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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001818-ME

CHRISTAL MULLINS APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE DWIGHT S. MARSHALL, JUDGE
ACTION NO. 15-CI-00717

BRENDA HAMILTON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR AND K. THOMPSON, JUDGES; HENRY, SPECIAL JUDGE.[1]

TAYLOR, JUDGE: Christal Mullins brings this appeal from Findings of Fact, Conclusions of Law and Judgment of the Floyd Circuit Court, Family Court

[1] Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Division, entered August 29, 2016, holding Brenda Hamilton to be a *de facto* custodian of E.H., and awarding custody of E.H. to Brenda. The Floyd Family Court "overruled" Christal's motion to alter, amend or vacate by order entered November 1, 2016.[2] For the reasons stated, we affirm.

Background

E.H. was born on January 24, 2003. His mother was Christal Mullins and purported father was Brandon Hall. Brandon passed away on September 20, 2010. At the time of Brandon's death in 2010, E.H. went to live with Donnie Hall, Brandon's father. Although unclear from the record as to the exact dates, Brenda Hamilton was married to Donnie Hall at some time during this period and the couple subsequently divorced. However, both Donnie and Brenda provided care for E.H. until Donnie's death in December 2015. In December 2014, Donnie became ill and E.H. came to reside exclusively with Brenda and has continued to reside with her throughout this proceeding.

On October 6, 2015, Brenda and Donnie filed a joint petition in the Floyd Family Court seeking to be declared *de facto* custodians of E.H. The petition alleged that E.H.'s mother, Christal, had "substance issues" and

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[2] Brenda Hamilton states in her brief that this motion was not timely filed, inferring that the appeal was untimely. A motion under Kentucky Rules of Civil Procedure 59.05 must be served not later than ten days from entry of the final judgment. This motion was served on September 8, 2016, ten days after entry of judgment. The motion was properly considered by the family court. *Huddleston v. Marley*, 757 S.W.2d 216, 217-18 (Ky. App. 1988).

insufficient housing, and thus could not properly care for E.H. The petition also alleged that E.H.'s biological father was Brandon Hall, who as noted, passed away in 2010. According to the petition, Donnie and Brenda had "solely cared for and supported" E.H. since 2010.

On October 13, 2015, the Floyd Family Court granted emergency custody of E.H. to Donnie and Brenda. As noted, Donnie died shortly thereafter in December 2015. The record shows no case activity until February 2016, when Christal filed a "Motion for Immediate Entitlement" to custody of E.H. That motion asserted that Donnie and Brenda were not "any legal relation" to E.H. because his true biological father was Leonard McCary.[3] The family court conducted an evidentiary hearing on July 1, 2016. The court entered findings of fact, conclusions of law and judgment on August 29, 2016. In relevant part, the court found that E.H. lived with Donnie after Brandon died in 2010. The court also held that Donnie and Brenda were the primary caregivers for E.H. for the period of September 20, 2010, through December 10, 2015, and that E.H. lived exclusively with Brenda beginning in December 2014.

At the hearing the court heard testimony from several witnesses, including Brenda and E.H. Based on the testimony and evidence presented, the

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[3] Christal Mullins asserted that Leonard McCary, not Brandon Hall was the biological father of E.H., based on an Ohio paternity test performed in 2003. That test result was filed in the record of this case in support of a motion to dismiss.

family court concluded that Brenda and Donnie were the primary caregivers for E.H. and thus qualified as *de facto* custodians. The court concluded it was in the best interest of E.H. to grant custody to Brenda and awarded Christal reasonable visitation. This appeal follows.

Standard of Review

Our review in this case looks first to whether Brenda is qualified to be a *de facto* custodian. 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); *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, to determine the best interest of the child, custody proceedings necessarily 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 (Ky. 2011); *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Upon review of child custody proceedings, this Court must determine whether the family court's findings of fact are clearly erroneous. *Id.*;

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).

Additionally, "[q]uestions as to the weight and credibility of a witness are purely within the province of the [family] court acting as fact-finder[.] CR 52.01[.]" *Truman v. Lillard*, 404 S.W.3d 863, 868 (Ky. App. 2012). "Findings of fact are not clearly erroneous if supported by substantial evidence." *Id.* (citation omitted). And, if the testimony and evidence presented is contested or in conflict, as in this case, this Court may not substitute its judgment for that of the family court. *Id.* at 868-69. We are also mindful that the family court as fact-finder, has the sole discretion to determine the quality of the evidence presented and the sole duty to judge the credibility of the witnesses. *Id.* at 868; CR 52.01. Our review proceeds accordingly.

