



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

E.K.H.-G.,	) No. ED108578
	)
Respondent,	) Appeal from the Circuit Court of
	) St. Charles County
vs.	)
	) Honorable John P. Banas
R.C., III,	)
	)
Appellant.	) Filed: November 17, 2020

Introduction

R.C. III (“Father”) appeals the trial court’s judgment granting E.K.H.-G (“Grandmother”) third-party custody of Father’s three-year-old daughter, M.C.G. (“Child”) following the death of N.G. (“Mother”), Grandmother’s daughter. Father raises six points on appeal. We reverse and remand.

Factual and Procedural Background

On May 13, 2016, Child was born to Mother in Florida. Father is Child’s biological father. Father and Mother were unmarried but resided together in a studio they rented from Grandmother in Florida. In late April 2018, Mother and Father separated. Mother and Child moved in with Grandmother, who also resided in Florida. Father continued living in the studio after he and Mother separated. On May 7, 2018, Mother died in a car accident. After Mother’s

death, Father and Grandmother agreed Child would continue residing with Grandmother. On July 15, 2018, Father took Child to Missouri without notifying Grandmother.

On August 24, 2018, Grandmother filed a petition for third-party custody in the St. Charles County Circuit Court,¹ seeking sole legal and physical custody of Child. Father was served with a copy of the petition but filed no responsive pleadings with the trial court. A guardian ad litem was appointed by the trial court. The case was set for a pre-trial conference on January 16, 2019. Father appeared *pro se* and Grandmother appeared with counsel. Father consented to Grandmother taking Child to Florida beginning February 2, 2019, and returning Child to him in Missouri March 2, 2019. The trial court granted Father leave to file responsive pleadings by February 15, 2019. The trial court also ordered Father to file a statement of income and expenses and a statement of property by February 15, 2019. Father filed no responsive pleadings, statement of income and expenses, or statement of property.

The trial court held another pre-trial conference March 1, 2019. Father failed to appear and failed to notify the trial court of the reason for his nonappearance. Grandmother appeared with counsel. The trial court ordered Child to remain in Grandmother's custody "until further order of the court." Trial on Grandmother's third-party custody petition was set for May 31, 2019; however, because the guardian ad litem could not be present, the case was continued to July 8, 2019.

On July 7, 2019, counsel for Father entered his appearance and requested thirty additional days to file responsive pleadings. Trial was held on July 8, 2018. At the beginning of trial, Father orally moved for a continuance. The trial court denied Father's oral motion for a continuance. The trial court also ruled Father was prohibited from calling witnesses on his own

¹ The parties agreed Missouri had subject matter jurisdiction over Grandmother's third-party custody claim under the Uniform Child Custody Jurisdiction and Enforcement Act, Section 452.700 *et seq.* The trial court entered a "Consent Order and Judgment" to that effect.

behalf. The trial court ruled Father was in “default” and stated, “I believe the case law allows even on default, if he shows up, he can question the witnesses and respond to the evidence that’s been put forward, but that’s the extent I’ll allow him to do at this time.” The trial court heard testimony from Grandmother and Father.² Father’s counsel was permitted to cross-examine Grandmother and Father and object to evidence. On July 31, 2019, the trial court entered its judgment granting Grandmother sole legal and physical third-party custody of Child and granting Father visitation.

This appeal follows.

Rule 84.04

Father’s brief violates Rule 84.04 in several respects. First, Father’s statement of facts does not comply with Rule 84.04(c). Rule 84.04(c) provides, “All statement of facts shall have specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits.” Father’s statement of facts contains only two references to the appellate record. “Specific relevant cites to the record are mandatory and essential for the effective functioning of appellate courts because courts cannot spend time searching the record to determine if factual assertions in the brief are supported by the record.” *Jimmy Jones Excavation, Inc. v. JDC Structural Concrete, LLC*, 404 S.W.3d 922, 924 (Mo. App. S.D. 2013) (quotations omitted). “It is not the function of the appellate court to search the record to discover the facts that substantiate a point on appeal.” *Id.*

