

NOT DESIGNATED FOR PUBLICATION

No. 106,172

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF
JUSTINE GUMBLE GENTRY n/k/a FOSTER
Appellant,

and

JEREMY L. GENTRY, SR.,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; RICHARD J. ROME and PATRICIA ROSE, judges. Opinion filed August 3, 2012. Reversed and remanded with directions.

Christopher T. Wilson, of Beam-Ward, Kruse, Wilson, Wright & Fletes, LLC, of Overland Park, for appellant.

R.J. Kleinherenbrink, of Forker, Suter, LLC of Hutchinson, for appellee.

Before GREENE, C.J., GREEN and BUSER, JJ.

Per Curiam: Justine Gumble Gentry (n/k/a Foster) appeals the district court's award of primary residential custody of her minor son, J.L.J., to his father, Jeremy L. Gentry, Sr. (Gentry) and from the denial of her motion for a new trial. We reverse and remand for a new trial on that issue.

FACTUAL AND PROCEDURAL BACKGROUND

Foster and Gentry were married on May 12, 2005. About 1 year later, the couple's son, J.L.G., was born. On September 18, 2007, however, Foster filed a petition for divorce in Reno County District Court. The district court granted the divorce on June 14, 2010, and entered a temporary custody order awarding the parties joint custody of J.L.G., with Foster as the temporary custodial parent.

On October 4, 2010, the district court held an evidentiary hearing to resolve the remaining matters pending in the divorce action. The main issue before the court was the assignment of a custodial parent for J.L.G., as both parents sought primary residential custody. The following facts were developed during the hearing.

Foster, who remarried on September 14, 2010, currently resides in Wyandotte, Oklahoma, with her husband, Chris Foster (Chris), and their two minor children. According to Foster, Wyandotte is located in the northeast corner of Oklahoma with a population of about 8 to 10 thousand people. Chris testified that he "love[s] [J.L.G.] like he was [his] own."

Foster testified that Chris' job requires a great deal of travel and until June 1, 2010, she and the family traveled with Chris and resided in a travel trailer. According to Foster, from March to September 2008, she lived in Colby, Kansas; from October 2008 until February 2009, she resided in Chicago, Illinois; from June to October 2009, she lived in Chillicothe, Missouri; and from March to June 2010, she lived in Shreveport, Louisiana. Foster testified that although she has been permanently residing with her children in Oklahoma since early June 2010, Chris is still working in Louisiana and will remain there for the next 2 or 3 years. Chris returns home to visit once or twice a month unless she brings the children to Louisiana to visit him.

Although Foster testified that she felt Gentry was a good father, she contended that allowing her primary residential custody would be in J.L.G.'s best interests because he could maintain a relationship with his two half-siblings and she could provide him with a structured home life. Foster explained that she is a fulltime mother to her three children and does not work outside the home. Additionally, Foster testified that J.L.G. is enrolled in an Oklahoma preschool that he attends 4 hours a day, and according to Foster, J.L.G. enjoys going to school. Foster further testified that J.L.G. attends flag football practice several times a week, and when the football season ends, Foster planned to enroll him in wrestling.

Foster testified that her family and Gentry's family reside primarily in Hutchinson, Kansas. Foster acknowledged that J.L.G. is close to both families, and it is important for J.L.G. to have regular contact with them. According to Foster, she tries to visit her family in Hutchinson "every few months"; however, she believed that after J.L.G. started kindergarten, she would be unable to visit as often due to scheduling conflicts. Foster explained that her family has not come to visit her in Oklahoma but the family was unable to visit prior to June 1, 2010, because she was not staying home fulltime.

Foster further testified that Chris' father lives in Wyandotte, Chris' "Uncle Richard" lives in Seneca, Missouri (2 miles from Wyandotte) Chris' mother, sister, and 4-year-old niece reside in Joplin, Missouri (20 miles from Wyandotte), and Chris' "Uncle Tony, Aunt Cheryl," and "Uncle Bill" live in nearby Neosho, Missouri. Additionally, Foster explained it takes about 4 to 5 minutes to walk to the home of her neighbors, Leon Foster (Chris' father) and Vonda Keller. Neighbors testified that the Fosters are wonderful neighbors and parents.