Analysis

Christal raises two arguments on appeal. First, the family court erred by finding both Donnie and Brenda to be *de facto* custodians. Second, the family court erred by not dismissing the action for failure of Brenda to name Leonard as an indispensable party. We will address each issue in the order presented in Christal's brief.

KRS 403.270[4] sets forth the following statutory mandate necessary to be considered a *de facto* custodian:

> (1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, "de facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.
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> (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

The statute specifically refers to a singular "person" who has been the primary caregiver and financial supporter of the child for the requisite time period. Our legal precedent is clear that one individual may qualify as *de facto* custodian or a married couple may qualify as such a couple is deemed to be a "single unit"

[4] We note that KRS 403.270 was amended by the General Assembly in July 2018, but we utilize the version of the statute in effect when this action was filed.

under KRS 403.270. *See e.g., J.G. v. J.C.*, 285 S.W.3d 766, 768 (Ky. App. 2009); *see also Cherry v. Carroll*, 507 S.W.3d 23 (Ky. App. 2016); Richard A. Revell, Diana L. Skaggs & Michelle Eisenmerger Mapes, *Kentucky Divorce* § 23.5 (2018).

Thus, under Kentucky precedent, two nonmarried individuals, even if living in the same household may not be named joint *de facto* custodians of a minor child. Frankly, if Donnie had not passed away prior to entry of the family court's judgment of August 29, 2016, we would agree with Christal's argument on this issue and remand this case for additional proceedings. However, notwithstanding that the court determined that Donnie and Brenda had qualified as joint *de facto* custodians, that part of the judgment as pertains to Donnie is a nullity and of no force or effect. Donnie was deceased when the court conducted the hearing and rendered judgment. Deceased persons may not be named *de facto* custodians of a minor child. While we are puzzled why the court would make this ruling as concerns Donnie, it does not affect the court's ruling in regards to Brenda's *de facto* custodian status, since the statutory requirements remain the same.

As concerns Brenda, the court conducted an evidentiary hearing and heard testimony from several witnesses, including Brenda and E.H. The court concluded that Brenda was the primary caregiver of E.H. and awarded *de facto* custodian status under the statute. Christal does not cite this Court to any evidence

in the record that refutes the family court's findings and conclusions on Brenda's status. In fact, Christal failed to designate as a part of the record on appeal the video recording of the evidentiary hearing in this case. Without the video recording or a hearing transcript, we must assume that the evidence and testimony presented at the hearing support the family court's judgment. *Gambrel v. Gambrel*, 501 S.W.3d 900, 902 (Ky. App. 2016). Thus, we affirm Brenda's status as *de facto* custodian of E.H.

Christal's final argument is that the family court erred by failing to dismiss this case due to Brenda's failure to name Leonard McCary, the purported biological father of E.H., as an indispensable party to the action. Christal did file a motion to dismiss during the case, based on this argument, but no hearing on the issue was ever held. At the lengthy final evidentiary hearing in the case conducted by the family court, Christal did not raise the issue nor make any argument in support of the motion. Then, in Christal's CR 59.05 motion, the issue was raised again before the family court. The court concluded the issue had been waived by Christal's silence on this issue at the evidentiary hearing. We agree with the family court that the failure to raise or argue this issue at the evidentiary hearing effectively waived the argument.

More importantly, we conclude that Christal was equitably estopped from raising the paternity issue in this proceeding. Based on the limited record

before this Court, we must assume that from E.H.'s birth in 2003, Brandon was a primary caregiver and provider for E.H., as if he were his father, until Brandon's death in 2010. There is nothing in the record that would refute that Brandon acted and believed at all times that he was the father of E.H. In 2008, Christal petitioned the Floyd District Court to change E.H.'s name from Mullins to Hall, whereupon, under oath, Christal swore that Brandon was E.H.'s father. Although the Ohio paternity report filed by Christal from 2003 in this case may have rebutted Brandon being the father of E.H., we believe she was estopped from raising the issue based on her prior conduct and the established father-son relationship of Brandon and E.H., prior to his death, as set out in the record of this case. *See Hinshaw v. Hinshaw*, 237 S.W.3d 170 (Ky. 2007).

Additionally, we note that at no time during the year that this case was pending in Floyd Family Court did Leonard seek to intervene as a matter of right to assert any parental rights. Given the facts of this case and the totality of circumstances, the family court did not err in refusing to consider the paternity argument. Similarly, although not addressed by Christal in this appeal, we find no error in the family court's ruling that it was in the best interest of E.H. to award Brenda custody.

For the foregoing reasons, the Findings of Fact, Conclusions of Law and Judgment of the Floyd Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Timothy A. Parker Prestonsburg, Kentucky	Tammy C. Skeens Pikeville, Kentucky