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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001489-ME;
NO. 2014-CA-001490-ME;
NO. 2014-CA-001491-ME;
AND
NO. 2014-CA-001492-ME

R. T. O. APPELLANT

v.

APPEALS FROM WARREN CIRCUIT COURT
HONORABLE J. RICHARD DOWNEY, JUDGE
ACTION NOS. 13-J-00829-001; 13-J-00830-001;
13-J-00831-001 and 13-J-00832-001

COMMONWEALTH OF KENTUCKY
AND A. O. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND VANMETER, JUDGES.

NICKELL, JUDGE: R.T.O.,[1] the biological father of four young girls, challenges orders flowing from a dependency and neglect action filed by the Cabinet for Health and Family Services (CHFS) that ultimately granted sole custody of the minors to A.O., their biological mother. Upon consideration of the briefs, the record and the law, we affirm.

FACTS

While responding to a residential call on December 18, 2013, Bowling Green Police observed injuries to A.O.'s face. It was alleged A.O. was the victim of domestic violence (DV) at the hands of R.T.O., her husband, and witnessed by her four minor daughters. It was further alleged R.T.O. had broken A.O.'s nose, caused her to have two black eyes and bruising. A three-year domestic violence order (DVO) was entered prohibiting contact between A.O. and R.T.O.

The next day, December 19, 2013, an instance of DV between R.T.O. and A.O. was referred to CHFS. That same day, CHFS social worker Ericka McComas-Church met with the four girls, one of whom confirmed R.T.O. punches A.O. in the face for lying and stealing. This child also confirmed A.O. had tried to call police on R.T.O.'s cell phone after he punched her in the face several times. McComas-Church's attempts to meet face-to-face with A.O., both at the family home and at A.O.'s workplace, were unsuccessful.

[1] Family members in this matter are identified by initials only consistent with Court policy. The four minors mentioned in this case are K.O. born September 17, 2001; E.O. born June 30, 2003; M.O. born September 27, 2005; and An.O. born August 19, 2007. The fourth child, "An.O.," is so identified to distinguish her from her mother, "A.O."

A background check on R.T.O. showed prior charges of fourth-degree assault-domestic violence and fourth-degree aggravated assault-spouse. Emergency protective orders (EPO) naming R.T.O. had been issued to two women other than A.O. in 1996 and 1999. McComas-Church found a history of referrals to Adult Protective Services for alleged injuries.

As a result of A.O.'s current injuries, the child's statement, the history of domestic violence and the risk posed by the home environment, CHFS petitioned the Warren Family Court to give it emergency custody of all four minors and asked that it be allowed to seek any educational and medical treatment needed by the children while it sought appropriate relative placement. The court found removal from the family home to be in the children's best interest because they were in immediate danger due to their parents' failure or refusal to provide for their safety and needs, and granted CHFS emergency custody.

At the temporary removal hearing on December 23, 2013, a plea of not true of alleged neglect was entered on behalf of both R.T.O. and A.O. Upon the court finding the children had been "exposed to significant DV in home which occurs with children present[;]" a "documented history of DV" creating a "dangerous situation" for the children; and parental denial of "any problem with DV[,]" all four minors were placed in the temporary custody of CHFS. The court further found there were no less restrictive alternatives to removal and, based on both live testimony and affidavits, concluded it had been proven by a

preponderance of evidence that if the children remained in parental custody, A.O. and R.T.O. would be unwilling and unable to protect them.

On or about January 28, 2014, CHFS requested an evaluation of the Ohio home of A.O.'s parents as a potential relative placement. At that time, A.O. was living with her parents. CHFS did not oppose A.O. remaining in the home with her children if they were placed there; however, A.O. was willing and able to move elsewhere if it would facilitate her children being placed with her parents.

