

RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-001495-MR

DAVID BAKER

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
CIVIL ACTION NO. 97-CI-000136

SHELIA RUTLEDGE

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: ABRAMSON, GARDNER and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Putative father, David Baker (Baker), appeals an order of the Graves Circuit Court entered June 5, 1997, which denied his petition to change the surname of the minor child known as Brady Downey to Brady Baker. Having thoroughly reviewed appellant's arguments and applicable statutes and case law, we affirm.

Brady Downey (Brady) was born July 8, 1994. His mother, Shelia Downey (now Rutledge) (Rutledge), was not married at that time. Pursuant to KRS Chapter 213 the name Brady Downey was entered on the certificate of birth. On May 8, 1995, an order was entered in the McCracken District Court in the case of Shelia Downey v. David Baker, Case No. 94-J-00601, in which Baker

was declared the putative father of the infant child known as Brady Downey. Thereafter, on April 7, 1997, Baker filed a petition against Rutledge in which he sought joint custody of Brady, visitation with the child, to have medical expenses divided equally between the parties, the federal and state income tax exemption and to require the infant child to carry appellant's last name. Rutledge filed a verified response and counter-petition in which she requested that the petition be dismissed or in the alternative, in part, that she be granted sole custody of the minor child and that Brady continue to maintain the last name (Downey) that he has had since birth.

On May 17, 1997, the parties entered an agreed order which adjudged Rutledge to have sole custody of the infant child, Brady Downey, and disposed of all remaining issues except the issue of what surname Brady was to bear. That remaining issue was "taken under advisement (by the court) subject to Counsel for the parties hereto filing simultaneous Briefs within ten (10) days from the date of this Order." The trial court, after reviewing the briefs submitted by the parties, entered its order on June 5, 1997, denying Baker's petition to change Brady's surname. This appeal followed.

Appellant argues that the trial court erred in not conducting a hearing to determine which surname would be in the best interest of the child. Relying upon Hazel v. Wells, Ky. App., 918 S.W.2d 742 (1996), Baker contends that neither the father's nor the mother's surname should be given preference, but

instead that the only factor relevant to the determination of what surname a child should bear is the best interest of the child. Id. at 744. The Hazel Court went on to list twelve factors which should be considered relevant in determining the "best interest" test.

However, Hazel is not controlling in the case sub judice. In Hazel, although the dispute was over the surname of a child born out of wedlock, the parties had agreed to paternity, child support and joint custody. In this case, Rutledge has sole custody of the child and Baker has no custody rights. When a child is born out of wedlock, Kentucky Revised Statutes (KRS) 213.046(10) governs the required contents of its birth certificate.¹ That statute provides:

(10) The following provisions shall apply if the mother was not married at the time of either conception or birth or between conception and birth or the marital relationship between the mother and her husband has been interrupted for more than ten (10) months prior to the birth of the child:

(a) The name of the father shall not be entered on the certificate of birth. The state registrar shall upon acknowledgement of paternity by the father and with consent of the mother pursuant to KRS 213.121, enter the father's name on the certificate. The surname of the child shall be any name chosen by the mother and father. If there is no agreement, the child's surname shall be determined by the parent with legal custody of the child.

¹ In the Hazel case, the Court refers to the applicable statute as KRS 213.0476(8). This statute was amended effective July 15, 1996, and the applicable section has been renumbered.

(b) If an affidavit of paternity has been properly completed and the certificate of birth has been filed accordingly, any further modification of the birth certificate regarding the paternity of the child shall require an order from the District Court.

(c) In any case in which paternity of a child is determined by a court order, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court.

(d) In all other cases, the surname of the child shall be any name chosen by the mother.

The trial court found that KRS 213.046(10)(a) is controlling under the facts of this case. Since Rutledge has sole custody of the child pursuant to the agreed order entered by the parties, she has statutory authority to choose the child's last name. We agree and thus affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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