

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001899-ME

DALIA NAFTALIYEVA

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 11-CI-502477

GERMAN NAFTALIYEVA

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

CLAYTON, JUDGE: Dalia Naftaliyeva (Dalia) brings this appeal from a Jefferson Family Court order suspending her visitation until she undergoes a mental health evaluation in Louisville, Kentucky. The matter was opposed by German Naftaliyeva (German) below. Because Dalia has not complied with the briefing requirements under Kentucky Rules of Civil Procedure (CR) 76.12, and

because our review of the record indicates that no manifest injustice occurred, we affirm.

Relevant Facts

Dalia appeals the February 20, 2015 order by the Jefferson Family Court in which the court stated that Dalia “expressed concerns that [German’s] counsel, Michelle Chalmers, and the previous Judge, Judge Jerry Bowles, were paying someone to follow her and that they did not like her.” As a result, the family court required Dalia to undergo a psychological examination “at Seven Counties” and comply with any recommended treatment. The family court then awarded temporary sole custody to German. Dalia subsequently traveled to Brooklyn, New York to have a psychosocial evaluation. The psychotherapist concluded that Dalia did not suffer from any mental illness.

Dalia then filed the report with the trial court. The family court refused to accept the evaluation conducted in New York, and ordered “a full psychiatric evaluation by a qualified health professional at Seven Counties, or other medical healthcare provider in the Louisville, Kentucky area, who is qualified to perform a psychiatric evaluation[.]” The court also required Dalia to “provide a copy of this Order to said evaluator so that the evaluator can be informed regarding the Court’s concern regarding Petitioner’s mental health state due to behaviors and statements made by Petitioner in open court on February 9, 2015...” The family court entered another order on April 28, 2015, suspending

Dalia's visitation until she completed a mental health assessment. This appeal follows.

On appeal, Dalia contests the family court's order requiring her to get a mental health evaluation in Louisville. She asserts that no doctor speaks Russian, her native language, in the Louisville area and that she does not trust the interpreters in Louisville because her ex-husband's relatives use those interpreters.

Analysis

German has chosen not to file an appellee brief in this case. CR 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). In this instance, we choose not to impose a penalty upon German.

CR 76.12(4)(a)(ii) provides that "[t]yping [in appellate briefs] shall be double spaced and clearly readable[,]" and CR 76.12(4)(c)(iii) states that each brief shall contain the following:

A "STATEMENT OF POINTS AND AUTHORITIES," which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the

authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited.

Furthermore, though Dalia has a section of her brief labeled “statement of the case,” CR 76.12(4)(c)(iv) provides that it shall contain:

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 the case of all other untranscribed electronic recordings, supporting each of the statements narrated in the summary.

Dalia has failed to provide any references to specific areas of the record. Finally, CR 76.12(4)(c)(v) provides that briefs 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.” Dalia has similarly not included any statement of preservation in her brief.

We note that we have previously stricken a brief for the noncompliance with similar provisions in *Hawkins v. Miller*, 301 S.W.3d 507, 508 (Ky. App. 2009) (failure to comply with the spacing requirements and the failure to cite to the record). Furthermore, in *J.M. v. Commonwealth, Cabinet For Health & Family Services*, 325 S.W.3d 901 (Ky. App. 2010), this Court stated as follows:

In *Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990), we established the principle that, where an appellant fails to comply with CR 76.12(4)(c)(iv), a reviewing court need only undertake an overall review of the record for manifest injustice. We believe that principle applies as well to the failure to comply with CR 76.12(4)(c)(v).

Another appropriate remedy is to strike J.M.'s brief for noncompliance with the Rule. CR 76.12(8)(a) ("A brief may be stricken for failure to comply with any substantial requirement of this Rule[.]"). We have chosen the less severe alternative of reviewing the case for manifest injustice due to the serious nature of the issues.

Id. at 902 n2. Because Dalia is proceeding *pro se*, we have opted for the less severe sanction and review the record for manifest injustice.

In her brief, Dalia states that the family court's order distorted what she actually said at the hearing. However, the hearing in which the family court required Dalia to attend a competency hearing is not included in the record. "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." *Smith v. Smith*, 450 S.W.3d 729, 732 (Ky. App. 2014) (citing *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)).

Kentucky Revised Statutes (KRS) 403.290(2) provides that a family court "may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request..." This provision was "designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties." *Morgan v. Getter*, 441 S.W.3d 94, 104 (Ky. 2014) (quoting *Uniform Marriage and Divorce Act (U.L.A.)* § 404, comment (West Publishing Co.1987)).

We note that the requirement that Dalia attend a competency evaluation in Louisville seems reasonable in light of the statements the trial court asserted that Dalia made at the hearing. The family court judge was likely more familiar with the facilities in Louisville than the ones in New York, and therefore she would be more certain as to their reliability. Furthermore, by requiring Dalia to present the psychotherapist with the court order ensured that the particular issue concerning people allegedly following her would be addressed. Having reviewed the record, we find no manifest injustice. Finally, we note that Dalia has appealed from an order temporarily suspending visitation, which is not a final and appealable order. *See, Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008), CR 54.01, CR 54.02.

The family court's order requiring Dalia to receive a mental health evaluation in Louisville is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Dalia Naftaliyeva, *Pro Se*
Louisville, Kentucky