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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002024-DG

ANGELA JOHNSON APPELLANT

ON DISCRETIONARY REVIEW FROM ROWAN CIRCUIT COURT
v. HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 06-XX-00004

DANIEL CONLEY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: This Court granted discretionary review on January 17, 2007, to the Rowan Circuit Court affirming the district court's order granting the name change sought by the natural father. The mother objected to the name change and argues that both lower courts erred in the interpretation of

[1] Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

statutory and case law applicable to this issue. We reverse and remand for further action.

Ethan Johnson was born on October 21, 2004. Daniel Conley is his father and Angela Johnson his mother. The parties were never married. At the time of Ethan's birth, Johnson provided the information used on the birth certificate. She named the child Ethan Johnson. On February 24, 2005, Conley filed a paternity complaint in Fleming District Court seeking to establish his paternity of Ethan. That case was dismissed due to improper venue. He then filed a paternity complaint in Rowan District Court on April 30, 2005. (Case 05-J-00044 styled *Daniel Conley v. Angela Johnson*). By order entered October 18, 2005, Conley was declared to be the legal and natural father of Ethan. At a later hearing on child support, visitation and custody, the Rowan District Court entered an order setting standard child support, setting visitation and denying joint custody. As to custody the court held, "After considering KRS 403.270 the Court rules that due to the animosity between the parents, joint custody would not benefit the child. *Squires v. Squires*, 854 S.W.2d 765, 768 (Ky. 1993)." During the paternity action, Conley sought to have Ethan's last name changed to his. However, the court refused to address that issue since it had not been raised in the paternity complaint.

Conley then filed a petition for name change on January 20, 2006. In the petition he stated the purpose of the desired name change is "so that my son may have my last name as his father." Johnson received notice of the hearing on the petition to change name and attended the hearing with counsel. The parties

agreed to submit the matter to the district court based upon memorandums to be filed by each party. The parties filed their memorandums. Conley argued KRS 213.046 (10)(c) and *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996) controlled while Johnson relied on *Hazel* and KRS 213.046 (10)(a). The Rowan District Court entered an order on May 18, 2006, granting Conley's petition for name change. In that order the court relying on *Hazel* stated:

> In the instant action, [Johnson] now argues that the Court should rely on KRS 213.046 (10)(d).[2] The history of this matter does not support this finding. The Court shall proceed under the best interest of the child standard.
>
> In the previous case, the father initiated the paternity action, litigated visitation restrictions which the mother wanted which were overly restrictive under the excuse that the child had to be breast fed pursuant to doctor's orders. The father is paying child support and now has initiated the name change petition. Considering the history of this case, and the reasons for and against name change as stated on the record by the respective attorneys, the Court finds that it is in the best interest of the child to be known as Ethan Johnson Conley. The Court orders the child's name to be changed to Ethan Johnson Conley. This is a final order.

Johnson appealed this order to the Rowan Circuit Court. That court affirmed the lower court's decision in an order entered August 22, 2006. The court stated that it "has reviewed the briefs submitted herein, the district court file and the relevant case law and as such cannot say that the decision of the district court was clearly erroneous. Accordingly, the decision of the Rowan District Court is affirmed."

[2] We believe this to be a typographical error. The correct statute is KRS 213.046(10)(a).

Johnson then sought discretionary review with this Court, which was granted by a three-judge panel of this Court on January 17, 2007.

On appeal, Johnson continues to argue that KRS 213.046 (10)(a) and *Hazel* are controlling in this matter and that since she has custody of Ethan, she has sole control over his surname. Conley argues that KRS 213.046 (10)(c) and *Hazel* control and the best interest of the child is paramount in the surname determination. KRS 213.046 (10) states:

> 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 acknowledgment 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.
> (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.

In *Hazel*, this Court decided which surname of a child born out-of-wedlock would be authorized when the parents shared joint custody but could not agree on the surname of their child. We determined that KRS 213.046 (8)(a)[3] was not applicable but rather that subsection (c) applied. We held that the decision on the surname should be based upon the "best interests of the child." Relying on cases from foreign jurisdictions, we held that "[w]hen relevant, the following factors should be considered in evaluating the best interest of the child":

> [I]dentification of the child as a part of a family unit; the effect on the child's relationship with each parent; the motivation of the parties; the effect . . . the failure to change the name will have in furthering the estrangement of the child from a father exhibiting a desire to preserve the parental relationship; the age of the child and how long the child has had the current name; the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; . . . the degree of community respect associated with the present and proposed surname[;] . . . the possibility that a different name may cause insecurity or lack of identity; the use of a particular surname for a substantial period of time without objection; the preference of the child [if age and maturity permit]; difficulty the child may experience with the proposed surname; [and] embarrassment or inconvenience that may result if the child's surname differs from that of the custodial parent. (Citations omitted.)

Hazel at 745.

The question before this Court is twofold: first, which subsection of KRS 213.046 (10) applies – (a) or (c); and second, if subsection (c) applies, did the

[3] KRS 213.046 has been amended since the *Hazel* case. What was section 8 of the statute is now addressed in section 10. The language is similar and the *Hazel* decision is still applicable to section 10.

district court sufficiently consider the *Hazel* factors in evaluating the best interest of the child? As to the first question of legal custody, the only order we have is the district court's December 1, 2005 order that states that "due to the animosity between the parents, joint custody would not benefit the child." This order was entered in the paternity action filed by Conley.[4] Johnson contends in her brief that she has had "sole custody of the minor child at all times pertinent", and that she was "granted custody of the child after a finding by the Rowan District Court that "joint custody would not benefit the child" and that "the Rowan District Court awarded Ms. Johnson custody of the minor child and the inherent right to choose the child's surname in accordance with KRS 213.046 (10)(a) . . . ."

Conley concedes that Johnson has legal custody when in his brief he states, "the Rowan District Court considered [Conley's] standing to file this action and noted that the issue of the child's name had been raised in trial proceedings regarding custody, visitation and support prior to the final award of legal custody of the minor child to [Johnson]." He argues, however, that the issue was raised during the paternity action and Conley was advised to file a separate petition for name change. Therefore, since Johnson "did not have legal custody of the child at the time [that] the name change issue was first raised before the Rowan District Court," KRS 213.046 (10)(c) applies and thus under *Hazel* the court must look to the best interest of the child and not solely at custody.

[4] While Johnson placed the December 1, 2005 order in the appendix to her brief, it is not a part of the record nor has the paternity action (05-J-00044) been made a part of the record of the name change case or this appeal.

We find Conley's arguments persuasive, and we believe the *Hazel* case's best interest test is more acceptable and logical and obviously more in the child's best interest. Nonetheless, "we have a duty to award the words of a statute their literal meaning unless to do so would lead to an abused or wholly unreasonable conclusion." *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984), *citing Department of Revenue v. Greyhound Corp.*, 321 S.W.2d 60 (Ky. 1959). "It is well settled that the interpretation of a statute is a matter of law. Accordingly, a reviewing court is not required to adopt the decisions of the trial court as a matter of law, but must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002).

The district court was obviously very familiar with the parties and facts of this case based upon the prior paternity action. Because of the animosity involved in the case, it denied joint custody and implemented a specific detailed visitation schedule to ensure Conley his visitation rights. However, the court also apparently issued a custody order granting Johnson custody of Ethan. It was only after the custody order was entered that Conley petitioned the court for the name change. Despite Conley's arguments to the contrary, this fact is determinative of the issue. Since Johnson was awarded legal custody in a court proceeding, we are mandated to give the words of the statute written by the legislature their plain meaning. *Bailey*, 662 S.W.2d at 834. In this case, the plain meaning of KRS 213 046 (10)(a) is "if there is no agreement, the child's surname shall be determined by

the parent with legal custody of the child." (Emphasis added). While the *Hazel* best interest test would appear to be more appropriate, we are bound to follow the statutes as written by the legislature. Therefore, the order of the Rowan Circuit Court affirming the decision of the Rowan District Court is reversed.

This matter is remanded to the Rowan District Court to enter an order in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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