2014 IL App (5th) 130519-U

NO. 5-13-0519

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LAUREN M. McMANEMY,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Monroe County.
	)	
v.	)	No. 12-F-7
	)	
RICHARD A. WEBER,	)	Honorable
	)	Richard A. Aguirre,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court applied the incorrect statute and burden of proof in denying respondent's petition for change of name of his minor son; thus, the case is reversed and the cause remanded with directions to apply the correct statute and burden of proof.

¶ 2 Respondent, Richard A. Weber, appeals from an order of the circuit court of Monroe County denying his petition for change of name of his minor son and instead keeping the name chosen by petitioner, Lauren M. McManemy. The issues raised on appeal are (1) whether the trial court applied the incorrect statute and burden of proof, and (2) whether the trial court erred in denying respondent's petition for change of name. We reverse and remand with directions.

¶ 3 BACKGROUND

¶ 4 The parties have an untraditional relationship in that they have never been married, engaged, or dated exclusively, but are the parents of a son, Liam Thomas McManemy (Liam), born on December 20, 2011. Respondent was present for the birth of the child, but was not listed on the birth certificate or present at the hospital when the birth certificate information was submitted. Petitioner chose the first and middle names for her son and provided him with her surname as his last name. Respondent did not fill out a voluntary acknowledgment of paternity when the child was born.

¶ 5 On March 2, 2012, petitioner filed a petition to establish parent-child relationship in which she named respondent as the biological father of her son and sought child support. On April 16, 2012, respondent filed a response in which he denied parentage and asked that the petition be dismissed. In the alternative, he sought DNA testing. Ultimately, DNA testing confirmed respondent is the father.

¶ 6 On April 16, 2013, the trial court entered an agreed order and joint parenting agreement in which the parties were awarded joint custody, with respondent receiving parenting time, including every other weekend and overnight visitation during the week, alternate holidays, and seven days of summer vacation. The order further provided respondent will pay child support in the amount of $426.67 per month, will pay half of day care costs, provide health insurance, and use the dependency exemption for the purpose of federal and state tax returns during alternate years.

¶ 7 On April 17, 2013, the trial court entered an order changing the child's last name to respondent's surname and ordering the father's name to be placed on the child's birth

certificate. On April 19, 2013, petitioner filed a motion to vacate the order changing the name. On May 1, the trial court entered an order granting petitioner's motion to vacate.

¶ 8 On May 14, 2013, respondent filed a petition for change of name, citing section 21-101 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/21-101 (West 2010)) as the statute under which to proceed. The petition also alleged "[t]hat it is in the best interests of the minor child that he bare [*sic*] his father's surname and only his father's surname." On June 19, 2013, the trial court held a hearing on respondent's petition for change of name.

¶ 9 At the hearing, respondent testified he was present at his son's birth and attended birthing classes with petitioner. On the way to a birthing class, petitioner told respondent she was not going to give the child respondent's last name, and respondent said he "disagreed tremendously." Respondent was not at the hospital when the forms were filled out and is not listed on the birth certificate as the father.

¶ 10 Respondent started overnight visitation with his son when his son was approximately one month old. Respondent pays $426.67 per month child support to petitioner and voluntarily agreed to pay an arrearage which arose because the amount he was paying was less than 20%. When asked why he wants Liam's last name changed to Weber, respondent specifically stated: "Basically I'm in his life. I'm a major part of his life. That is one. I'm his–his father. You know, I just–I'm paying child support. I'm doing everything I think I should. I just–I really want him to have his father's last name." Respondent explained that in his family, there is no one else to carry on the family name.

¶ 11 Similarly, petitioner testified she did not want Liam's last name changed because Liam is carrying on her family name. She specifically stated: "I just believe that it was my right when I had Liam, and I made that choice. It was a choice I made, and I didn't take it lightly." She explained that she put much thought into the name and she wants Liam to carry on her family name.

