IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 08, 2015 Session

IN RE MATTIE H.

Appeal from the Juvenile Court for Coffee County
No. 14J0559 Jere M. Ledsinger, Judge

No. M2014-01350-COA-R3-JV – Filed April 30, 2015

The trial court entered an order establishing paternity and setting child support for a non-marital child. The trial court also granted J. W. B.' s (hereinafter "Father")[1] oral motion to change the child's surname from T. H.' s (hereinafter "Mother") to Father's. Mother appeals only the order changing the child's surname. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed and Remanded

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which BRANDON O. GIBSON, J., and KENNY ARMSTRONG, J., joined.

Eric J. Burch, Manchester, Tennessee, for the appellant, T. H.

Edward H. North, Manchester, Tennessee, for the appellee, J. W. B.

MEMORANDUM OPINION[2]

This action was commenced in the Juvenile Court of Coffee County on April 28, 2014, when the State of Tennessee filed a petition on behalf of Mother to establish

[1]In cases involving minor children, it is the policy of this Court to use the initials of children and parties to protect the privacy of the children involved.

[2] This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

paternity of Mattie H., born December 19, 2013. In her petition, Mother prayed for the court to establish paternity and for an order establishing child support and retroactive child support. Following a hearing on June 18, 2014, the trial court entered an agreed order on June 26, 2014, establishing paternity, setting Father's child support obligation at $238.00 per month, and denying an award of retroactive child support.[3] Also, at the June 18 hearing, Father made an oral motion to change Mattie's surname from Mother's surname to Father's. On July 10, 2014, the trial court entered an order granting Father's oral motion. In its order the trial court found that it was in the child's best interest to have the father's last name for the following reasons: a) The father has had substantial contact (10 times) during the child's young life, b) The father has on several occasions offered financial assistance to the child's mother even though he has not paid child support, c) The child's relationship with both parents will be enhanced and improved, and d) Having the father's last name will avoid harassment by future classmates and friends of the child's and the child will not be embarrassed by having the mother's last name. Mother filed a notice of appeal the same day.

Father subsequently filed a motion for additional findings of fact in support of the trial court's judgment that changing Mattie's surname was in her best interest. Following a hearing on August 19, 2014, the trial court entered an agreed order finding that additional facts were established by the testimony of the parties and considered by the Court, as follows: 1) it was important to change the child's name now rather than later in life, 2) Mother stated that she wanted Mattie's surname to remain the same as Mother's, 3) the same degree of community respect is associated with Mother's and Father's surnames. The trial court entered final judgment in the matter on August 25, 2014.

Issue Presented

The sole issue presented by Mother for our review is whether the trial court erred by ordering Mattie's surname to be changed from Mother's to Father's.

Father raises the additional issue of whether Mother's statement of the evidence should be excluded for failure to comply with Rule 24(c) of the Tennessee Rules of Appellate Procedure.

Discussion

We begin our discussion by noting that no transcript was transmitted on appeal and Father asserts that the statement of the evidence submitted by Mother should be excluded because it fails to comply with Rule 24(c) of the Rules of Appellate Procedure where "[i]t does not describe the testimony or the evidence presented at the hearing of this matter." The statement of evidence submitted by Mother provides, in its entirety:

[3] The trial court's order indicates that Father's child support obligation included a deviation from the child support guidelines. Mother has not appealed the child support order.

> This was a very abbreviated hearing following an oral motion to change the child's last name. The record filed with the Court of Appeals accurately reflects the testimony at the hearing."

Upon review of the record, we observe that, on October 20, 2014, Father filed an objection to Mother's statement of the evidence on the ground that "it was not filed with the clerk of the trial court within 60 days of filing of the Notice of Appeal." By order entered October 28, 2014, we determined that Mother's statement of the evidence was timely filed. We stated:

> [O]n July 24, 2014, the appellee [Father] filed a timely post-judgment motion requesting that the trial court make additional findings of fact. When a [Tennessee Rule of Civil Procedure] 52.02 motion to make additional findings of fact is timely filed, the trial court retains jurisdiction over the case pending a ruling on the motion. Tenn. R. App. P. 4(e). A notice of appeal filed prior to the trial court's ruling on the post-judgment motion will be considered premature and will be treated as filed as of the date of entry of the order disposing of the motion. Tenn. R. App. P. 4(e). Accordingly, the appellant's notice of appeal is deemed to have been filed as of August 25, 2014, the date the trial court ruled on the post-judgment motion. The statement of the evidence was thus timely filed on October 13, 2014.

Father did not object to Mother's statement of the evidence on the ground that it did not accurately describe the testimony or evidence at trial. Accordingly, Father waived any objection he may have on that ground. *Williams v. Williams*, No. M2013–01910–COA–R3–CV, 2015 WL 412985, at *7 (Tenn. Ct. App. Jan. 30, 2015) (failure to object to contents of a statement of the evidence in the trial court results in waiver of objection on appeal) (citing *see Barnhill v. Barnhill*, 826 S.W.2d 443, 458 (Tenn. Ct. App. 1991) (in which the court concluded the appellant was attempting to raise an issue for the first time on appeal because he had failed to make a motion or objection at the trial court level): *see also Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983) (stating it has long been the general rule that questions not raised in the trial court will not be entertained for the first time on appeal)).

