COMMONWEALTH OF KENTUCKY; AND D.R., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

COMBS, CHIEF JUDGE: J.R.[1] appeals from an order of the Woodford Family Court granting permanent custody of his son, D.R., to his maternal grandparents as a result of an abuse petition filed against J.R. The child's biological mother is deceased. After our review, we affirm.

[1] Because a juvenile is involved, the names of all involved parties are withheld in order to assure confidentiality.

On April 16, 2007, the Cabinet for Health and Family Services (the Cabinet) in Woodford County filed an abuse petition on behalf of D.R., a minor, against J.R., his biological father. D.R. has been diagnosed with cerebral palsy and deals with severe physical limitations; he is confined to a wheelchair. The Cabinet alleged that J.R. had slapped D.R. in the face and neck hard enough to leave a "significant red mark." According to a report later filed by the Cabinet, J.R. admitted to slapping D.R. because the child had bitten him. J.R. said that he had been pulling D.R.'s lip down because the child had been lying to him; D.R. then bit his father's finger.

The abuse petition also charged that J.R. had subjected D.R. to inappropriate disciplinary practices. The first referral to the Cabinet involved an inquiry as to whether J.R. had caused D.R. to suffer a broken leg by over-stretching the child's leg during physical therapy sessions. That complaint was determined to have been unsubstantiated. A later Cabinet referral alleged that J.R. had placed soap and vinegar in D.R.'s mouth to such a degree as to cause vomiting at school. The Cabinet had handled these earlier incidents by referral to counseling rather than by recourse to an abuse petition.

On May 2, 2007, the trial court appointed a guardian *ad litem* to represent D.R.'s interests. On June 1, 2007, J.R. decided to place D.R. in Heartspring, a residential facility located in Wichita, Kansas. J.R. had been considering such a move prior to the filing of the abuse petition because of D.R.'s increased resistance to self-care and walking. D.R. had not been removed from

J.R.'s care at this point. On June 14, 2007, the trial court ordered that J.R. was to have no unsupervised contact with D.R. It also ordered that if D.R. should leave Heartspring, the parties were to advise the court immediately.

On August 20, 2007, the guardian *ad litem* filed a preliminary report. She advised the trial court that based upon her conversations with professionals at Heartspring, D.R. did not require institutional care. D.R.'s maternal grandparents were willing and able to take care of him. The grandparents had previous experience in caring for D.R. and had visited him on numerous occasions. They had also taken him for his appointments with his doctor and for therapy appointments. They took him on family outings. The grandmother is a retired registered nurse. The grandparents' home in Wetumpka, Alabama, is equipped with a wheelchair ramp and a handicapped bathroom. They are well prepared to provide care for D.R. The guardian *ad litem* concluded her report by requesting that temporary custody of D.R. be given to his grandparents so that he would not have to be institutionalized while the case was pending. The court treated the report as a motion that temporary custody of D.R. be given to the grandparents, and a temporary removal hearing was scheduled.

The parties appeared before the Woodford Family Court on September 4, 2007. J.R. admitted and stipulated that he had abused D.R. by slapping him. The trial court ordered that D.R. be released from Heartspring, and he was placed in the temporary custody of his maternal grandparents. The court also reiterated its prior order that there was to be no unsupervised contact between

J.R. and D.R. J.R. was ordered to pay $600.00 per month in temporary child support to the grandparents, and all Social Security benefits received on D.R.'s behalf were ordered to be paid over to the grandparents. J.R. agreed to the placement and to the financial arrangement.

On October 11, 2007, a supervisor in the Cabinet for Health and Family Services filed a report regarding the case and noted that J.R.'s initial visits with D.R. in Alabama had gone well. However, J.R. expressed reservations about restrictions that the grandparents had placed on him with respect to his visits. He was concerned about D.R.'s weight gain and other physical health needs. The report detailed J.R.'s progress in counseling. The report also indicated that his grandmother believed that it would be detrimental for D.R. to return to live with his father because D.R. experienced bad dreams and cried before his father's visits.

During a hearing on October 16, 2007, the Cabinet supervisor orally supplemented her initial report with information that she obtained after a trip to Alabama to meet with D.R. D.R. told her that he was afraid of his father and that he did not want to live with him. He reported additional past incidents of abuse by J.R., including that J.R. had allowed him to fall in the bathroom. The supervisor observed that D.R. had adjusted well to living with his grandparents. She concluded that she did not believe that it would be advisable or beneficial for D.R. to return to his father's custody at the present time.

The guardian *ad litem* also filed another report on October 16 in which she indicated that D.R. was adjusting well to living with his grandparents

and to his new school. The parties had agreed that J.R. would visit D.R. in Alabama on Saturday and Sunday of every third weekend and that J.R. would call D.R. on other occasions. J.R.'s first weekend visit with D.R. at the grandparents' home had gone well. However, D.R. became upset with J.R. during his second visit because of an incident at church and refused to tell him good-bye. According to the report, D.R. did not eat well that evening and had a hard time falling asleep.

