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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000465-ME
AND
NO. 2018-CA-000466-ME

AMY LAGE AND
DENNIS LAGE — APPELLANTS

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NOS. 17-CI-501660 & 17-CI-501661

BRITNEY ESTERLE — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Amy Lage and Dennis Lage bring these appeals from January 23, 2018, orders of the Jefferson Circuit Court, Family Court Division, denying

their motions to be declared *de facto* custodians of K.S.H. and T.L.H., the biological children of Britney Esterle.[1] We vacate and remand.

I. Background

On July 28, 2015, Britney Esterle was admitted to Lifehouse Maternity Home in Louisville, Kentucky. Britney, who was pregnant with her fifth child, brought her two-year-old twins, K.S.H. and T.L.H., with her to Lifehouse. The Lifehouse director then contacted a program volunteer, Amy Lage, to inquire whether she could care for the twins while Britney delivered and recovered from childbirth.

By agreement of the parties on August 3, 2015, K.S.H. and T.L.H. began living with Amy and her husband, Dennis Lage. The parties originally agreed the twins would stay with Amy and Dennis for four months. Thereafter, the parties agreed to extend the time into January 2016. In March 2016, Britney left Lifehouse, but the twins remained with Amy and Dennis.

On May 15, 2017, Amy and Dennis filed Petitions for Adoption of K.S.H. and T.L.H. (Action Nos. 17-AD-500274 and 17-AD-500275) and filed Motions for Emergency Custody (Action Nos. 17-J-502073 and 17-J-502074).[2] In

[1] Amy Lage and Dennis Lage's Motion to Alter, Amend or Vacate the January 23, 2018, order was denied by order entered February 20, 2018.

[2] The record on appeal does not contain the family court records from the emergency custody actions or the adoption actions. Rather, the record on appeal merely includes the records from

their Motions for Emergency Custody, Amy and Dennis sought an order permitting the twins to remain with them pending outcome of the adoption proceedings. On May 16, 2017, an order was entered granting emergency custody to Amy and Dennis until a temporary removal hearing could be held. A temporary removal hearing was conducted on May 19, 2017.[3] And, by order entered May 24, 2017, K.S.H. and T.L.H. were returned to Britney's custody after spending almost two years with Amy and Dennis.[4]

Following the May 19, 2017, ECO hearing, Amy and Dennis filed Motions for *De Facto* Status and Petitions for Custody (Action Nos. 17-CI-501660 and 17-CI-501661). An evidentiary hearing was originally scheduled for September 27, 2017. The hearing was rescheduled to January 19, 2018. Amy and Dennis, along with their counsel, were present for the hearing. Britney was not present at the hearing nor was counsel present on her behalf.[5]

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the actions Amy and Dennis Lage initiated by filing Motions for *De Facto* Status and Petitions for Custody (Action Nos. 17-CI-501660 and 17-CI-501661).

[3] In the underlying action before this Court, (Action Nos. 17-CI-501660 and 17-CI-501661), the family court referred to the temporary removal hearing as the May 24, 2017, ECO hearing. The record reflects the hearing was held on May 19, 2017, and we will refer to the hearing as the May 19, 2017, ECO hearing.

[4] The Petitions for Adoption were subsequently dismissed for lack of standing as Amy and Dennis no longer had physical custody of K.S.H. and T.L.H.

[5] Britney Esterle retained counsel after Amy and Dennis filed the Motions For *De Facto* Status and Petitions for Custody on May 23, 2017. However, by order entered January 3, 2018, Britney's counsel was permitted to withdraw.

At the hearing, several witnesses testified on behalf of the Lages including Amy, Dennis, the twins' therapist, the twins' guidance counselor, and a close family friend. Although Britney did not testify at the hearing on the Motions for *De Facto* Status, the family court utilized Britney's testimony from the May 19, 2017, ECO hearing by taking judicial notice thereof. And, the family court then based its findings of fact upon said testimony:

