

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 15, 2015 Session

**IN RE DARIUS S.**

**Appeal from the Juvenile Court for Rutherford County  
No. 7203C Donna Scott Davenport, Judge**

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**No. M2014-02525-COA-R3-JV – Filed November 30, 2015**

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In this post-divorce custody dispute, Father challenges the trial court's decision to make Mother the primary residential parent. Because Father failed to file a transcript or a statement of the evidence, we must affirm the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and W. NEAL MCBRAYER, JJ., joined.

Kelly L. S., Shelbyville, Tennessee, Pro Se.

John C. Taylor, Murfreesboro, Tennessee, for the appellee, Felicia C. P.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

Felicia P. ("Mother") and Kelly S. ("Father") are the parents of Darius S., born in February 2004. Pursuant to an April 2009 agreed order, Darius's parents shared equal parenting time, and there was no child support to be paid. In June 2013, Mother filed a petition to enforce the parenting plan and/or to change custody of the minor child in which she alleged that, "Father has prohibited Mother from enjoying the requisite amount of visitation time with the child, which has gotten even worse since his relocation to another county." Mother further asserted that the child had witnessed domestic violence in Father's home and that the child was afraid of Father.

In August 2013, Mother filed a motion for an ex parte temporary restraining order

and change of primary custody. She alleged that Darius had been with Mother over the weekend and that Mother noticed “severe bruising on his buttocks.” The child disclosed that Father “had beaten him with a shoe because the child got on the wrong school bus . . . .” The trial court granted Mother a temporary restraining order and gave her temporary custody of the child. After a hearing, the court ordered that Darius remain in Mother’s custody pending further orders of the court.

The matter came on to be heard by a magistrate on May 12, 2014. The hearing took place over several days. The magistrate entered a detailed final order on July 1, 2014 in which he found that there had been a material change in circumstances “in that neither parent ever followed the 2009 parenting plan.” The court then considered the statutory factors set forth at Tenn. Code Ann. § 36-6-106(a)<sup>1</sup> and found that the greatest

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<sup>1</sup> The version of Tennessee Code Annotated section 36-6-106(a) in effect at the time of this hearing set forth the following non-exclusive list of factors relevant to determining custody:

(1) The love, affection and emotional ties existing between the parents or caregivers and the child;

(2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;

(3) The importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment; provided, that, where there is a finding, under subdivision (a)(8), of child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, by one (1) parent, and that a nonperpetrating parent or caregiver has relocated in order to flee the perpetrating parent, that the relocation shall not weigh against an award of custody;

(4) The stability of the family unit of the parents or caregivers;

(5) The mental and physical health of the parents or caregivers. The court may, when it deems appropriate, order an examination of a party pursuant to Rule 35 of the Tennessee Rules of Civil Procedure and, if necessary for the conduct of the proceedings, order the disclosure of confidential mental health information of a party pursuant to § 33-3-105(3). The court order required by § 33-3-105(3) shall contain a qualified protective order that, at a minimum, expressly limits the dissemination of confidential protected mental health information for the purpose of the litigation pending before the court and provides for the return or destruction of the confidential protected mental health information at the conclusion of the proceedings;

(6) The home, school and community record of the child;

(7)(A) The reasonable preference of the child, if twelve (12) years of age or older;

(B) The court may hear the preference of a younger child on request. The preferences of older children should normally be given greater weight than those of younger children;

(8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that, where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or § 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence

weight should go to the factor regarding abuse by Father; the court awarded custody to Mother with Father to have parenting time only after completing an anger management course.

Father appealed the magistrate's decision to the juvenile court judge, who heard the matter de novo on September 5, 2014. The record does not contain a transcript of the hearing or a statement of the evidence. The trial court's order, entered on October 22, 2014, states that there was a hearing on the merits. Based upon the proof, the trial court found a material change in circumstances "in that neither parent ever followed the 2009 plan, that the Father has abused the child, and that Father has had no contact with the child for over a year." The court then went through the Tenn. Code Ann. § 36-6-106(a) factors. The court found that Mother had been the child's primary caregiver since August 26, 2013 and had "provided everything" since that time. On the issue of abuse, the court stated:

The Court finds that the Father has abused the child, has left bruises on the child; the mode of force used and method of discipline here is unacceptable. The Court finds that the Father is a bully, and finds evidence that he bullies the Mother in this matter. Mother was so frightened of what the Father would do to her, she took the child back to his house after exercising her visitation the weekend she found bruising on the child. Mother had a legitimate fear of the ramifications she and the child would both face, causing her to use every legal outlet she could in order to have custody changed from Father to her. Mother attempted to file a police report with the Bedford County Police Department, called the Department of

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relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected to the evidence. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

(9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

(10) Each parent's or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child. In determining the willingness of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, the court shall consider the likelihood of each parent and caregiver to honor and facilitate court ordered parenting arrangements and rights, and the court shall further consider any history of either parent or any caregiver denying parenting time to either parent in violation of a court order.