Second, Father’s Points II, III, IV, V, and VI do not comply with Rule 84.04(d). Rule 84.04(d)(1) provides an appellant’s point relied on must “state concisely the legal reasons for the appellant’s claim of reversible error” and “explain in summary fashion why, in the context of the

² Father was called as a witness in Grandmother’s case-in-chief. Father did not testify on his own behalf.

case, the legal reasons support the claim of reversible error.” Father’s Points II, III, IV, V, and VI do not identify or explain the legal reasons that support his claims of reversible error. They allege:

Point II: “The court erred in denying counsel for the Respondent the opportunity to review the case and to prepare the case for submission to the court. By refusing to continue the case while denying Respondent the right to present his own evidence, the Court also precluded Respondent from making an offer of proof because Respondent’s counsel was denied the opportunity to investigate the facts of the case.”

Point III: “The Court erred in denying the natural father the right to present evidence at trial with regard to the statutory factors upon which the Court relies on for determining custody in the best interests of the child.”

Point IV: “The court erred in its application of the factors enumerated in § 452.375.2 *RSMo* 2016. The Court’s application of these factors is not supported by the evidence.”

Point V: “The Court erred in limiting the participation of the Guardian *ad Litem* to the questioning of the Petitioner’s witnesses and the presentation of a Parenting Plan.”

Point VI: “The Court erred in admitting the medical records into evidence with no testimonial deposition of the records custodian based on an un-notarized records affidavit.”

However, Father “fails to articulate a concise legal reason explaining how the trial court erred or why the law, in the context of the facts, supports his claims of reversible error.” *See Green v. Green*, 445 S.W.3d 642, 647 (Mo. App. E.D. 2014). “A point that does not explain why the legal reasons support the claim of reversible error merits dismissal.” *Id.*

Father’s brief also violates Rule 84.04(d)(5). Rule 84.04(d)(5) provides, “Immediately following each ‘Point Relied On,’ the appellant . . . shall include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority upon which that party principally relies.” Father’s brief includes no list of cases or statutes he purports to rely on immediately following each of his Points II, III, IV, V, and VI. “An appellant must cite

legal authority to support his points relied on if the point is one in which precedent is appropriate or available; if no authority is available, an explanation should be made for the absence of citations.” *In re Marriage of Fritz*, 243 S.W.3d 484, 488 (Mo. App. E.D. 2007). “Failure to cite relevant authority supporting the point or to explain the failure to do so preserves nothing for review.” *Id.*

Third, the arguments under each of Father’s points relied on violate Rule 84.04(e). Under Rule 84.04(e) “the point relied on shall be restated at the beginning of the section of the argument discussing that point” and “[t]he argument shall be limited to those errors included in the “Points Relied On.” The argument portion of Father’s brief restates none of his points relied on. In addition, Father attempts to argue an error not included in his point relied on in Point IV.

Rule 84.04(e) also provides the argument must contain “a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved” and “the applicable standard of review.” Father’s brief is silent regarding whether the claimed errors were preserved for appellate review. One aspect of Father’s argument in Point VI is not preserved for review. In addition, Father’s arguments do not separately state the applicable standard of review for each claim of error. Father attempts to state the standard of review for his first point relied on only. However, the standard of review cited by Father is inapplicable to the disposition of his claim of error. The standard of review for Father’s Points II, III, IV, V, and VI appears nowhere in Father’s brief. “The standard of review is an essential portion of all appellate arguments; it outlines this court’s role in disposing of the matter before us.” *Waller v. Shippey*, 251 S.W.3d 403, 406 (Mo. App. W.D. 2008). “While it would be easy enough for this court to determine the applicable standard of review, it is not our duty to supplement the deficient brief with our own research.” *Id.*

Further, many of Father’s arguments are analytically insufficient. “An argument must explain why, in the context of the case, the law supports the claim of reversible error. It should advise the appellate court how principles of law and the facts of the case interact.” *In re Marriage of Smith*, 283 S.W.3d 271, 275 (Mo. App. E.D. 2009). Father’s argument references case law and Rule 74.05 in his discussion of Point I. However, other than his vague references to sections 452.375.5(5)(a)³ and 452.375.2 in Point IV, Father cites no legal authority for his arguments on any of his claims of error.