A social worker summarized A.O.'s description of the tumultuous events of December 18, 2013, as follows:

> Early in that morning [R.T.O.] and her (sic) were arguing about something that happened the previous day. [A.O.] did not do the dishes on 12/17/13. On the (sic) 12/17/13, there was a glass sitting on the table, [R.T.O.] grabbed the table and shook it knocking the cup over spilling the tea. [R.T.O.] told [A.O.] to clean it up. [A.O.] stated that she needed to go to work. [R.T.O.] blocked the door to keep [A.O.] from walking out the door. [A.O.] pretended to go to the kitchen towel (sic) to clean up the tea, but walked out the back door going on to work. [A.O.] told [R.T.O.] to clean it up. [A.O.] was late for work. When [A.O.] returned to the home [R.T.O.] was still upset.
>
> On 12/18/13, [A.O.] does not recall any particular thing setting [R.T.O.] off on this morning it was around 4:30-5:00 am. [R.T.O.] and [A.O.] were in the living room. [R.T.O.] punched [A.O.] with a close (sic) fist in the middle of her face in between her eyes. [A.O.] did not have her glasses on. [A.O.'s] nose started bleeding. [R.T.O.] told [A.O.] to go clean herself up. [A.O.] said no. [R.T.O.] dragged her by her pony tail to the bathroom and then throws a towel at her. [A.O.] cleaned herself up. [R.T.O.] pushed [A.O.]. [A.O.] fail (sic) in to (sic) the bathtub. [A.O.] could not recall what was said. At some point they ended up back in the living room.

[R.T.O.] told [A.O.] to stay there. [R.T.O.] went looking for a baseball bat. [R.T.O.] had asked [A.O.] where she hid his baseball bat; [A.O.] stated under the bed. [R.T.O.] walked back in to (sic) the living room from the bedroom. [A.O.] knows he had something but did not know what was in [R.T.O.'s] hand. [A.O.] was sitting on the couch when [R.T.O.] entered the living room. [R.T.O.] held [A.O.] down on the couch. [R.T.O.] had a screwdriver in his hand. [R.T.O.] was standing over [A.O.] and put the screwdriver to her temple and stated that it would only take a second to put the screwdriver to (sic) her head. The screwdriver was pointed at her left temple. [R.T.O.] let her up after a while (sic). [A.O.] went and stood next to the window. [R.T.O.] approached her pushing her saying he should just put her throw (sic) that window. [R.T.O.] punched [A.O.] in the bridge of her nose with a closed fist. [R.T.O.] punched [A.O.] again and told her she needed a fat lip to go with those black eyes.

[R.T.O.] told [A.O.] that he was done hurting his hands; [R.T.O.] started hitting [A.O.] with the handle of the screwdriver. The children were in their beds. [A.O.] tried to run to the front door. [R.T.O.] tripped and fell. [R.T.O.] screamed you broke my ankle. [R.T.O.] had a hold of [A.O.] (sic) leg at her ankle. [A.O.] was leaning against the door. The girls came out of their rooms when their daddy yelled but not when she was yelling. [M.O.] started asking [R.T.O.] if he was okay. [K.O.] helped [R.T.O.] get up. [R.T.O.] told the girls it was time for them to get ready for school. [R.T.O.] put on an ankle brace. When [A.O.] came out of the bathroom [R.T.O.] told her to sit down next (sic) him. [R.T.O.] told [A.O.] that this was all her fault because she lied and stole from him. [R.T.O.] grabbed her nose and pulled it to reset it stating that her nose was broken. The younger girls were listening to the conversation.

[R.T.O.] cornered [A.O.] next to the washing machine and started hitting [A.O.] in the back with a closed fist. [A.O.] crawled over and pulled herself up. [A.O.] went to the girl's room to help them get ready. [R.T.O.] ran up behind her and punched [A.O.] in the side of the head.