We, accordingly, turn to whether the trial court erred by granting Father's oral motion to change Mattie's surname from Mother's surname to Father's.

Tennessee Code Annotated § 68-3-305 provides, in relevant part:

> If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on

> the certificate of birth and all information pertaining to the father shall be omitted, and the surname of the child shall be that of either:
>
> (A) The surname of the mother;
> (B) The mother's maiden surname; or
> (C) Any combination of the surnames listed in subdivisions (b)(1)(A) and (B).

Tenn. Code Ann. § 68-3-305(b)(1)(2013). The statute further provides:

> In any case in which paternity of a child is determined by a court of competent jurisdiction, 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.

Tenn. Code Ann. § 68-3-305(c).

Under the statute, a non-marital child carries his or her mother's surname "unless both parents have requested otherwise." *Barabas v. Rogers*, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993); *In re Jacob H.C.*, No. M2012–02421–COA–R3–CV, 2013 WL 6155608, at *3 (Tenn. Ct. App. Nov. 20, 2013) (citing Tenn. Code Ann. § 68–3–305(c); *Sullivan v. Brooks*, No. M2009–02510–COA–R3–CV, 2011 WL 2015516, at *1 (Tenn. Ct. App. May 23, 2011)). The child's surname is not changed following a paternity proceeding unless the court so orders. *Id*. Moreover, "the courts should not change a child's surname unless the change promotes the child's best interests." *Id*. (citations omitted). The burden of proof is on the party seeking to change the child's surname to demonstrate that the change is in the child's best interests. *Id*. (citations omitted). When determining whether changing the child's surname is in the child's best interests, factors to be considered by the court include:

> (1) the child's preference, (2) the change's potential effect on the child's relationship with each parent (3) the length of time the child has had its present surname, (4) the degree of community respect associated with the present and proposed surname, and (5) the difficulty, harassment, or embarrassment that the child may experience from bearing either its present or its proposed surname.

Id. (citations omitted).

In this case, the trial court concluded that it was in Mattie's best interest to change her surname because 1) Father had had "substantial contact (10 times) during this young child's life"; 2) Father had offered financial assistance to Mother "even though he [had] not paid any child support"; 3) Mattie's relationship with both parents would be

"enhanced and improved"; and 4) having Father's surname would allow Mattie to "avoid harassment by future classmates and friends of the child and the child will not be embarrassed by having the mother's last name." In its August 2014 agreed order the trial court found as additional facts: 1) that Mother wanted Mattie's surname to remain Mother's surname; 2) that "… it was important to change the name of the minor child now rather than later in the child's life[]" and 3) that the same degree of community respect was associated with Mother's and Father's surnames.

Notwithstanding the trial court's finding that Father's contact with Mattie was "substantial," we note that Father testified that he had visited Mattie "at least ten (10) times" since her birth. We further observe that Mattie was approximately six months of age at the time of trial.[4] Although the determination of what constitutes "substantial" may be somewhat subjective, we cannot agree with the trial court that Father's visitation with Mattie on ten occasions for an undetermined amount of time over a six-month period constitutes "substantial" visitation. Additionally, it is undisputed that Father failed to pay child support until the State filed an action for support on behalf of Mother, was not present at Mattie's birth, and did not contribute to Mother's prenatal or birth expenses.[5] The issue of Mattie's surname was not raised until Father made an oral motion during the child support proceeding initiated by the State on Mother's behalf.

The trial court made no findings to support its conclusion that Mattie would suffer harassment in the future if her surname remained unchanged, and there is nothing in the record to indicate that Father introduced any evidence to support that conclusion. Similarly, there is nothing in the record to support the trial court's conclusion that changing Mattie's surname would "enhance" Mattie's relationship with either parent. Further, the parties agree that Mother's surname and Father's surname are equally respected in the community, and Mattie clearly has no preference at this juncture in her life.

There is no legal foundation for preferring a paternal surname to a maternal surname. *Id*. at 288. Mattie currently bears Mother's surname in accordance with the statutes, and the record contains no evidence demonstrating that a change in Mattie's surname is warranted at this time. Father has simply failed to carry his burden of proof to demonstrate that changing Mattie's surname is in her best interest. We accordingly reverse the trial court's judgment changing Mattie's surname from Mother's surname to Father's.

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[4] The trial court states that Mattie was five months and five days old when the matter was heard. We observe, however, the Mattie was born on December 19, 2013, and the paternity hearing took place on June 18, 2014.

[5] In its July 10, 2014, order, the trial court noted that Father stated that he had offered to provide for needs of the child, that he purchased milk on one occasion, that he was not present at Mattie's birth, and that he would pay "his share of the hospital cost[.]"

Holding

In light of the foregoing, the trial court's judgment is reversed with respect to changing Mattie's surname from Mother's surname to Father's surname. Costs on appeal are assessed against the Appellee/Father, J.W.B, and his surety, for all of which execution may issue if necessary. This matter is remanded to the trial court for the collection of costs and for further proceedings as are necessary and consistent with this opinion.

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ARNOLD B. GOLDIN, JUDGE