

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000024-DG

MARK STEWART SEARS

APPELLANT

ON DISCRETIONARY REVIEW FROM HARRISON CIRCUIT COURT
v. HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 01-XX-00001

TONYA CAROL FRYMAN, NOW JACKSON
IN THE INTEREST OF: ENGLISH LOU
ANN WALTERS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, PAISLEY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This appeal involves a dispute over the surname of a child in a case in which paternity was determined by court order. The district court changed the surname¹ to that of the father and the circuit court reversed on a matter of law. We opine that "the best interest of the child" is an issue of fact to be determined by the district court in deciding what

¹ For an interesting history of surnames, see Leadingham v. Smith, Ky. App., 56 S.W.3d 420 (2001).

surname the child should bear. Accordingly, it will be necessary to send the case back to the circuit court for review (in its appellate role) of the district court's findings. Hence, we vacate and remand.

English Lou Ann Walters was born on July 30, 1996, to a single mother. At birth, the mother chose to give the child the surname of Walters. Sixteen months later, genetic paternity testing was performed which showed Mark Stewart Sears was the father. Three years later, an Agreed Judgment of Paternity and Support was entered on December 27, 2000. Subsequently, the father requested joint custody, which was denied, and a change in the surname to Sears, which was granted, in an order entered August 2, 2001. Supplemental findings concerning custody were entered on April 30, 2002, on remand from circuit court. On appeal, the circuit court affirmed the custody ruling and reversed the ruling on changing the child's surname in an order entered December 3, 2002. The circuit court held as a matter of law that the award of sole custody effectively resolved the issue of the child's surname pursuant to KRS 213.046(10)(a), which allows the parent with custody to make the determination where the parents cannot agree. The father sought discretionary review to this Court and we granted review solely on the issue of the child's surname.

The father contends that the circuit court applied the wrong subsection of the statute, that KRS 213.046(10)(c) applies which requires the father's surname when paternity is established by court order. KRS 213.046(10) governs in the case of a child born out of wedlock. The relevant subsections read as follows:

- (a) The name of the father shall not be entered on the certificate of birth. The state registrar shall upon acknowledgment of paternity by the father and with consent of the mother pursuant to KRS 213.121, enter the father's name on the certificate. The surname of the child shall be any name chosen by the mother and father. If there is no agreement, the child's surname shall be determined by the parent with legal custody of the child.

. . . .

- (c) In any case in which paternity of a child is determined by a court order, 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.

The father's contention that subsection (c) requires the father's surname to be placed on the birth certificate in this case is incorrect. In Hazel v. Wells, Ky. App., 918 S.W.2d 742, 744 (1996), a panel of this Court had that issue before it when that statutory language was in KRS 213.046(8) subsections (a) and (c). In that case, the father Wells's position was the same

as Sears's. Our Court agreed that subsection (c) was applicable, but added:

[w]e do not construe that subsection to mandate that the child be given the surname of the declared father. Requiring only that "the name of the father and surname of the child [be] entered on the certificate of birth" when such issues have been "determined by a court order," this subsection does not provide any guidance for determining *what* surname the child should be given. The provision simply implies that the court order should state what surname the child will bear and that the determined surname should be "entered on the certificate of birth." Id.

Wells, 918 S.W.2d at 744. The Wells Court did not refer back to subsection (a) and determine that the custodial parent got to pick the surname. Instead, the Wells Court adopted the approach of the Nevada Supreme Court in Magiera v. Luera, 106 Nev. 775, 776, 802 P. 2d 6, 7 (1990), and held "the only factor relevant to the determination of what surname a child should bear is the best interests of the child." Hazel v. Wells, 918 S.W.2d at 744. The Wells Court then identified a number of factors for the trial court's consideration in determining the "best interest of the child." Id. at 745.

The mother in our case would like to distinguish the Wells case from our case because Wells involved joint custody whereas our case involves sole custody (with visitation). We do not see a distinction in the holding of Wells from our case,

although it may be a factor for consideration by the district court in arriving at the "best interests of the child".

The circuit court in our case, in its role as an appellate court, reversed the district court, holding as a matter of law that KRS 213.046(10)(a) applied and that the parent with legal custody determines the child's surname. The circuit court did not review the district court's application of the "best interests of the child" in determining the child's surname. Therefore, we need to vacate the circuit court order and remand the matter back to the circuit court so that it can review (as an appellate court) the district court's finding that it is in the "best interests of the child" to change her name from Walters to Sears.

For the foregoing reasons, the judgment of the Harrison Circuit Court, as to the child's surname, is vacated and remanded for further proceedings consistent with this opinion.

BARBER, JUDGE, CONCURS.

PAISLEY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

PAISLEY, JUDGE, DISSENTING. I respectfully dissent. I believe that KRS 213.046(10)(a) does apply in a sole custody situation such as that before us. I would affirm the circuit court.

BRIEF FOR APPELLANT:

Henry Watson, III
Cynthiana, Kentucky

BRIEF FOR APPELLEE:

Dawn Curran Letcher
Carlisle, Kentucky