> [An.O.] was present in the room. [A.O.] fell into the dresser catching her. [R.T.O.] stated that [A.O.] was lucky that she ducked not catching the full force of that hit. The (sic) [M.O.] and [E.O.] were in the living room getting their back (sic) packs.
>
> [A.O.] started begging him not to hit her anymore. [R.T.O.] kept telling her to be honest about things. The bus pulled up. [A.O.] put the girls on the bus. [A.O.] then started getting ready for work as quickly as she could. [R.T.O.] was asking her where she was going. [R.T.O.] told her to call in. [A.O.] said no. [R.T.O.] said someone will say something. [A.O.] told [R.T.O.] that no one will notice or say anything because they never have before. [R.T.O.] told [A.O.] to stay home with him to make things right. [A.O.] grabbed her things and told [R.T.O.] that she had to go to work. [A.O.] went out the back door. [R.T.O.] said he would call into work for [A.O.] and said he would tell her work that she got hurt on her way to work. [R.T.O.] called [A.O.'s] work. Zoe (assistant manager) spoke to [R.T.O.]. Zoe told [A.O.] that she will need a doctor's excuse. Zoe stated that she would not be able to pick up her paycheck until after 1:00 pm since she did not work her shift.
>
> [R.T.O.] spent the day saying that things would be better; they could get divorced and filed (sic) bankruptcy. [R.T.O.] stated that he had contacted Kentucky legal aid about a divorce.

During the adjudication hearing on March 25, 2014, CHFS filed the Ohio home evaluation of A.O.'s parents in open court. The detailed report indicated a strong, organized family in which the four girls could thrive. The court overruled R.T.O.'s objection to use of the Ohio report, but held in abeyance its consideration pending further review of the file. The court also found deposing the author of the Ohio report was R.T.O.'s burden.

A pretrial conference was held April 22, 2014. As of April 18, 2014, attempts to evaluate the Grayson County, Kentucky, home of R.T.O.'s sister[2] as a possible relative placement were unsuccessful due to the paternal aunt's unavailability. In light of the "positive" home evaluation of the maternal grandparents, at the end of the hearing, temporary custody of all four girls was placed with them in Ohio.

According to a CHFS report, R.T.O.:

> has filed for custody of his children in Hardin Co. without a change of venue. [R.T.O.] has also filed a complaint incorrectly stating that the Warren Co. CHFS office will not transfer his CPS case to Hardin Co. All necessary paperwork has been submitted to the Hardin Co. office however, it has not been accepted at this time. [R.T.O.] does however have a courtesy worker in Hardin Co. that makes regular contact with him.

At a pretrial conference on June 24, 2014, a change of venue motion was denied.

An adjudication hearing occurred July 28, 2014, at which the court found the children to be neglected by R.T.O. under KRS[3] 600.020(1)(a)(2, 3 and 4). He also found the girls were dependent regarding A.O. Pending disposition, the children were to remain with their maternal grandparents in Ohio. The court

[2] R.T.O. moved the court to require the maternal grandparents to bear the cost of transporting the children from Ohio to Kentucky to visit him. Because the Guardian *ad litem* (GAL) could not attend the hearing at which the motion would be heard, she filed a written report stating the aunt often transports R.T.O. from his new Hardin County home to the Warren County Courthouse and would most likely be willing to transport R.T.O. to Ohio to visit his four daughters. The GAL went on to remind the court the aunt "was arrested by the Bowling Green Police Department and removed from the courtroom in handcuffs during our last hearing."

[3] Kentucky Revised Statutes.

found by a preponderance of the evidence that R.T.O. had neglected his four daughters by:

> beating mother in children's presence over a span of 10 years beginning in 2003, increasing to twice a week often in the latter period. Threatened to take mother's life on early morning of 12-18-13, in presence of children, by ramming a screwdriver through her skull. Twice convicted of assault 4th vs. mother. Mother was rendered unable to properly care for children as a result.

The court further noted, "Home of the father is not suitable" and made other findings "on video record."

