

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000480-ME

KASEY D. UNDERWOOD

APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
FAMILY COURT DIVISION

v.

HONORABLE JEFF MOSS, JUDGE
ACTION NO. 17-J-00262

BRANDON KRABILL

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: JONES, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kasey D. Underwood brings this appeal from a February 5, 2018, Order of the Jessamine Circuit Court, Family Court Division, changing the last name of the parties' child to that of the father, Brandon Krabill, and awarding the 2017 income tax dependency exemption to Brandon. For the reasons stated, we vacate and remand.

Kasey and Brandon were never married but had a child together.

When Kasey was approximately five-months pregnant, the parties ended their relationship. Then, on October 25, 2016, the parties' son, J.G.U., was born. The parties reunited shortly after the child's birth and apparently cohabitated from January 2017 until mid-July 2017. On August 9, 2017, Kasey initiated a paternity action in the family court and identified Brandon as the child's father. By agreed order entered August 22, 2017, Brandon agreed to submit to DNA testing. Shortly thereafter, Kasey filed a motion seeking sole custody of the child and requesting Brandon be granted only supervised visitation; Brandon filed a response.

By order entered September 13, 2017, the family court adjudicated Brandon as the father of J.G.U. The family court denied Kasey's motion for sole custody and awarded the parties joint custody. The parties agreed to a temporary time-sharing schedule. On October 31, 2017, a judgment of paternity and order of child support was entered.

On November 3, 2017, Brandon filed a motion seeking, *inter alia*, that J.G.U.'s last name be changed from the mother's last name to his last name. Following a hearing, by Order entered February 5, 2018, the family court granted Brandon's motion to change the child's last name to his name. The February 5, 2018, Order also provided that the parties had agreed to rotate the income tax dependency exemption for the child. However, the parties could not agree which

party would receive the tax exemption for 2017. The family court ordered that the 2017 income tax dependency exemption would be allocated to Brandon; thereafter, the tax exemption would rotate between the parties annually, with Brandon getting the exemption in all years ending in an odd number and Kasey getting the exemption in even numbered years. This appeal follows.

Kasey initially contends the family court erred by changing the last name of the parties' child, J.G.U., from her last name to the father's last name. More particularly, Kasey asserts the family court did not consider the best interests of the child in its decision to change his last name.

We begin our review by noting that Brandon failed to file an appellee's brief in this case. Pursuant to Kentucky Rules of Civil Procedure (CR) 76.12(8)(c), there exists a range of penalties that may be utilized where an appellee fails to timely file a brief. *See 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 Kasey's statement of the facts as set forth in her brief as correct subject to our review of the entire record on appeal.

As the parties were not married when the child was born, Kasey gave the child (J.G.U.) her last name. Since his birth in 2016, J.G.U. has had the mother's last name. More than a year after his birth, the child's father moved to change the child's last name to his.

Kentucky Revised Statues (KRS) 401.020 vests jurisdiction upon a motion to change a child's name in the family court, and KRS 401.020 implies a right for a party to have an evidentiary hearing upon the motion. *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 425 (Ky. App. 2001); *see also Burke v. Hammonds*, 586 S.W.2d 307 (Ky. App. 1979). The family court must ultimately determine whether the name change is in the best interests of the child. *Hazel v. Wells*, 918 S.W.2d 742, 745 (Ky. App. 1996). And, the best interests determination must be based upon a preponderance of the evidence. *Likins v. Logsdon*, 793 S.W.2d 118, 122 (Ky. 1990). The family court also must conduct the evidentiary hearing pursuant to KRS 401.020 and is required to make findings of fact and conclusions of law pursuant to CR 52.01.

