

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Buzayene G. Kidane,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-892 (C.P.C. No. 13DR-05-1635)
Tsige Gezahegn,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2015

Buzayene G. Kidane, pro se.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

KLATT, J.

{¶ 1} Plaintiff-appellant, Buzayene G. Kidane, appeals a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, that granted him a divorce from defendant-appellee, Tsige Gezahegn. For the following reasons, we affirm that judgment.

{¶ 2} The parties married on August 6, 2000. During the marriage, the parties had three children. According to Gezahegn, Kidane abused her throughout the marriage. Gezahegn obtained a civil protection order against Kidane in 2012.

{¶ 3} Kidane filed for divorce on May 1, 2013. The case proceeded to trial. On October 3, 2014, the trial court issued a judgment that granted the parties a divorce, divided the marital assets, and determined child custody and support. The trial court named Gezahegn the legal custodian and residential parent for the children. Kidane received parenting time with the children every other week from Friday to Wednesday and, on the alternating weeks, from Wednesday to Thursday. The trial court ordered

Kidane to pay child support of \$306 per month when private health insurance is provided to the children, and \$410.86 per month when private health insurance is not provided to the children.

{¶ 4} Kidane appeals the October 3, 2014 judgment, and he assigns the following errors:

I. THE TRIAL COURT ERRED IN AWARDING THE DEFENDANT-APPELLEE TSIGE GEZAHEGN CHILD SUPPORT AND CUSTODY OF [M.K.](8), [M.K.](7), AND [H.K.](2) BY FALSE CLAIM OF ABUSE AND A RECENT DISCOVERY OF CHILD ABUSE AGAINST THE MOTHER WAS NOT CONSIDERED BY THE COURT IN AWARDING CUSTODY.

II. THE TRIAL COURT ERRED IN AWARDING THE DEFENDANT-APPELLEE TSIGE GEZAHEGN CHILD SUPPORT AND CUSTODY OF [M.K.](8), [M.K.](7), AND [H.K.](2) BECAUSE THE APPELLANT BUZAYENE KIDANE WAS NOT ABLE TO ADEQUATELY PRESENT HIS CASE IN FACT THAT THE APPELLEE FAILED TO COMPLY WITH APPELLANT[']S DISCOVERY REQUEST OF THE APPELLEE[']S 2013 FEDERAL AND STATE TAX RETURN W-2 FORM, 2013 & 2014 PAY STUBS, 2013 & 2014 BANK STATEMENTS, THE CHILDREN'S 2013 & 2014 DAYCARE DROP[-]OFF AND PICK[-]UP TIMES, AND THE CHILDREN'S MEDICAL AND SCHOOL RECORDS, THE TRIAL COURT ALSO FAILED TO ENFORCE SAID DISCOVERY REQUESTS.

III. THE TRIAL COURT ERRED IN AWARDING THE DEFENDANT-APPELLEE TSIGE GEZAHEGN CHILD SUPPORT AND CUSTODY OF [M.K.](8), [M.K.](7), AND [H.K.](2) BY RELYING UPON AN AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY ORDERS BY THE APPELLEE EVEN THOUGH THE AFFIDAVIT WAS NEVER FILED WITH THE TRIAL COURT. FURTHER, THE AFFIDAVIT INDICATES IT WAS SIGNED IN COLUMBUS ON A DATE IN WHICH THE APPELLEE TESTIFIED IN COURT THAT SHE WAS NOT IN THE STATE OF OHIO ON SAID DATE.¹

{¶ 5} By his first assignment of error, Kidane initially argues that the trial court erred in finding Gezahegn's testimony credible and considering Gezahegn's version of

¹ To protect the privacy of the children, we have redacted their names from the assignments of error.

events when determining child custody and support. Kidane points to evidence that he contends discredits Gezahegn's rendition of the events that precipitated the end of the parties' marriage, including Gezahegn's allegations of domestic abuse.

{¶ 6} At the outset, we reject Kidane's argument to the extent it challenges the child support determination. The events at issue have no relevance to the child support determination, which primarily focuses on the parties' income. Therefore, we will confine our review to whether the trial court erred in consideration of the events, as described by Gezahegn, when allocating the parties' parental rights and responsibilities pursuant to R.C. 3109.04.

{¶ 7} Trial courts have broad discretion in deciding custody matters. *Davis v. Flickinger*, 77 Ohio St.3d 415, 421 (1997). Appellate courts accord that discretion " 'the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned.' " *Pater v. Pater*, 63 Ohio St.3d 393, 396 (1992), quoting *Miller v. Miller*, 37 Ohio St.3d 71, 74 (1988). This deference is owed because "the trial judge has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis* at 418. Under the abuse-of-discretion standard applicable to appeals of custody matters, " '[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court.' " *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81 (1984).

{¶ 8} Essentially, Kidane wants this court to do something outside of our province. We cannot second-guess the trial court's credibility findings and reverse the custody determination even if we believed his version of events over Gezahegn's. Moreover, Kidane also faces a more fundamental problem: the trial court made no factual findings regarding the events that led to the breakdown of the parties' marriage. While the trial court noted that Gezahegn had testified that Kidane had abused her, the court did not decide whether that testimony was true or not. In large part, the trial court settled on the custody arrangement it ordered due to the extreme conflict between the parties and the fact that, at the time of trial, the parties operated under a civil protection order. Kidane does not contest either the existence of the conflict or the civil protection order.

