RENDERED: DECEMBER 6, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000048-MR

DAWN RENEE JENSEN (F/K/A HAINS) APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LIBBY G. MESSER, JUDGE
ACTION NO. 14-CI-04288

BRYAN JASON HAINS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

GOODWINE, JUDGE: Dawn Renee Jensen ("Jensen") appeals an order of the Fayette Family Court denying her motion to hyphenate the child's surname. After careful review, finding no error, we affirm.

Jensen and Bryan Jason Hains ("Hains") were married in 2000 and divorced on July 1, 2015. When the parties married, Jensen took Hains' surname.

The parties' child was born during the marriage in 2012, and her last name is Hains. The parties separated two years later and were divorced by decree of dissolution entered July 1, 2015.

The parties attended mediation during the pendency of the divorce action. During mediation, Jensen raised the issue of hyphenating the child's surname, but Hains did not consent. Jensen chose not to litigate the issue at the time. The parties entered into a separation agreement that did not include hyphenating the child's surname.

On July 16, 2018, Jensen filed a motion to change the child's surname from Hains to Jensen-Hains. For more than two years, Jensen did not raise this issue. While Jensen's motion was pending, the child started kindergarten.

The family court heard Jensen's motion on October 2, 2018. After hearing testimony from two professional lay witnesses and both parties, the family court took the matter under submission. The court entered an order denying Jensen's motion to change the child's surname. The court found that based on the substantial evidence test, Jensen failed to prove by a preponderance of the evidence that there was a substantial reason to hyphenate the child's surname or that the child experienced a significant detriment by not having a hyphenated surname.

Jensen filed a motion to alter, amend, or vacate based on a new but unpublished opinion. The family court denied Jensen's motion, and this appeal followed.

On appeal, Jensen argues: (1) current case law regarding the standard of proof required to change a child's name under KRS[1] 401.020 is contradictory; (2) the family court erred in failing to apply the "best interests of the child" standard; and (3) the family court erred in finding Jensen did not meet her burden of proof.

First, Jensen argues our current case law regarding the standard of proof required to change a child's name under KRS 401.020 is contradictory. Hains asserts Jensen failed to preserve this argument. CR[2] 76.12(4)(c)(v) requires appellate briefs contain "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." The purpose of this rule is that we "can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012).

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

Jensen's blanket preservation statement asserts this argument was preserved orally and in numerous pleadings. We reviewed the portions of the record Jensen cited in support of her preservation statement, and Jensen never raised this argument below. As such, we agree that Jensen failed to preserve this argument.

"It is axiomatic that a party may not raise an issue for the first time on appeal." *Sunrise Children's Services, Inc. v. Kentucky Unemployment Insurance Commission*, 515 S.W.3d 186, 192 (Ky. App. 2016) (citation omitted). "As this Court has stated on numerous occasions, 'appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012) (quoting *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). As this argument is not properly before us and Jensen does not request review for palpable error under CR 61.02, we decline to address this argument.

Second, Jensen argues the family court erred in failing to apply the "best interests of the child" standard. Application of a legal standard is a matter of law, which we review *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001). "There is no requirement

that we grant any deference to the trial court where factual findings are not at issue." *Id.* (citation omitted).

Jensen argues the "best interests of the child" standard should apply instead of the substantial evidence test. In this section of Jensen's argument, she asserts that throughout the proceedings, she has taken the position that the "best interests of the child" standard should apply. However, later in her brief, Jensen acknowledges that the substantial evidence standard applies.

Despite Jensen's argument to the contrary, the applicable standard espoused in *Likins v. Logsdon*, 793 S.W.2d 118 (Ky. 1990) is that the parent must "present objective and substantial evidence of just cause and significant detriment to the child before the child's name is changed where the petition for change of name is contested." *Id.* at 122. The parent requesting a name change must prove their case "by a preponderance of the evidence[.]" *Id.*

In *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420 (Ky. App. 2001), this Court considered whether the best interests standard should apply instead of the substantial evidence standard and held the substantial evidence "standard is to apply when a petition is tendered to change the name of a child of divorced parents." *Id.* at 426. As discussed in *Leadingham*, we lack the power to change the applicable standard. "'The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and

its predecessor court.' Therefore, even if this Court were inclined to abandon the 'substantial grounds' test announced in *Likins*, we are not so empowered." *Id.* (quoting SCR[3] 1.030(8)).

Finally, Jensen argues the family court erred in finding she failed to meet her burden of proof. Despite urging this court to apply the best interests standard, Jensen concedes the *Likins* test is the current applicable standard. "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." CR 52.01. "[F]indings of fact are clearly erroneous only if they are manifestly against the weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) (citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967)).

The family court made ample findings of fact regarding the evidence presented at the hearing. Jensen called two professional witnesses during the hearing. The court declined to qualify either professional as an expert because neither focuses their practice on the effects of names on children or the impact of a name change on children, and neither interviewed the parties' child. Dr. Ronald Werner-Wilson has a Ph.D. in child and family development with an emphasis on marriage and family therapy. He admitted he is not an expert on names and their effect on a child's attachment to a parent, and that he had not studied this area. He

[3] Kentucky Supreme Court Rules.

testified generally about a child's attachment to a parent and how not sharing a surname with a parent could cause confusion. Dr. Dianna Hartley has a Ph.D. in psychology. She testified generally regarding attachment, bonding, and identity. Dr. Hartley further testified that not sharing the mother's surname could create confusion for a young child.

The parties also testified regarding the child's attachment and their opinions on the effects of changing the child's surname. Jensen testified that hyphenating the child's name would be more neutral and would allow the child to relate to her more. The child has a stepmother, and Jensen testified that hyphenating the child's surname would clear up any confusion regarding who the child's mother is. Jensen further testified that the child was bonded to her, but she was concerned about attachment issues when the child was away. Hains testified that the child was a kindergartener and changing her name would be very confusing to her as her identity had been established. He also testified that the child had a strong bond with both parents.

The family court made ample findings of fact and concluded that "[Jensen] simply provided no evidence that [Jensen's] bond, attachment, or relationship with [the child] will be negatively affected if [the child's] name remains unchanged, much less that retaining her current surname would be detrimental to [the child]." (R. at 205). Instead of presenting substantial evidence

of an existing, significant detriment to the parties' child, Jensen merely presented general and speculative evidence in support of her argument. As such, the family court's findings were not clearly erroneous.

For the foregoing reasons, we affirm the order of the Fayette Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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