During cross-examination, Foster acknowledged that J.L.G. dislocated or broke either his collarbone and/or elbow while in her custody, and she explained that she had no idea how J.L.G. was injured. Additionally, Foster testified that J.L.G. hit his finger with a

hammer in May 2010, which required stitches. Finally, Foster testified that she and J.L.G. spent the night at a domestic violence shelter following an argument she had with Chris in March 2009. Foster denied that she went to the shelter because she feared for her safety; instead, she went because she needed some time away from Chris and she did not know Chris' family at the time. Foster explained that Chris did not harm her during their argument. Chris corroborated Foster's story, and he said that Foster went to the shelter to give them both time to cool off.

Gentry testified that he resides in Hutchinson, in a home he shares with a roommate and his roommate's son. Gentry explained that he has lived in Hutchinson since December 2007. Following the couple's separation in September 2007, Gentry lived with his sister for 1 year, with his father for 6 months, and with his brother for 4 months before returning to his father's home prior to moving into his current residence.

Gentry testified that J.L.G. has been sleeping in his queen-sized bed for the last couple of years because J.L.G. would rather sleep with him than in his own bed. However, Gentry indicated that J.L.G. had probably reached the age where "he could have his own bed," and he explained that he has a bedroom available in his current residence for J.L.G.

Gentry is employed as the operations manager for his father's company, Lifesafer Interlock of Kansas. His father testified that Gentry's hours are flexible, and he can take time off to care for J.L.G. without consequence. Gentry testified that his previous employers—jobs that Foster's husband, Chris, obtained for him—sent him to Texas for approximately 2 weeks, Mississippi for about 1 1/2 months, and Colorado for 1 month. According to Gentry, he no longer has substantial overnight business travel, although he occasionally works outside of Hutchinson. On those trips, he brings J.L.G. and a babysitter to assist him.

Similar to Foster, Gentry testified that he believed it would be in J.L.G.'s best interests for the court to award him primary residential custody because it was important for J.L.G. to be close to his extended family, including Foster's relatives—the Floreses and Gumbles. Gentry also explained that he can provide J.L.G. "a safe and happy life." Jerry Gentry, Jr. (Jerry), Gentry's father, and Jerry's wife, Jennifer Marie Gentry, both testified that they are close to J.L.G. and Foster's extended family.

Gentry testified that J.L.G. is enrolled in a preschool in Hutchinson, and if he received primary custody, J.L.G. would attend school on Tuesdays and Thursdays for 3 hours a day. Gentry testified that while he is at work, his sister, who works at a preschool, takes care of J.L.G. His sister takes J.L.G. to the preschool with her in the morning, and once the school day has ended, his sister takes J.L.G. home with her until Gentry comes home from work.

Gentry expressed concerns about J.L.G. being around Chris because he believed Chris has "an extreme amount of anger" due to several arguments he has heard about between Foster and Chris. Gentry also testified he is worried about his son's safety due to the injuries he has sustained while in Foster's custody. During cross-examination, Gentry acknowledged that it is important for J.L.G. to be close to his half-siblings. He explained, however, that awarding Foster primary residential custody is not in J.L.G.'s best interests due to the "situations that have happened" with Chris.

Foster's mother, Helen Flores, testified on Gentry's behalf. Flores testified that she was not concerned about J.L.G.'s safety when he is in his father's care because J.L.G. "is number one to [Gentry]." Flores explained that Gentry considers her part of his family "no matter what happens," and he always allows her and her family to have contact with J.L.G.

On the other hand, Flores testified she did not believe that residing in Oklahoma with Chris was "a proper environment for [her] grandson." Flores further testified that she was not comfortable around Chris and has never visited her daughter in Oklahoma because she does not feel welcome in Chris' home. According to Flores, her family was not invited to Foster's wedding, and she has not met her newest grandchild, J.L.G.'s 3 1/2-month-old sibling.

Flores testified that Chris has a temper, and she described several arguments between Chris and her daughter. She related that Foster "fled from the house" on two occasions. Flores explained that Foster told her that Chris "kicked on her stomach." while she was pregnant, during the argument which led to her stay at the domestic violence shelter. Flores stated, "I just don't like that [Foster] is fleeing in the middle of the night. I don't like her being helpless out there. Uh, all the family that are around her are his family. I just—I just don't care for her to be out there with no family."

At the conclusion of the hearing, the district court awarded the parties joint custody of J.L.G. and designated Gentry as J.L.G.'s custodial parent. Judge Rome indicated that he could "take judicial notice" of the fact that J.L.G.'s extended family—the Floreses and Gentries—"are sterling" because anyone who lives in Hutchinson knows that these two families "are [the] salt of the earth." Judge Rome then explained that his decision was primarily based upon the benefits he believed J.L.G. would receive from continued contact with his extended family.