> [Amy] stated that she and her husband were the primary caregivers and financial supporters for the children. However, she offered testimony and information which spurred the Court to review and take judicial notice of the sworn testimony elicited in the May [19], 2017[,] Emergency Custody Hearing (herein after [sic] ECO) in which Hon. Deborah Deweese ordered that the children be returned to the care, custody and control of [Britney].
>
> In the current hearing, [Amy] had referenced an agreement between herself, Lifehouse and [Britney] whereby three (3%) of [Britney's] check was to be provided to [Amy] to assist in providing for the children. [Amy] testified that she received approximately $100.00 in total while [Britney] was residing in Lifehouse. However, a review of the ECO hearing provides very different information regarding the financial support for the children by the parties. [Britney] testified during the hearing that, while at Lifehouse, twenty (20%) percent of her check was taken and provided to [Amy] for the benefit of the children. She testified that after leaving Lifehouse she was paying $100.00 per week for her children. At the hearing [Britney] referred to documentary evidence to support her contentions regarding the money provided for the children.
>
> Additionally, testimony during both the current hearing as well as the above-referenced earlier one,

indicated that the children have consistently been covered by Passport for their health insurance and this has always been provided by [Britney]. All medical issues, as well as the speech and developmental services provided for the children, were apparently paid for through Passport. There was no testimony by [Amy] to indicate otherwise. In addition, the ECO hearing brought forth testimony from [Amy] that [Britney] saw the children about once a month, not the six-week time frame to which she testified in today's hearing.

[Britney's] ECO hearing testimony was that she contacted [Amy] weekly to attempt to set up parenting time and that [Amy and Dennis] always had plans for the children on the weekend. They would take the children to the waterpark, set up swimming lessons on Saturday mornings and multiple other activities. [Britney] would ask to take the children to those lessons or join them for the lessons but there was always an excuse provided by [Amy] that would negate the possibility.

The statute provides that the party seeking *de facto* status must provide clear and convincing evidence that they have, in fact, been the primary caregiver **and** (emphasis added) financial supporter, of a child in their care for a specific amount of time depending on the age of the child. While it is uncontroverted that the children have resided in the home of [Amy and Dennis] for the prescribed time, the Court does not find by clear and convincing evidence that [Amy and Dennis] were, indeed, the primary caregivers and financial supporters of the children. The evidence contained in the record from the May [19], 2017[,] hearing, indicates that [Britney] remained a consistent and large financial provider for the children and was constantly attempting to be further involved in their lives. That hearing underscores the attempts at parenting the children that [Britney] continued to make after leaving the Lifehouse, and how those attempts appeared to be thwarted by [Amy and Dennis]. [Britney] was clear in her testimony that she

> believed [Amy] was trying to keep the children from her. Lastly at that hearing was [Britney's] testimony regarding an agreement that she and [Amy] had just entered several weeks earlier regarding [Britney] reclaiming her children for the summer. [Britney] stated that it was her intent to keep the children after the summer break but she did not announce that to [Amy] for fear they would end up in some court action.

January 23, 2018, order at 2-4, which denied Amy and Dennis's Motions for *De Facto* Status.

Amy and Dennis then filed a motion to alter, amend, or vacate the January 23, 2018, order, and also filed a motion for recusal of the family court judge. Those motions were denied by order entered February 20, 2018. These appeals follow.

II. Standard of Review

Our review in this case looks initially to whether Amy and Dennis have qualified as *de facto* custodians. Kentucky Revised Statutes (KRS) 403.270(1) requires a court to determine by clear and convincing evidence whether a person meets the statutory definition of a *de facto* custodian. If a person is granted *de facto* custodian status, the court must then determine what is in the best interest of the child in awarding custody, with equal consideration given to a parent and *de facto* custodian. KRS 403.270(2); KRS 405.020(3); *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

De facto custodian proceedings necessarily require family courts to conduct evidentiary hearings to consider the evidence contemplated under the statute. Kentucky Rules of Civil Procedure (CR) 52.01. Likewise, child custody proceedings also require courts to conduct evidentiary hearings and make findings of fact pursuant to CR 52.01. *See Anderson v. Johnson*, 350 S.W.3d 453, 456 (Ky. 2011); *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Upon review of *de facto* custodian and child custody proceedings, this Court must determine whether the family court's findings of fact are clearly erroneous. *Reichle*, 719 S.W.2d at 444; CR 52.01. Our review of related legal issues and questions of law is *de novo*. *Ball v. Tatum*, 373 S.W.3d 458, 464 (Ky. App. 2012).

III. Analysis

We begin our review by noting that Britney has not filed an appellee brief in this appeal. 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). This Court 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." *Id.* at 732 (quoting CR 76.12(8)(c)). For purposes of this appeal, we accept Amy and Dennis's statement of facts set

forth in their brief as correct, of course subject to our independent review of the entire record on appeal.

Amy and Dennis contend the family court erred by denying their Motions for *De Facto* Status. More particularly, Amy and Dennis assert the family court erroneously took judicial notice of Britney's testimony from the May 19, 2017, ECO hearing and, thus, improperly based its findings of fact upon such testimony. It is undisputed that neither Britney nor her counsel appeared at the January 19, 2018, hearing. Nevertheless, the family court relied upon Britney's testimony from the May 19, 2017, ECO hearing to support its findings of fact. The family court justified its reliance upon such testimony by taking judicial notice thereof. Amy and Dennis argue that such action by the family court constituted an error of law.