¶ 12 Petitioner also explained that Liam had her surname for 18 months as of the time of the hearing, and it is the name on his social security card. Petitioner testified that she knew it would make respondent "very happy" if Liam's last name were changed to Weber, but she did not believe that it would change respondent's relationship with Liam because "[w]e are both gonna love Liam no matter what his last name is." Neither party wanted to hyphenate Liam's last name to "McManemy-Weber."

¶ 13 Petitioner's attorney asserted that the standard to change the name is clear and convincing evidence, and the trial court agreed. In its order, the trial court specifically stated "[t]hat pursuant to 735 ILCS 5/21-101 *et seq*. [a]n order shall be entered as to a minor only if the court finds by clear and convincing evidence that the change is necessary to serve the best interest of the child." Ultimately, the trial court denied respondent's petition for name change and held that the minor shall continue to have petitioner's last name. Respondent filed a motion to reconsider, which was denied. Respondent then filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 The first issue raised on appeal is whether the trial court applied the incorrect statute and burden of proof. Respondent contends a noncustodial parent does not have

standing to request a child's name be changed under section 21-101 of the Code, but must proceed under section 602 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/602 (West 2010)). Petitioner responds that respondent has failed to preserve this issue for appeal because it was respondent who directed the trial court to section 21-101 of the Code in his petition for name change, failed to object below to the trial court's application of section 21-101, and failed to suggest an alternate burden of proof to the trial court. Even assuming *arguendo* that the issue was preserved, petitioner contends that the trial court applied the correct statute and burden of proof or, in the alternative, any error in applying the incorrect statute and burden of proof was harmless.

¶ 16 Under Illinois law, a party can seek a name change pursuant to both the Code and the Act. Section 21-102 of the Code provides that a petition for the name change of a minor must be signed "by the parent or guardian having the legal custody of the minor." 735 ILCS 5/21-102 (West 2010). Section 21-101 specifically states as follows:

> "An order shall be entered as to a minor only if the court finds by clear and convincing evidence that the change is necessary to serve the best interest of the child. In determining the best interest of a minor child under this Section, the court shall consider all relevant factors, including:
>
> (1) The wishes of the child's parents and any person acting as a parent who has physical custody of the child.
>
> (2) The wishes of the child and the reasons for those wishes. The court may interview the child in chambers to ascertain the child's wishes with respect to the change of name. ***

(3) The interaction and interrelationship of the child with his or her parents or persons acting as parents who have physical custody of the child, step-parents, siblings, step-siblings, or any other person who may significantly affect the child's best interest.

(4) The child's adjustment to his or her home, school, and community." 735 ILCS 5/21-101 (West 2010).

¶ 17 A noncustodial parent is not authorized to bring a petition to change their child's name under section 21-101. *In re Marriage of Charnogorsky*, 302 Ill. App. 3d 649, 659, 707 N.E.2d 79, 84-87 (1998).

¶ 18 On the other hand, a name change may be sought through the court with jurisdiction over custodial matters because "changing a child's name is a matter incident to custody of the child." *In re Marriage of Presson*, 102 Ill. 2d 303, 307, 465 N.E.2d 85, 87 (1984). Seeking a name change pursuant to the Act is appropriate in situations such as the one presented here "when a party with joint custody seeks a name change over the objection of the other joint custodian." *In re Wright*, 363 Ill. App. 3d 894, 897, 844 N.E.2d 427, 428 (2006). In *In re Marriage of Presson*, our Illinois Supreme Court specifically stated that the surname of a child can only be changed if the name change is in the child's best interest and that the test to be applied is identical to the standard employed in awarding custody under section 602 of the Act. *In re Marriage of Presson*, 102 Ill. 2d at 307, 465 N.E.2d at 87.

¶ 19 Section 602 of the Act directs the trial court to "consider all relevant factors," including those explicitly enumerated there. While the language does not require a court

to set forth specific findings, the statute requires that the record reflect that the court considered the evidence of the statutory factors prior to making its decision. Here, the trial court's order shows that it proceeded under the wrong statute and employed the wrong burden of proof.