“Failure to substantially comply with Rule 84.04 preserves nothing for review and is a proper ground for dismissing an appeal.” *Green*, 445 S.W.3d at 645. However, “it is never this court’s preference to dismiss an appeal without reaching the merits.” *Waller*, 251 S.W.3d at 406-07. “In cases relating to children’s welfare, we may relax the rigid requirements [of Rule 84.04] if we can sufficiently ascertain the issues being raised.” *Buckley v. Tipton*, 270 S.W.3d 919, 922 (Mo. App. W.D. 2008). Because this case involves the welfare of Child, we review Father’s claims *ex gratia* to the extent we sufficiently understand them. But we “stress and urge upon counsel the importance of following the tenets of Rule 84.04; its mandate is simple enough.” *Cheatham v. Melton*, 593 S.W.2d 900, 903 (Mo. App. E.D. 1980).

Discussion

We address Father’s point regarding the trial court’s imposition of discovery sanctions first because we find it dispositive. Father’s third point on appeal claims the trial court erred by not allowing him to present evidence at trial, namely the testimony of his mother, whom he lived with in Missouri. Rule 61.01 allows the trial court to enter sanctions against a party for violating discovery requests. *Doss v. Brown*, 419 S.W.3d 784, 789 (Mo. App. W.D. 2012). “The trial court has broad discretion to control discovery,” which “extends to the trial court’s choice of

³ All statutory references are to RSMo (2018), unless otherwise indicated.

remedies in response to the non-disclosure of evidence or witnesses during discovery.” *Brancati v. Bi-State Dev. Agency*, 571 S.W.3d 625, 637 (Mo. App. E.D. 2018). “However, a trial court’s discretion as to the imposition of sanctions for failure to comply with discovery procedures is not unfettered.” *Fidelity Nat. Ins. Co. v. Snow*, 26 S.W.3d 473, 475 (Mo. App. S.D. 2000). If there is a clear showing of an abuse of discretion, we will interfere with the trial court’s decision to impose sanctions for discovery violations. *S.R. v. K.M.*, 115 S.W.3d 862, 865 (Mo. App. E.D. 2003).

“Prior to imposing sanctions on the errant party, the trial court must first determine whether, in a particular situation, the opposing party has been prejudiced.” *Id.* (citing *State ex rel. Missouri Highway & Transp. Comm’n v. Pully*, 737 S.W.2d 241, 245 (Mo. App. W.D. 1987)). “When a discovery sanction would destroy completely one party’s case, it is an abuse of discretion for the trial court to impose those harsh sanctions without finding that the errant party has shown contumacious and deliberate disregard for authority of the trial court.” *Id.*

Here we find the trial court abused its discretion when it ordered Father be prohibited from presenting a defense after failing to file responsive pleadings, a statement of income and expenses, or a statement of property with the trial court. The trial court made no determination Grandmother was prejudiced by Father’s failure to file these documents.⁴ The trial court also made no finding Father’s failure to file responsive pleadings, a statement of income and expenses, or a statement of property resulted from his deliberate disregard for the authority of the trial court.

