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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001508-MR

REGINALD VON FLESTER, JR. APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 16-CI-00090

WHITNEY ANNE FLESTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Appellant, Reginald Von Flester, appeals from an Order of the Hopkins Circuit Court denying his motion to change the surname of the parties' minor child. After our review, we affirm.

Reginald and Appellee, Whitney Anne Flester, are the parents of a daughter born in 2012 prior to their marriage. On the birth certificate, the child's

surname was listed as Knight, that of her Mother, but Reginald acknowledged paternity at that time. He was declared later the child's father by an Agreed Judgment of Paternity entered by the Henderson Circuit Court on June 21, 2013.

The parties married on February 14, 2014; they separated on February 17, 2014. On February 25, 2016, Whitney filed a Petition for Dissolution of Marriage in Hopkins Family Court. By Order entered March 17, 2016, the court appointed a Guardian *ad litem* (GAL) for Reginald, who was incarcerated.

On June 7, 2016, Reginald filed a Motion to Change Name of Child pursuant to KRS[1] 401.020 in which he sought to change the child's last name to Flester. Whitney opposed the Motion.

A hearing was scheduled for June 20, 2016. The court attempted to reach Reginald at the correctional facility by telephone, but it was unable to do so. Counsel agreed to submit affidavits on the issue. Both parties filed affidavits, and Reginald's counsel filed an agreed notice of submission for a ruling on the motion. By Order of August 12, 2016, the Hopkins Circuit Court, Family Court Division, denied his motion. The court explained as follows:

> Pursuant to KRS 401.020, both parents (provided both parents are living), one parent (if the other parent is deceased) or the child's guardian (if neither parent is living) may file a "petition" to change the legal name of the child. The statute now provides that such a petition may be filed in family court if there is an open case involving the family pending before the Court. While a family court is generally granted subject matter jurisdiction to hear such a matter, the Court finds that

[1] Kentucky Revised Statutes.

> [Father] has not properly sought the Court's jurisdiction in this case.
>
> The statute requires that a "petition" be filed by the parent seeking the name change; if the other parent refuses to sign the petition, a summons must be issued to that parent and served on that parent in accordance with the Rules of Civil Procedure. The Court finds that the motion filed by [Father] is deficient for at least these [sic] reasons: (1) The motion does not comply with the requirements of a "petition" and is not accompanied by the required fees set forth by the Administrative Office of the Courts for such a petition; (2) there was no summons issued to [Mother]; and (3) [Mother] was not properly served pursuant to the requirements of the Kentucky Rules of Civil Procedure.
>
> Although the Kentucky statute does not provide for notice and service upon the child, at least one U.S. District Court has held that due process requires that notice of the petition and an opportunity to be heard must be afforded to the opposing parent and to the child. *Roe v. Conn,* 417 F. Supp. 769, 782 (M.D. Ala., 1976). In the present case, the child has not been made a party to the "petition" to change the child's name and no summons has issued to the child; neither has a guardian *ad litem* been appointed to accept service on behalf of the child.
>
> Therefore, for these reasons, the motion must be and is DENIED.

In addition, the court explained that even if Reginald had complied with the statutory requirements, it would nonetheless have denied his motion to change the child's name. Relying on *Hazel v. Wells,* 918 S.W.2d 742 (Ky. App. 1996), the court concluded that Reginald had failed to establish "by a preponderance of evidence that a change of the child's surname would be in [the child's] best interest."

On August 22, 2016, Reginald filed a Motion to Alter, Amend, or Vacate, which the court denied by an order entered on September 8, 2016. On October 6, 2016, he filed a Notice of Appeal to this Court.

On appeal, Reginald first contends as follows:

> Hopkins County Family Court committed palpable error when the Court failed to conduct and [sic] evidentiary Hearing on the Appellant's motion to change the name of his child. Only after a full hearing at which all interested parties -- including the Appellant -- would be given an opportunity to be heard would the Court be able to determine if the proposed name change is or is not in the best interests of the child. The Court violated Appellant's right to due process in not conducting an Evidentiary Hearing.

(Underline and bold-face emphasis in the original omitted.)

Reginald contends that he was deprived of due process because he was never given the opportunity to voice his opinion and he was deprived of a full evidentiary hearing and of the opportunity to submit his affidavit to the Court. He provides no citation to the record, nor does there appear to be any evidence of record to support this statement. "[T]his Court may not consider statements in the briefs that are not supported by the record." *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 423 (Ky. App. 2001). Moreover, as Whitney notes, Reginald did not identify the issue on his prehearing statement.[2] CR[3] 76.03(8) strictly limits a party

[2] Reginald's prehearing statement only identifies the issue to be raised on appeal as "whether the court was incorrect in deciding against appellant in that he can have the name of the child legally changed to appellant's surname." (Uppercase in original).

[3] Kentucky Rules of Civil Procedure.

on appeal to issues set forth in the prehearing statement. Therefore, we must decline to consider the issue.

Within the body of his first argument, Reginald states that the court erred in finding that he had not complied with KRS 401.020. It is not apparent whether he intended to raise that alleged error as a separate issue on appeal because it is not identified as such either in the brief or in the prehearing statement. Therefore, we must decline to address it as well.

Reginald also contends that the court erred in denying his motion regardless of whether his pleadings had been properly filed. He essentially re-argues his case.

Hazel, supra, upon which the trial court relied, similarly involved a dispute over the surname of a child born out of wedlock. In *Hazel,* this Court agreed that the father had no greater right than the mother to have a child bear his surname and that the only relevant factor must be the best interests of the child. When 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; [4] 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 v. Wells*, 918 S.W.2d 742, 745 (Ky. App. 1996), *as modified* (Mar. 22, 1996), *quoting James v. Hopmann,* 907 P.2d 1098, 1100 (Okla.App. 1995).

In the case before us, the family court properly considered those factors and made detailed findings of fact as to why retention of the child's current surname was in the child's best interests or why modification was not. The court made findings that reflected the *Hazel* factors; *i.e.,* that the child had maintained a surname since birth, which did not interfere with her identification with either party's family; that the child was given her current surname with agreement of both parties, who have maintained a loving and appropriate relationship with her; that Reginald had not attempted to change the child's name before and only made the request as the divorce was nearing its conclusion; that there was no evidence of estrangement due to the child's surname; that there is no allegation by Reginald that the child's current surname carries any stigma in the community; that the child identifies with her current surname; that the child uses her current surname in school, for social security purposes, on a savings account; that she has friends who know her current surname; that the child's surname has always been different from

her father's (and different from her mother's since February 2014)[4] and that there was no evidence that the difference created any embarrassment or inconvenience for the child.

Our standard of review is whether the trial court's findings are clearly erroneous. CR 52.01. *See Largent v. Largent*, 643 S.W.2d 261, 263 (Ky. 1982) ("CR 52.01 does apply, regardless of how the evidence is presented at trial."). We find no error whatsoever – much less clear error.

We affirm the Order of the Hopkins Circuit Court denying Father's motion to change the child's surname.

ALL CONCUR.

BRIEF FOR APPELLANT:

James F. Greene
Madisonville, Kentucky

BRIEF FOR APPELLEE:

J. Christopher Hopgood
Henderson, Kentucky

[4] The date of the parties' marriage.