On October 29, 2010, Foster filed a motion for change of judge and a motion for new trial. Shortly thereafter, Foster filed an affidavit in support of her motion for change of judge contending that Judge Rome inappropriately ruled on the basis of his "own personal experiences and biases" regarding his extrajudicial knowledge of J.L.G.'s extended family in Hutchinson rather than the evidence presented. On November 24, 2010, the district court denied Foster's motion for change of judge.

Following the denial of her motion for change of judge, Foster filed an affidavit in support of her motion for a new trial. Foster claimed prejudice because the district judge inappropriately took judicial notice of a disputable matter—the character of the Gentry and Flores families—and issued a ruling based upon his own "independent knowledge" rather than the evidence.

Gentry countered there was no basis for a new trial because Judge Rome indicated his ruling was based on J.L.G.'s best interests, and his custody decision was supported by substantial competent evidence. Additionally, Gentry's counsel noted, "When you're in a community like Hutchinson, judges will know about families. If a judge had to recuse themselves because they heard something about a family, there could not be too many cases a court can hear."

On April 7, 2011, a hearing was held, before a different judge, Judge Patricia Rose, to consider Foster's motion for a new trial. After hearing the arguments of the parties, Judge Rose denied Foster's motion. Judge Rose found that although Foster had "a very valid point that judicial notice was not appropriate in regard to the information Judge Rome was citing," she assumed that Judge Rome based his ruling on the best interests of the child. Judge Rose explained, "Judge Rome often talked about people he knew. That was a characteristic of Judge Rome. And he knew a lot of people." Judge Rose further explained that she could not tell from the transcript how much emphasis Judge Rome placed upon his personal knowledge of the extended families. However, she stated that she could not grant Foster's motion without finding that Judge Rome had no other basis for his decision, and she found some evidence in the record which supported the award of residential custody to Gentry: "[W]hat I perceive from this is simply that Judge Rome was maybe a little less than discerning in stating his reason, but that he had reason for the decision that he made."

Foster timely appeals the district court's decision to award Gentry primary residential custody of J.L.G.

DISCUSSION

Foster contends the district court improperly took judicial notice of the character and reputation of J.L.G.'s extended family, a prejudicial error which resulted in a ruling based upon Judge Rome's personal experiences rather than admissible evidence. Gentry, on the other hand, supports the district court's ruling as properly based upon J.L.G.'s welfare and best interests, and he contends that substantial competent evidence supports the district court's decision to designate him as J.L.G.'s primary custodial parent. Inexplicably, Gentry does not address the issue of judicial notice.

Under K.S.A. 2010 Supp. 60-1610(a)(3), district courts are required to make decisions regarding the custody or residency of a child "in accordance with the best interests of the child." In fact, "[w]hen the custody issue lies only between the parents, the *paramount* consideration of the court is the welfare and best interests of the child." (Emphasis added.) *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). To assist district courts in making this decision, K.S.A. 2010 Supp. 60-1610(a)(3)(B) provides a nonexclusive list of 11 factors that, if relevant, the district court must consider, including: "(iv) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests." *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 701-02, 229 P.3d 1187 (2010).

Appellate courts will overturn a district court's custody determination "only upon an affirmative showing by the appellant that the court abused its sound judicial discretion, [citations omitted]" as it is not the function of an appellate court "to delve into the record and engage in the emotional and analytical tug of war between two good parents over

[their child]." *Vandenberg*, 43 Kan. App. 2d at 701; see *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). A judicial action constitutes an abuse of discretion,

"if [the] judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011), *cert. denied* ___ U.S. ___ (2012).

Foster essentially contends that the district court abused its discretion because its decision was based upon an error of law, *i.e.*, the district court improperly took judicial notice of disputable matters, and an error of fact, *i.e.*, substantial competent evidence does not support its designation of Gentry as J.L.G.'s custodial parent. Specifically, Foster alleges that the district court based its decision solely upon Judge Rome's "personal knowledge and experiences" rather than the evidence presented; a fact Foster contends is evidenced by his decision to improperly take judicial notice of the character and reputation of J.L.G.'s extended family.