Further, the trial court did not explore the imposition of a lesser sanction, which would have been fully curative here. *See id.* “The type of sanction imposed under Rule 61.01 ‘should

⁴ The trial court found only that Grandmother would be prejudiced if Father’s *request for a continuance* was granted. The record reveals the trial court made no findings Grandmother was prejudiced by Father’s failure to file responsive pleadings, a statement of income and expenses, and a statement of property.

depend on the nature of the information sought in relation to the proceeding, what orders will best assist the litigant seeking the information, and the benefits and disadvantages to litigants and the court resulting from the sanction-chosen.” *Stockmann v. Frank*, 239 S.W.3d 650, 656 (Mo. App. E.D. 2007) (quoting *J.B.C. v. S.H.C.*, 719 S.W.2d 866, 870 (Mo. App. E.D. 1986)). Here, Father failed to file responsive pleadings and statements of income, expenses, and property. Given the nature of the information Father failed to disclose, the trial court could have reasonably prohibited Father from presenting evidence regarding child support.⁵ This lesser sanction would have been fully curative while still allowing Father to present the merits of his case. *See id.* The trial court’s decision prohibiting Father from presenting any evidence in his defense, however, was unreasonable and against the logic of the circumstances in this case.

Prohibiting Father from presenting any evidence in his defense disadvantaged Father by denying him the opportunity to contest Grandmother’s evidence regarding custody of Child. In addition, prohibiting Father from presenting any evidence in his defense disadvantaged the trial court because it did not have before it all evidence relevant to whether Grandmother carried her burden of showing Father is unfit, unsuitable, or unable to have custody of Child or the welfare of Child requires third party custody. *See K.M.M. v. K.E.W.*, 539 S.W.3d 722, 736 (Mo. App. E.D. 2017) (alteration omitted) (“Natural parents are not to be denied custody of their minor children, unless the third party seeking custody first carries its burden of showing that each parent is unfit, unsuitable, or unable to have custody or that the welfare of the children requires

⁵ We note the judgment determined it was “unjust and inappropriate to award child support to Grandmother” given Father bears the expense for travel to and from his visitation with Child in Florida.

it”). Nor did the trial court have before it all evidence relevant to determine what legal and physical custody arrangement was in the best interests of Child.⁶

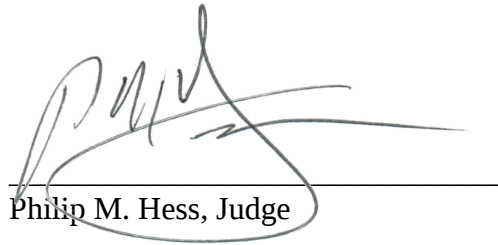
“The polestar guiding the resolution of custody disputes is in the best interests of the child.” *In the Interest of K.K.M.*, 647 S.W.2d 886, 892 (Mo. App. E.D. 1983). “A natural parent’s right to custody of their child is superior to that of third parties.” *K.M.M.*, 539 S.W.3d at 736. “The law presumes that the best interests of [a] minor child[] are best served by the vesting of custody in the parent.” *Id.* (quoting *K.K.M.*, 647 S.W.2d at 889). Father’s lack of diligence in this case is inexcusable. However, given the nature of this third-party custody dispute, the trial court’s view of the circumstances affecting Child’s best interests should have been informed by *both* Father’s and Grandmother’s version of the facts. *See Jones v. Jones*, 10 S.W.3d 528, 540 (Mo. App. W.D. 1999).

We find the trial court abused its discretion in sanctioning Father for his failure to comply with discovery requests by preventing him from offering any evidence in his defense during the proceedings.

⁶ The judgment determined Father would “share all major holidays with [G]randmother,” have visitation with Child “one week each month until August 2020,” and have visitation “one weekend per month in the state of Florida” starting August 2020. We note, however, Grandmother testified she felt comfortable with Child spending six weeks with Father in Missouri during the summer *unsupervised* if Father stayed with Father’s mother because she felt Father’s mother was “responsible” and could “watch[] over [Father] and [Child].” The trial court prohibited Father from presenting the testimony of his mother regarding her ability to watch Child with Father in Missouri. Without such testimony, the trial court was disadvantaged in determining what legal and physical custody arrangement was in the best interests of Child.

Conclusion

The trial court's judgment is reversed and remanded for additional proceedings consistent with this Opinion.



Philip M. Hess, Judge

Gary M. Gaertner, Jr., P.J. and
Michael E. Gardner, J. concur.