In the amended dispositional report filed on August 4, 2014, CHFS adjusted its permanency goal to "return to parent." Following a hearing, the court entered an order returning the children to A.O.'s sole custody. Other orders stated:

> 1) Father argued that joint custody, primary residence to mother, should be ordered. However, the parties are not good candidates for joint custody, given the history of this case. Sole custody to mother. 2) Father shall have telephonic visitation rights as previously ordered; further, per mother, father may contact Ohio Dept Jobs/Family Services . . . to set up supervised visitation. 3) Mother of children to engage in therapy. 4) No domestic violence in mother's home.

On September 4, 2014, R.T.O. filed a standardized form styled "Self-Help Motion Regarding Visitation." The reasons given for requesting a change in visitation were:

> [m]other has not been compliant with last 3 orders. My disability states I am unable to travel long distances. I have been totally compliant with all case plans and feel I don't require supervised visitations. The last court order states no domestic violence in mother's home and

childrens (sic) should be in counciling (sic) and this hasn't been done.

On September 29, 2014, *after the notices of appeal had been filed on September 9, 2014,* the trial court entered an order noting supervised visitation had been ordered months before and R.T.O. had taken no steps since its entry to visit his children. The court denied the claim that a disability prevented R.T.O. from traveling because no such disability had been claimed previously or proved subsequently. The court denied the request for unsupervised visits because there was no denial of A.O.'s vivid description of a decade of "horrific violence" R.T.O. had inflicted upon her—often in the presence of their children. Finally, the court denied that portion of the motion claiming the children were not receiving counseling because it was "conclusory" and had not been shown to be based in fact.

In his notice of appeal, R.T.O. stated his intention "to appeal every order entered in this action" and specifically referenced an order and amended order entered after the temporary removal hearing, and orders entered after the adjudication and disposition hearings. No designation of record was filed by either party. The lack of a designation is troublesome because while someone handwrote on the notices of appeal these four consolidated cases have video records, no video was certified as part of the appellate record by the circuit court clerk and none was provided to us. As a result, we cannot undertake a thorough review of the record, especially the alleged inadequacy of testimony developed—or undeveloped, as the case may be—during the hearings. R.T.O. bore the burden of presenting a

"complete record" to us. *Ray v. Ashland Oil, Inc*., 389 S.W.3d 140, 145 (Ky. App. 2012) (internal citation omitted). He did not carry his burden. Furthermore, "[i]t 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." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). It is against this backdrop that we begin our review of the five issues raised on appeal.

ANALYSIS

R.T.O.'s first claim is the trial court erroneously relied on hearsay when it considered an evaluation of the home of the maternal grandparents conducted by the state of Ohio. Although we have not heard or watched R.T.O.'s actual objection, the order entered March 28, 2014, confirms R.T.O. lodged a "substantive/objection" during the adjudication hearing. It was overruled.

No one disputes the home study was hearsay, and initially, the trial court held in abeyance whether it would consider the study. In his brief, R.T.O. argues the trial court abused its discretion in ultimately relying on the document because he had no opportunity to cross-examine its author.

At the close of the temporary removal hearing in December 2013, custody of the four girls was given to CHFS. At the adjudication hearing on March 28, 2014, the trial court held R.T.O. shouldered the burden of deposing the author of the Ohio home study if he chose to do so. There is no deposition in the

record. It was not until April 22, 2014, that the trial court amended its prior order and gave temporary custody to the maternal grandparents.

KRE[4] 802—the only authority cited in support of this claim by R.T.O. —forbids the use of hearsay, unless it fits within a recognized exception mentioned in KRE 803 or 804. However, KRS 620.080(2) specifically allows the use of hearsay during a temporary removal hearing "for good cause." *N.L. v. W.F.*, 368 S.W.3d 136, 146 (Ky. App. 2012).

Initially, the court did not believe the children could be returned to either parent—not to the father because of his anger and proclivity for DV; and not to the mother due to her physical condition in the wake of R.T.O. having beaten her and threatened to penetrate her skull with a screwdriver. The extensive home study performed in Ohio documented the maternal grandparents as a stable family with a stable home into which all four girls could be placed together with relatives. Both CHFS and A.O. approved of the children living in Ohio—consistent with KRS 620.090(2). We discern no abuse of discretion in the trial court's temporary placement of the girls with their maternal grandparents, especially since the girls thrived in Ohio and the temporary placement was ultimately changed to the mother's sole custody making any error both harmless and now moot.