Children's Services Abuse Hotline, and consulted with her attorney, who filed a restraining order against Father the very next business day.

The trial court found that Darius had "continuity with the Mother." As to each parent's ability to facilitate a relationship with the other parent, the court determined that this factor weighed in favor of Mother. The court further stated:

There is still no proof that Father has done anything the Court has ordered him to do in order to even have visitation with the child and has failed to do anything for the child in the last year. The Court finds that the Father has cited that his stepchildren's schedule and financial issues have prevented him from visiting with his child.

Weighing all of the factors, the trial court determined that custody should remain with Mother. As to Father's parenting time, the court ordered him to complete an eight-week anger management course; after that, his visitation was to be supervised and "shall be a minimum of four (4) hours per month, not to exceed eight (8) hours per month." His monthly child support was \$292.00 a month, and the court found a child support arrearage of \$3,504.00. Father appeals.<sup>2</sup>

#### STANDARD OF REVIEW

In an appeal of a decision rendered after a bench trial, we review the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. TENN. R. APP. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). Moreover, we "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

While we recognize that Father is representing himself, in order to preserve fairness between pro se litigants and their adversaries, pro se litigants are not excused from complying with the same substantive and procedural rules that represented parties must observe. *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

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<sup>2</sup> Father initially appealed this case to circuit court, but the circuit court determined that it lacked subject matter jurisdiction and transferred the appeal to this Court.

## ANALYSIS

In his statement of the issues, Father discusses a number of issues, many of which address the actions of the magistrate, which are not properly at issue in this appeal.<sup>3</sup> Rather, the final order on appeal is that of the juvenile court. Overall, Father seems to challenge the trial court's decision to make Mother the primary residential parent. We have concluded that one argument made by Mother is determinative here: Father's failure to provide a transcript of the evidence or a statement of the evidence precludes this Court from reviewing the findings of the juvenile court.

The following is a summary of the applicable legal principles with respect to an incomplete appellate record:

The appellant bears the primary burden of preparing a fair, accurate, and complete record on appeal, and the appellee shares some responsibility for ensuring that the record is adequate. Ordinarily, “[a]n appellant who elects not to file either a transcript or a statement of the evidence will be faced with the practically insurmountable presumption that the record contained sufficient evidence to support the trial court’s decision.” *Savage v. Hildenbrandt*, No. M1999-00630-COA-R3-CV, 2001 WL 1013056, at \*6 (Tenn. Ct. App. Sept. 6, 2001). In the absence of a transcript or a statement of the evidence, we ordinarily presume that the record, had it been preserved, would have contained sufficient evidence to support the trial court’s decision.

Further, “it has long been the law of this State that where the trial court heard proof and the proof is not brought before the appellate court, it is conclusively presumed that there was evidence presented to support the trial court’s findings and decree.” *Harbour v. Brown*, C.A. No. 577, 1986 WL 6848, at \*1 (Tenn. Ct. App. June 20, 1986).

*Riddle v. Riddle*, No. M2006-00472-COA-R3-CV, 2007 WL 1094133, at \*3-4 (Tenn. Ct. App. Apr. 11, 2007) (citations omitted). In light of the fact that the record contains neither a transcript nor a statement of the evidence of the September 5, 2014 hearing before the juvenile court judge, we must conclusively presume that the evidence supports the trial court’s findings and decree.

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<sup>3</sup> The argument section of Father’s brief fails to comply with the requirements of Tenn. R. App. P. 27(a)(7). Instead of stating his contentions and the reasons and supporting authorities, Father lists bullet points of authorities (such as Rule 10 of the Code of Judicial Conduct) and theories (such as violation of Fourth Amendment rights against unreasonable searches and seizures).

Mother asks this court to find Father's appeal frivolous pursuant to Tenn. Code Ann. § 27-1-122, but we decline to make such a finding.

CONCLUSION

We affirm the judgment of the juvenile court. Costs of appeal are assessed against the appellant, Kelly S., and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE