RENDERED: OCTOBER 26, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000819-MR

JENNIFER PONCE — APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 14-CI-00073

LUKE PENICK — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jennifer Ponce brings this appeal from Findings of Fact, Conclusions of Law and Order entered April 10, 2017, in the Marion Circuit Court changing the surname of Ponce's daughter. We vacate and remand.

Jennifer Ponce gave birth to a daughter, Liliana Isabel Ponce,[1] on February 28, 2013. The putative father, Luke Penick, was deployed overseas as a member of the United Stated Army Reserves from January 2013 until November 2013. After returning from his deployment, Penick filed a paternity action in Marion District Court (Action No. 13-J-00093). A judgment of paternity was entered on February 10, 2014, adjudicating Penick to be the father of Liliana Ponce.

Penick then filed a Petition for Custody in the Marion Circuit Court (Action No. 14-CI-00073) on March 6, 2014. The parties reached an agreement, and by order entered October 27, 2014, Ponce and Penick were awarded joint custody. Ponce was designated the primary residential parent, and Penick was awarded timesharing.

On May 15, 2015, Ponce filed a motion to relocate with the child to Illinois. Following a hearing, the circuit court rendered its Findings of Fact, Conclusions of Law and Order on June 29, 2015, wherein it granted the motion. The circuit court ordered the parties to alternate physical custody of Liliana every five weeks until she began school. After starting school, Liliana would reside with

[1] The child's first name was consistently spelled by the parties throughout the course of the proceedings below as Liliana. However, in the April 10, 2017, Findings of Fact, Conclusions of Law and Order, the circuit court spelled the child's name as both Liliana and Lilianna. We shall utilize the spelling consistently employed by the parties, Liliana.

Ponce and attend school in Illinois. Penick would have timesharing during the summer and during other school vacation periods.

On February 20, 2017, almost three years after paternity was adjudicated, Penick filed a motion requesting that Liliana's surname be changed from Ponce to Penick. Ponce opposed the name change. The circuit court conducted an evidentiary hearing on April 7, 2017. The child was four years old at the time of the hearing. In its Findings of Fact, Conclusions of Law and Order entered on April 10, 2017, the circuit court ordered that Liliana's surname be changed to Ponce-Penick. This appeal follows.

We begin our review by noting that Penick failed to file an appellee brief in this case. 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." CR 76.12(8)(c). For purposes of this appeal, we accept Ponce's statement of facts as set forth in her brief as correct, subject to our review of the entire record on appeal.

Notwithstanding that Liliana was born out of wedlock, there is no dispute in this case regarding paternity and presumably the parties agreed that Ponce would be the child's last name for purposes of birth certificate registration. Although the birth certificate was not entered into evidence below, there is no dispute that the child's last name since birth in 2013 has been Ponce. Hence, the motion filed by Penick to change Liliana's last name is governed by KRS 401.020, which vests the circuit court with jurisdiction to adjudicate the motion.[2] KRS 401.020 reads in relevant part as follows:

> Both parents, . . . may have the name of a child under the age of eighteen (18) changed by the District Court, or if the Family Court or Circuit Court has a case before it involving the family, the Family Court of a county with a Family Court, or the Circuit Court of a county without a Family Court of the county in which the child resides. However, if one (1) parent refuses or is unavailable to execute the petition, proper notice of filing the petition shall be served in accordance with the Rules of Civil Procedure. . . .

KRS 401.020 implies a right for a party to have an evidentiary hearing on a motion to change name. *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 425 (Ky. App. 2001). The circuit court in our case properly conducted an evidentiary hearing. The only witnesses were the two parties. Upon hearing the evidence, the circuit court, as noted in its order, must determine whether the

[2] The motion was filed in the original custody proceeding in the Marion Circuit Court, where the circuit court had retained jurisdiction over the parties and the subject matter.

surname change is in the best interest of the child based upon a preponderance of the evidence. *Likins v. Logsdon*, 793 S.W.2d 118, 122 (Ky. 1990).

Upon conducting an evidentiary hearing under KRS 401.020, the court is required to make findings of fact and conclusions of law pursuant to CR 52.01. CR 52.01 requires that a court acting without a jury must make specific findings of fact. CR 52.01 provides, in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; . . . . Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

The purpose of the mandatory findings of fact in CR 52.01 is to provide a clear record of the basis of the trial court's decision thereby allowing a reviewing court to easily understand the trial court's view of the controversy. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Simply put, a trial "judge must make findings of fact and not address the matter in a perfunctory manner." *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011). The failure of the trial court to make any findings of fact is violative of CR 52.01. *Id.*

Based on our review of the record, the only substantive findings of fact are set forth in paragraphs 5 and 6 of the court's order. These findings are

meager at best and do not address how the name change to a hyphenated surname is in the child's best interest. Additionally, in a contested name change proceeding, the parent seeking the change must "present objective and substantial evidence of just cause and significant detriment to the child before the child's name is changed." *Likins*, 793 S.W.2d at 122. The court's findings and conclusions failed to address this standard of proof or the evidence which would support it.

Based on our review of the record on appeal and the lack of sufficient findings to support the circuit court's order, we are constrained to vacate the circuit court's order and remand for another hearing. Thereupon, the circuit court should make findings of fact and conclusions of law as to whether the name change is in the best interest of Liliana.

We view any remaining contentions of error as moot.

For the foregoing reasons, the Order of the Marion Circuit Court is vacated and this cause remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT: NO BRIEF FOR APPELLEE.

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