R.T.O.'s second claim—a total of one sentence with no citation to legal authority or the record—is the trial court abused its discretion by giving temporary custody to the maternal grandparents who live in another state without

[4] Kentucky Rules of Evidence.

prior notice. We are not in the habit of creating or fleshing out arguments for litigants. "[I]t is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations omitted); see also CR[5] 76.12(4)(c)(v). Furthermore, as noted in the prior argument, custody has now been changed to the mother so this claim, even if meritorious, is of no moment.

R.T.O.'s third argument is the trial court failed to determine the truth or falsity of allegations contained in the petition and made findings on items not alleged in the petition. As with the prior argument, R.T.O. fails to fully construct this argument, and we will not practice the case for him. *Hadley.* The order entered after the adjudication hearing recites a pattern of DV and abuse perpetrated by R.T.O. on A.O. as alleged in the petition.

The fourth claim is the trial court abused its discretion in finding the father's home "is not suitable." Again, without citation to the record or legal authority, R.T.O. claims the trial court could not make such a finding because it heard no evidence about his home. Without the video record, we cannot verify the claim or determine whether the court's finding of unsuitability was supported by substantial evidence. Under *Thompson,* we must assume the missing record supports the trial court's result. As with the other claims, we will not research and write the brief for a litigant. *Hadley.*

[5] Kentucky Rules of Civil Procedure.

One point compels comment, however. R.T.O. argues the characterization of his home as unsuitable made "it impossible that the children would be returned to him at the disposition hearing." KRS 600.020(1), defining an "abused or neglected child," encompasses far more than home life and living conditions. R.T.O. would do well to consider the more than ten years he abused his wife in the presence of his children—described in vivid detail by A.O., challenged by no one and corroborated by at least one of his children and police officers—as sufficient reason for the trial court to reject him as a potential custodian for his daughters. Furthermore, if the trial court heard *no proof* of the suitability of R.T.O.'s home, that means *R.T.O.* offered no proof in his own behalf to which he can point. There being no basis for relief, none will be forthcoming.

The fifth and final claim is the trial court erroneously gave A.O. sole custody of the girls—mostly because a dependency, neglect and abuse case is not an appropriate vehicle to "rehash" custody. *S.R. v. J.N.*, 307 S.W.3d 631, 637 (Ky. App. 2010). We question the applicability of *S.R.* which is factually distinct.

The parents of the child in *S.R.* were already divorced and the mother, who had custody of the child, had remarried. When difficulties escalated in the new marriage, the child's biological father interceded to protect his son. That is a far different situation than this case wherein CHFS petitioned to protect four minors from more than a decade of DV perpetrated on their mother by their father. It was only after the initial emergency had been resolved that the court addressed who should have custody of the girls and due to safety concerns ultimately

awarded sole custody to the mother with telephonic and supervised visitation to the father. During the pendency of the action, A.O. took steps to gain the trust of the CHFS and prove herself a worthy custodian; R.T.O. took no such steps.

Litigants often bemoan the amount of time that passes while awaiting a court decision. Not so with R.T.O. who apparently believes the trial court moved too swiftly in his case. In his view,

> [t]he appropriate thing for the trial court to have done at the disposition hearing was to return the children to the custody of both parents, who could then initiate a KRS Chapter 403 circuit civil action to litigate custody and visitation/timesharing. By determining the custody rights of these parents, the father has been deprived of any opportunity to regain custody of his children.

It is clear from the record the trial court did not view R.T.O. as a custodial candidate and awarded sole custody of all four girls to A.O. In light of the record provided to us, we discern no error.

WHEREFORE, the orders of the Warren Family Court are affirmed.

ALL CONCUR.

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