D.R. told the guardian *ad litem* that he no longer wanted to have Sunday visits with his father. He also told her that he had "been through too much" living with his father and did not think that he ever wanted to live with him again because he was scared. The guardian *ad litem* concluded her report by recommending that D.R. remain in the temporary custody of his grandparents. By agreement of the parties, the court subsequently changed the visitation schedule to Saturdays only. It permitted the grandparents to monitor D.R.'s telephone conversations with J.R. and to terminate them if D.R. became upset.

A dispositional hearing was held on December 18, 2007. At this hearing, the trial court ordered that sole permanent custody of D.R. was to be given to his maternal grandparents. In reaching this decision, the trial judge expressed her opinion that a continuance of temporary custody by the grandparents was not an available option. On January 15, 2008, the trial court entered the following order that reflected all of its rulings at the dispositional hearing:

> This matter having come before the Court for Disposition and the Court having reviewed the Dispositional Report prepared by the Cabinet for Health and Family Services,

> the Report of the Guardian Ad Litem and having heard additional information from the Cabinet Supervisor and the Guardian Ad Litem as well as having heard statements from counsel on behalf of the father of this child, [J.R.], it is hereby ORDERED that the child's maternal grandparents, [G.D.] and [J.D.], are to receive SOLE PERMANENT CUSTODY of [D.R.] effective December 18, 2007. Additionally, the following clarifications are made: (a) any and all benefit checks for [D.R.] from Social Security are to be paid directly from the Social Security Administration to the maternal grandparents, [G.D.] and [J.D.][;] (b) [J.R.] is permitted to place telephone calls to [D.R.] on Tuesday, Thursday and Sunday evenings at 7 p.m. central standard time; the calls are to last no longer than thirty minutes and the grandparents are to make [D.R.] available for these calls; (c) if [D.R.'s] school makes his grades available online, the maternal grandparents are to make any access code for this information available for [J.R.] to receive monthly updates on [D.R.'s] grades; if this information is not available online, the maternal grandparents are to send a note to [D.R.'s] school that permits [J.R.] monthly contact for updates on [D.R.'s] grades and IEP; (d) the maternal grandparents are to send [J.R.] a monthly report by e-mail on [D.R.'s] physical medical appointments and physical medical information. All prior agreements as to the recommendations made in the Guardian Ad Litem's Report filed October 16, 2007 as well as all prior Orders of this Court regarding child support, supervised visitation and other matters are to remain in effect.

J.R. filed a timely notice of appeal from this order on January 16, 2008.

The only issue for our consideration on appeal is whether the trial court erred in awarding sole permanent custody of D.R. to the grandparents. J.R. contends that as the biological parent of D.R., he had a superior right to custody of his son that could only be overcome upon a finding that he was an "unfit" parent.

Although J.R. orally objected to the court's permanent custody ruling at the hearing, he did not preserve his argument for appellate review. Nor did he present it to the trial court in a post-hearing motion. "Appellate courts review only claims of error which have been presented to trial courts." *Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky. 1998).

On appeal, J.R. argues that in effect, the court's grant of permanent custody amounted to an involuntary termination of his parental rights. He now objects for the first time that the findings of the trial court were insufficient to support his lack of fitness as a parent. Again, his failure to raise that issue deprived the trial court of the opportunity to rectify an alleged error and to rule accordingly. Our role in reviewing a record for error precludes us from considering a new argument and essentially granting a litigant a second opportunity to be heard as if he were once again before the trial court. *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 607 (Ky. App. 2006). It is a time-honored and consistently repeated rule of Kentucky courts to require proper preservation of issues for appellate purposes, and we could cite a myriad of cases as substantiation.

In the case before us, J.R. incorrectly contends that his parental rights have been involuntarily terminated. A grant of sole permanent custody to the grandparents did not terminate his status as D.R.'s father. The court's order set forth clear guidelines for J.R.'s opportunities for access to D.R. As the Commonwealth notes in its brief, Kentucky Revised Statutes (KRS) 620.130

grants J.R. the opportunity to petition the court for custody at a future time. Such would not be the case if the court had involuntarily terminated his parental rights.

In an abuse case brought pursuant to KRS Chapter 620, a court may order a dispositional alternative that most closely meets the best interests of the child. Among the choices it may consider is the following provision:

> Removal of the child **to the custody of an adult relative**, other person, or child-caring facility or child-placing agency, taking into consideration the wishes of the parent or other person exercising custodial control or supervision. (Emphasis added.)

KRS 620.140(1)(c). While the court is directed to take into consideration the wishes of a parent, it is not required to defer to them. We note that considerable latitude is conferred upon a court in tailoring a remedy to meet the needs of a child. The preamble to the statute at § (1) recites that a court "shall have, but shall not be limited to" the dispositional alternatives that are then set forth.

Under the facts and circumstances of this case, we conclude that the circuit court did not abuse its discretion under KRS 620.140 to elect to award sole permanent custody of D.R. to his grandparents as a dispositional alternative.

We affirm the order of the Woodford Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward M. Thompson
Lexington, Kentucky

BRIEF FOR APPELLEE
COMMONWEALTH OF
KENTUCKY:

Alan J. George
Versailles, Kentucky

BRIEF FOR APPELLEE
GUARDIAN AD LITEM FOR THE
CHILD, D.R.:

Susan Smith Horne
Lexington, Kentucky