At the beginning of his ruling, Judge Rome explained that his decision was guided by the best interests of the child standard. Then, without notice or a request by either party to do so, Judge Rome took judicial notice of the character and reputation of J.L.G.'s extended family:

"I can tell everybody in the courtroom that I can take judicial notice of these two families, the Gentrys and the Floreses and I don't know the Gumbies. But—but the Flores family and the Gentry family in this Court's opinion are sterling. I mean they're good. They're good people. They all work. And if you have—if you have lived in Hutchinson more than a day, you know, that the Anchor Inn and the Floreses are salt of the earth. There is no question about that. Same way with the Gentrys. And I can take judicial notice that both of these parents love sports. I mean they're nuts about it. Not nuts, but

they—they're advocates. That's a good term. . . . They're good athletes on all sides—well, at least on the—on the Gentry side, I know about that, and the extended family. They're huge to everybody, and I know that the Floreses support athletics in this community."

K.S.A. 60-409 governs the parameters for taking judicial notice. Under K.S.A. 60-409(a), courts "shall [without request by a party] take judicial notice of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." *Razey v. Unified School District*, 205 Kan. 551, 554-55, 470 P.2d 809 (1970). A court may, under K.S.A. 60-409(b), also take judicial notice of the following matters:

"Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (2) the laws of foreign countries and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy "

In other words, "[u]nder the doctrine of judicial notice courts take cognizance[,] without proof[,] of facts known generally by well-informed persons, but not of particular facts not of common notoriety, of which they have no constructive knowledge, or which may be disputed by competent evidence.' [Citation omitted.]" *Razey*, 205 Kan. at 555. Importantly, "[j]udicial notice takes the place of proof, and it is of equal force.' [Citation omitted.]" *Insurance Office v. Woolen-mill Co.*, 72 Kan. 41, 47, 82 P. 513 (1905).

We agree with Foster that the district court erred when it took judicial notice of the character and reputation of the Flores and Gentry families. As the Kansas Supreme Court explained in *Weigand v. Union Nat'l Bank of Wichita*, 227 Kan. 747, 755, 610 P.2d 572

(1980), "[i]t is improper for a trial court to take judicial notice of the reputation of a particular individual. [Citation omitted.] Personal reputation is not a matter of such 'generalized knowledge' that it cannot reasonably be the subject of dispute. [Citations omitted.]"

K.S.A. 60-412(b) provides that decisions made under the doctrine of judicial notice are subject to review in the same manner as other evidentiary rulings. If the district court erroneously admits evidence at trial, under K.S.A. 2010 Supp. 60-261, the appellate court must determine whether the error was harmless. Reversal is required only where an erroneous admission of evidence was of such a nature as to influence the outcome of the trial and deny substantial justice. *State v. Ransom*, 289 Kan. 373, 388, 212 P.3d 203 (2009). Thus, the appellate court must determine whether the evidence admitted had any likelihood of altering the outcome of the trial. *State v. Boggs*, 287 Kan. 298, 319, 197 P.3d 441 (2008). In making such a determination, each case must be analyzed in light of the record as a whole. *State v. Garcia*, 282 Kan. 252, 270, 144 P.3d 684 (2006).

We are persuaded that Judge Rome's decision to improperly take judicial notice of the character and reputation of J.L.G.'s extended families influenced the outcome of the trial and denied Foster substantial justice in this matter. The findings made by Judge Rome in support of his decision to award Gentry custodial custody erroneously emphasized Judge Rome's personal knowledge regarding J.L.G.'s extended family rather than any substantial competent evidence in the record.

Our decision is underscored by Judge Rome's explanation that his ruling was premised upon the benefits he believed the extended family could offer J.L.G.:

"Uh, the Florescs are all up here [in Hutchinson] and—and the Gentrys are all up here. And I know that they all love this child. And there is no—no doubt that—that the mother and father are—are loving parents. And they—they care about [J.L.G.]. And I'm not

overlooking the fact that there are two step or two half siblings, you know, in Oklahoma. But when I look at what—what these two families, the extended families, the Flores family and the extended family on the Gentry side can offer this kid, I think it's in his best interests that the father be awarded—well, they're joint custody, but the father be awarded the designation of the custodial parent."

Given this record, Judge Rome's decision to take judicial notice of disputable matters constitutes reversible error because it likely affected the outcome of the trial. *Boggs*, 287 Kan. at 319.

Finally, in order to assure both parties of a fair and impartial hearing on the issue of permanent residential custody without the possibility of being influenced by the erroneously considered character and reputational matters, a new district court judge should be assigned to preside over this hearing.

Reversed and remanded with directions.