¶ 20 The trial court's order denying respondent's petition for name change specifically states "[t]hat pursuant to 735 ILCS 5/21-101 *et seq.* [a]n order shall be entered as to a minor only if the court finds by clear and convincing evidence that the change is necessary to serve the best interest of the child." The order goes on to cite and discuss the relevant factors under section 21-101 of the Act. While there is some merit to petitioner's assertion that respondent invited application of the wrong statute and waived this issue on appeal by failing to raise the issue below, we refuse to decide this case on waiver grounds. We simply cannot ignore the fact that the incorrect statute and wrong burden of proof were applied here.

¶ 21 The instant case is similar to *In re Wright* in which both parties and the trial court incorrectly proceeded under section 21-101 of the Code rather than section 602 of the Act. In that case, our Illinois Supreme Court reversed, specifically stating:

> "Here, the name-change petition was clearly resolved under the first means, the Code. The case was identified as a miscellaneous-remedies case and heard by a judge other than the one presiding over the parentage case. In addition, the parties before the circuit court and before this court centered their arguments on standing to seek a petition change under the Code.

> We find, however, this was not the appropriate means to resolve the dispute between [the parents]. Section 21-102's use of '*the* parent *** having *the* legal custody' implies no custodial dispute over the name change. (Emphasis added.) 735 ILCS 5/21-102 (West 2004). The latter approach is appropriate for the situation that exists here, when a party with joint custody seeks a name change over the objection of the other joint custodian. Such a disagreement over the name change creates a custody dispute that should be resolved by the court within the confines of the proceeding wherein parentage was declared.
>
> *** A child's name change in this context is an important decision. See generally 750 ILCS 45/6(e) (West 2004) (authorizing the court determining parentage to enter an order for visitation, custody, and support). That court should resolve this issue–an issue incident to custody." *Wright*, 363 Ill. App. 3d at 896-97, 844 N.E.2d at 428-29.

¶ 22 Petitioner argues *Wright* is inapplicable because the instant case was not filed as a "miscellaneous remedies" case, but was heard in the family division; however, we believe *Wright* is applicable and indicates that it is necessary that a petition for name change proceed under the Act rather than the Code where the party seeking the name change is a joint custodian and the other joint custodian objects to the name change.

¶ 23 We also disagree with petitioner's assertion that even if the wrong statute and burden of proof were applied, any error was merely harmless. While the trial court did weigh the testimony of the parties, consider several relevant factors, and write a cogent and thoughtful order, we agree with respondent that an issue incident to custody, such as

the one presented here, must be decided under the correct statute and burden of proof. "Clear and convincing" evidence requires a quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question. *Bazydlo v. Volant*, 164 Ill. 2d 207, 213, 647 N.E.2d 273, 276 (1995). Thus, in the instant case, the trial court made its decision to deny respondent's petition utilizing a higher standard than merely "best interest."

¶ 24 As a reviewing court, we should not reverse a trial court's findings merely because we do not agree with the lower court or because we might have reached a different conclusion if we had been the trier of fact. The trial judge, as the trier of fact, is in a superior position to a reviewing court to observe the witnesses, judge their credibility, and determine the weight to be given to their testimony. *Bazydlo*, 164 Ill. 2d at 214-15, 647 N.E.2d at 276-77. Accordingly, the trial court must be the one to make the initial determination as to whether or not Liam's last name should be changed utilizing the correct statute and burden of proof. On remand it is possible that the trial court may make the exact same determination under the Act utilizing the best-interest standard; nevertheless, we find this case must be reversed and remanded for the trial court to make its determination employing the proper statute and burden of proof.

¶ 25 For the foregoing reasons, we hereby reverse the order of the circuit court of Monroe County and remand with directions consistent with this order.

¶ 26 Reversed and remanded with directions.