{¶ 9} Next, Kidane argues that the trial court erred in not considering allegations that Gezahegn physically abused the children when determining child custody and support. We must reject this argument because Kidane has not filed a complete transcript of the trial.

{¶ 10} "[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13. The appellant has the responsibility to provide a transcript of those proceedings because the appellant bears the burden of showing error by reference to matters in the record. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 19 (1988). "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980).

{¶ 11} Here, the trial court could only commit the error alleged if, at trial, Kidane submitted evidence of child abuse, which the trial court then ignored. However, the absence of a full transcript prevents us from discerning whether Kidane introduced any evidence substantiating his abuse claim. As we lack the means to assess Kidane's argument, we must presume that no error occurred.

{¶ 12} In so ruling, we are cognizant that Kidane attached to his brief an email from his older son to the principal of his younger son's school that references the alleged physical abuse of the younger son by his mother. However, "[a]n exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal." *Cashlink, LLC v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 8. Moreover, the email is dated December 5, 2014—well after trial ended. The trial court, therefore, could not have admitted this email into evidence at trial and considered it in reaching its judgment. Consequently, we must exclude it from our review. *Morgan* at ¶ 13, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus (" 'A reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.' ").

{¶ 13} In sum, we reject both of the arguments made in the first assignment of error. Therefore, we overrule the first assignment of error.

{¶ 14} By the second assignment of error, Kidane argues that the trial court erred in not enforcing his requests that Gezahegn produce certain documents. We disagree.

{¶ 15} Kidane first sought the documents at issue through subpoena. On November 1, 2013, Kidane caused the court to issue a subpoena directing Gezahegn to produce her pay stubs and bank statements, as well as any records showing the children's daily schedules and payment of childcare expenses. In a hearing before the magistrate regarding an unrelated matter, Kidane apparently told the magistrate of his subpoena and Gezahegn's failure to respond. The magistrate issued an order on March 11, 2014 requiring Gezahegn to turn over the requested documents within 14 days of the order. Kidane then caused the court to issue a second subpoena, which also sought Gezahegn's pay stubs, on March 17, 2014.

{¶ 16} A party may not use a subpoena to obtain the production of documents from another party. Civ.R. 45. "Rather, * * * documents * * * may be obtained from a party in discovery only pursuant to Civ.R. 34." *Id.* Thus, when Kidane used subpoenas to seek documents from Gezahegn, he violated Civ.R. 45. Nevertheless, upon learning of Kidane's subpoena and Gezahegn's noncompliance, the magistrate assisted Kidane by ordering Gezahegn to turn over the requested documents. Thereafter, the record contains no indication that Kidane informed the magistrate or trial court that Gezahegn had not followed the order, nor does the record show that Kidane sought the magistrate's or trial court's intervention when Gezahegn proved to be disobedient. We can find no error in the lack of enforcement of the order when Kidane did not take any steps to procure that enforcement.

{¶ 17} Despite his initial discovery missteps, Kidane eventually served upon Gezahegn a Civ.R. 34 request for the production of documents. This request sought the same types of documents as the subpoenas, as well as additional documents. Gezahegn apparently did not respond to the request because Kidane filed a motion to compel on June 2, 2014. Trial began the day after Kidane moved to compel production. The trial court did not specifically rule on the motion to compel, but, in its final judgment, it denied all pending motions, which included the motion to compel.

{¶ 18} If a party does not produce the documents sought in response to a Civ.R. 34 request, the requesting party may move to compel production pursuant to Civ.R. 37(A)(2). Here, Kidane moved to compel production, but he did so only one day before trial began. The belated filing of the motion left no opportunity for the trial court to provide any meaningful recourse to Kidane. For an order to compel to have any effect, the trial court would have had to continue the trial to allow Gezahegn time to respond to the order. Kidane, however, did not move for a continuance. Given these circumstances, we conclude that the trial court did not err in denying the motion to compel. Accordingly, we overrule Kidane's second assignment of error.

{¶ 19} By his third assignment of error, Kidane argues that the trial court erred in considering an affidavit signed by Gezahegn and submitted in support of Gezahegn's motion for temporary orders when determining child custody and support. We find this argument unavailing.

{¶ 20} In rendering judgment after a bench trial, a trial court considers the evidence adduced from the witness stand, the exhibits admitted during trial, and stipulations. *Midstate Educators Credit Union, Inc. v. Werner*, 175 Ohio App.3d 288, 2008-Ohio-641, ¶ 35 (10th Dist.); accord *Hoaglin Holdings, Ltd. v. Goliath Mtge., Inc.*, 8th Dist. No. 83657, 2004-Ohio-3473, ¶ 15 ("In making its decision following trial, the trial court may only consider the evidence the court admitted at trial."). Here, because Kidane did not supply this court with a full transcript, we cannot determine whether Gezahegn's affidavit was offered or admitted into evidence. However, admitted or not, the affidavit does not seem to have influenced the trial court's decision. The final judgment cites Gezahegn's testimony at trial; it contains no mention of Gezahegn's affidavit. Accordingly, we overrule Kidane's third assignment of error.

{¶ 21} For the foregoing reasons, we overrule the three assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.