Judicial notice is governed by Kentucky Rules of Evidence (KRE) 201 and provides that a court may take "judicial notice of adjudicative facts." KRE 201(a). Subsection (b) of KRE 201 provides in part that "[a] judicially noticed fact must be one not subject to reasonable dispute . . . ." The indisputability test is satisfied if the noticed fact is either: "(1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or (2) Capable of accurate and

ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201(b).

Pursuant to KRE 201, "court records are not singled out for special treatment, and it thus appears that they . . . may now be resorted to for judicial notice provided that the particular record's accuracy cannot reasonably be questioned and provided further that the fact established by the record is not subject to reasonable dispute." *Rogers v. Commonwealth*, 366 S.W.3d 446, 451 (Ky. 2012). Moreover, under KRE 201 "it may be appropriate to notice court records for the occurrence and timing of matters reflected in them–the holding of a hearing, say, or the filing of a pleading–but **it will generally not be appropriate to notice the truth of allegations or findings made in another matter, since such allegations or findings generally will not pass the 'indisputability' test**." *Id.* at 451-52 (emphasis added) (citing *Meece v. Commonwealth*, 348 S.W.3d 627, 692-93 (Ky. 2011)); *see also Marchese v. Aebersold*, 530 S.W.3d 441, 446-48 (Ky. 2017).

More importantly, this Court has previously instructed family courts that the evidence introduced in one court or proceeding cannot be used in another proceeding by judicial notice to prove a similar proposition in that case. In *S.R. v. J.N.*, 307 S.W.3d 631, 637-38 (Ky. App. 2010), this Court stated:

> Evidence introduced in an adversary proceeding—and not stipulated to by the parties or reduced to a finding by

the court—is by its nature subject to dispute. Unless the circuit court ruled on the truth or falsity of that evidence in the prior proceedings, thereby making it a judicially noticeable finding of fact, then that evidence cannot be judicially noticed. Our Supreme Court has stated the rule generally that courts "cannot adopt by judicial notice the *evidence* introduced in [one] case for the purpose of proving a similar proposition in another case." *Johnson v. Commonwealth*, 12 S.W.3d 258, 263 (Ky. 1999) (emphasis original). We believe the rule is no less applicable in the case before us.

A family court is no less bound by procedural, substantive and evidentiary rules of law than any other circuit court simply because the creation of family courts was animated by the "one judge-one family" policy. Louise E. Graham & James E. Keller, 15 *Ky. Prac. Domestic Relations Law* § 8:27 (3d ed. 2008) ("The 'one judge-one family' policy animating the creation of Family Courts in Kentucky is designed to reduce stress for families and promote the efficient delivery of services to those families whose disputes involve them in the court system."); *see also* [Kentucky Constitution] § 112(6); KRS 23A.100. Family court judges become familiar with the families that appear before them, and with their disputes. Judges will be left with impressions that may or may not be relevant to the issue then before the court. If those impressions are not sufficiently relevant, or do not carry sufficient *veritas* to make them judicial findings, they should have no legal import in any proceeding. We learn by the case before us that if a family's various causes of action in family courts are not kept distinct by the court's adherence to well-founded rules, parties or the court itself could leverage mere impressions from a prior proceeding into findings in a subsequent one, despite that in the prior action the impression was not sufficient to merit establishment as a judicially noticeable finding of fact. . . .

In this case, the family court conducted a hearing upon Amy and Dennis's Motions for *De Facto* Status on January 19, 2018, and neither Britney nor her counsel appeared. There was testimony presented at the hearing in support of Amy and Dennis's claim that they were the primary caregivers and financial supporters for K.S.H. and T.L.H. during the time between August 3, 2015, and May 24, 2017. No testimony was presented at the hearing on Britney's behalf. In its January 23, 2018, order, the family court stated that Amy's testimony from the January 19, 2018, hearing had "spurred the Court to review and take judicial notice of the sworn testimony elicited" at the May 19, 2017, ECO hearing.[6] Throughout the family court's order denying Amy and Dennis's Motion for *De Facto* Status, the family court made several references to its reliance upon Britney's testimony from the May 19, 2017, ECO hearing. The ECO hearing was conducted some eight months earlier, in a separate court action, and in front of a different judge. The family court even stated in its January 23, 2018, order that the evidence in the record from the May 19, 2017, ECO hearing indicated that Britney "remained a consistent and large financial provider for the children and was constantly

[6] This creates another error by the family court as a matter of law. Kentucky Rules of Evidence 201(e) requires a court to give parties notice of its intent to take judicial notice of any matter relevant to the case and gives parties the opportunity to be heard on the propriety of taking judicial notice. No hearing was conducted on the family court's decision to take judicial notice of Britney's testimony in the ECO case prior to the court's ruling. This was a fundamental due process error. *See Marchese v. Aebersold*, 530 S.W.3d 441, 448-49 (Ky. 2017).

attempting to be further involved in their lives." The family court ultimately concluded that Amy and Dennis did not qualify as *de facto* custodians.