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 primary purpose of requiring the family court to make specific findings of fact under CR 52.01 is to provide a clear basis for the family court's decision upon appellate review. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). If the family court fails to make adequate findings of fact, such failure must be brought to the court's attention by a motion for more definite findings under CR 52.04; if not brought to the court's attention, the error is deemed waived. *Anderson v. Johnson*, 350 S.W.3d 453, 457-58 (Ky. 2011). However, incomplete findings of fact are distinguishable from a court's failure to make any findings of fact upon an issue. The court's failure to make any findings of fact results in reversible error even in the absence of a motion pursuant to CR 52.04; see *Brown v. Shelton*, 156 S.W.3d 319, 321 (Ky. App. 2004); *Anderson v. Johnson*, 350 S.W.3d at 458 (holding that CR 52.01 creates a general duty for the trial court to make findings of fact and CR 52.04 applies only after the trial court has complied with that general duty).

In the case *sub judice*, relevant to the name change of the child, the family court merely concluded:

Pursuant to *Hazel v. Wells*, [918 S.W.2d 742 (Ky. App. 1996)] the Court further finds that the child's best interest require his name to be changed. Further, the Court orders the birth certificate of the child be amended and a new certificate issued to reflect that Brandon Lance

Krabill is the father of the minor child, J.G.U. Further, the child's legal name shall be changed from [J.G.U.] to [J.G.K.], dob 10/25/2016.

February 5, 2018, Order at 3. The family court determined that changing the child's last name would be in his best interests; however, the family court did not include any findings of fact to support its conclusion of law as to the child's best interests. *See Anderson*, 350 S.W.3d 453. The failure of the family court to make any findings of fact to support its conclusion as to the child's best interests clearly violates CR 52.01 and results in reversible error. *See Anderson*, 350 S.W.3d 453. Due to the absence of findings of fact to support the family court's determination that changing the child's last name to the father's last name was in the child's best interests, we vacate the family court's order of February 5, 2018, and remand for the family court to reconsider its decision as to the child's last name. In so doing, the family court shall make specific findings of fact and state separately its conclusions of law. *See Anderson*, 350 S.W.3d 453, 458.

Kasey also contends that the family court erred in its award of the 2017 income tax dependency exemption to Brandon. It is undisputed that the parties agreed to rotate the income tax dependency exemption every other year. Nevertheless, Kasey complains the family court erred by initially awarding the 2017 income tax dependency exemption to Brandon because Kasey was the custodial parent of the child during most of 2017. Kasey relies upon *Adams-*

Smyrichinsky v. Smyrichinsky, 467 S.W.3d 767 (Ky. 2015) and asserts that as the family court allocated the 2017 income tax dependency exemption to the noncustodial parent, Brandon, the court must state how the allocation benefited the child. Kasey contends that no such reasons were set forth by the family court.

In *Adams-Smyrichinsky*, 467 S.W.3d 767, the Kentucky Supreme Court set forth the law in Kentucky as to the allocation of the income tax dependency exemption. In *Adams-Smyrichinsky*, the Court held that “if the court cannot articulate a sound reason for why awarding the exemption to the noncustodial parent actually benefits the child” such award should not be made. *Id.* at 783-84.

Likewise, in the case *sub judice*, the family court merely found that Kasey had claimed the income tax dependency exemption in 2016, the year the child was born, and concluded that the tax exemption for 2017 should be claimed by the father, Brandon. We do not believe the family court’s finding that the custodial parent, the mother, claimed the exemption in 2016 was sufficient to justify assigning the 2017 income tax dependency exemption to Brandon, the noncustodial parent. Rather, as Kasey had physical possession of the child for most of 2017, it was incumbent upon the court to set forth reasons why awarding the exemption to Brandon, the noncustodial parent, actually benefited the child. Therefore, we vacate that portion of the order assigning the 2017 income tax

dependency exemption to Brandon and remand for the family court to reconsider the assignment of the 2017 income tax dependency exemption in accordance with *Adams-Smyrichinsky*, 467 S.W.3d 767.

For the foregoing reasons, the Order of the Jessamine Circuit Court, Family Court Division, is vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Gregory Ralph Kujawski
Lexington, Kentucky