It is clear from the January 23, 2018, order the family court relied upon Britney's testimony from the May 19, 2017, ECO hearing, and it did so by taking judicial notice thereof. However, Britney's testimony from the ECO hearing does not pass the indisputability test of KRE 201. *See Rogers*, 366 S.W.3d at 451. Britney's testimony is not generally known within the community nor is it capable of accurate determination by sources whose accuracy cannot be reasonably questioned. *See* KRE 201. And, it is clear that Britney's testimony was disputed by Amy and Dennis. Moreover, by taking judicial notice of Britney's testimony, Amy and Dennis were unable to cross-examine Britney upon the *de facto* custodian issue. Accordingly, we are of the opinion that the family court committed an error of law by taking judicial notice of Britney's testimony from the May 19, 2017, ECO hearing.[7] We, therefore, vacate and remand for the family court to reconsider Amy and Dennis's Motion for *De Facto* Status without taking judicial notice of Britney's testimony from the May 19, 2017, ECO hearing.

Amy and Dennis also contend that the family court erred by determining they were not the primary financial supporters of K.S.H. and T.L.H. More specifically, Amy and Dennis assert the family court erred by finding that the

[7] As noted, there is no tape or transcript of the May 19, 2017, ECO hearing included in the record on appeal in this case.

children's doctor visits, therapy appointments, and counseling services were paid for by insurance provided by Britney. Thus, the family court concluded that Amy and Dennis could not qualify as d*e facto* custodians. We must agree with Amy and Dennis that the family court committed an error of law on this issue also.

KRS 403.270 requires that the *de facto* custodian serve as the "primary" financial supporter but not the "sole" financial supporter of the children. *Spreacker v. Vaughn*, 397 S.W.3d 419, 422 (Ky. App. 2012), *overruled on other grounds by Meinders v. Middleton*, 572 S.W.3d 52, 57-59 (Ky. 2019). The Court in *Spreacker* held "that there is no authority in the Commonwealth withholding *de facto* status from a custodian who receives financial support provided by the government through public benefits rather than having earned the monies through his or her own employment." *Id.* at 421-22 (citing *S.S. v. Commonwealth*, 372 S.W.3d 445, 448 (Ky. App. 2012)). The *Spreacker* Court noted that "[s]uch a holding would disqualify the poor and disabled from ever attaining the status of a *de facto* custodian." *Spreacker*, 397 S.W.3d at 422. In sum, receipt of public benefits alone does not preclude a financial supporter from obtaining *de facto* custodian status under KRS 403.270(1).

In this case, K.S.H. and T.L.H. received public benefits in the form of health insurance. The twins received this public benefit through Britney's eligibility, but Britney did not "provide" the benefits. And, the twins' receipt of

this public benefit does not preclude Amy and Dennis from qualifying as the primary financial provider for the twins. *See Spreacker*, 397 S.W.3d at 422. There was evidence presented that the insurance provided by this public benefit supplemented the financial support that Amy and Dennis provided. However, the family court made no findings regarding the parties' respective support for the children, and, of course, Britney did not testify at the hearing. Unless the insurance benefit was the "**sole** support" for the children, the benefit itself would not supplant Amy and Dennis's support, assuming the evidence establishes they provide primary support for the children. *See id.* at 422. Therefore, we agree with Amy and Dennis that the family court erred by precluding them from being considered as the primary financial providers for the twins solely because the children received health insurance as a public benefit. However, we do not reach the issue of whether Amy and Dennis have presented clear and convincing evidence to establish they were primary caregivers and financial supporters for the children. Rather, we vacate and remand for the family court to reconsider the *de facto* custodian status of Amy and Dennis in light of this Opinion and conduct another hearing if the family court deems necessary.

Any remaining contentions of error are deemed moot or without merit.

For the foregoing reasons, the order of the Jefferson Circuit Court, Family Court Division, is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Corey Shiffman
John H. Helmers, Jr.
Louisville, Kentucky

NO BRIEF FOR APPELLEE.