NOT DESIGNATED FOR PUBLICATION

No. 99,405

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Petition of:

HALEY JO DENNING,
BY HER NATURAL FATHER AND NEXT FRIEND,
CRAIG A. REES, TO CHANGE HER NAME,
Appellee,

and

CHRISTINE M. DENNING,
Appellant.

MEMORANDUM OPINION

Appeal from Ellis District Court; EDWARD E. BOUKER, judge. Opinion filed January 9, 2009. Affirmed.

John T. Bird, Glassman, Bird, Braun & Schwartz, L.L.P. of Hays, for appellant.

Robert E. Diehl, of Dreiling, Bieker & Hoffman, LLP, of Hays, for appellee.

Before McANANY, P.J., GREEN and BUSER, JJ.

Per Curiam: Christine M. Denning appeals the district court's ruling changing the surname of her minor child, Haley, to that of her former husband and the child's father, Craig A. Rees. We affirm.

Factual and Procedural Background

Denning and Rees were married on October 9, 2004. During the marriage, Denning took Rees' surname. On March 1, 2005, Denning informed Rees that she was pregnant. The next day she served him with a divorce petition. Denning stated in this petition that she was "now pregnant and will have expenses and costs attendant to her pregnancy." Rees answered by stating he was "without sufficient information to admit or deny that [Denning] is now pregnant."

On July 12, 2005, the district court filed an agreed pretrial order in the divorce case. This order identified the paternity of the child after its birth as an issue to be decided by the district court. Rees testified in the present case that he wanted paternity testing because Denning had informed him of the pregnancy the day before he was served with the divorce petition. Rees testified that he never denied paternity but told Denning

he probably was the father. Denning retained Rees' surname until their divorce was final on August 22, 2005.

On October 18, 2005, Denning gave birth to Haley. Rees visited the hospital when Denning notified him of the birth the next day. Before Rees arrived, Denning executed a birth certificate establishing Haley's name. Although Denning entered her name on the birth certificate as the mother, Denning did not list Rees as the father. Denning testified that hospital personnel advised her to omit Rees' name on the certificate based on the pending paternity test. Denning did not inform the hospital personnel that she was married to Rees when Haley was conceived.

About November 23, 2005, paternity testing identified Rees as the father of Haley. On May 8, 2006, Rees filed a motion in the divorce case to change Haley's surname to his own. Two months later, the district court appointed a guardian ad litem (GAL) to represent Haley's interests. The GAL was directed in part to "investigate and make a recommendation to the Court . . . concerning [Rees'] motion to change the name of minor child."

A few months later, the GAL filed her report in the divorce case. The GAL stated that she had reviewed diary notes written by Rees and his mother, Rees' deposition, and a

recent psychological evaluation of Rees. None of these materials are in the record on appeal. The GAL also reported having met with Denning and Rees for about 1 1/2 hours each.

In anticipation that Rees would file a petition for a name change, the GAL discussed the issue in her report to the district court. After surveying Kansas case law, including *J.N.L.M. v. Miller*, 35 Kan. App. 2d 407, 130 P.3d 1223 (2006), the GAL concluded:

> "[T]he parents were married and, by agreement, were actively trying to conceive a child. Although names had not been discussed, because [Denning] took [Rees'] name, it can be assumed that the child would also bear [Rees'] name. [Rees] was not allowed input into the child's name at the time of her birth but his position should now be considered by the court. After paternity had been established, [Rees] has constantly sought to enforce his parental rights to Haley.
>
> "From the above discussion and application of the *J.N.L.M.* considerations, a change of name would most likely not affect the mother-daughter relationship at all. A change of name to [Rees'] name would most likely foster the father-daughter relationship. It is my opinion that a change of name to [Rees'] surname would be in Haley's best interest."

On December 5, 2006, Rees filed the present action for change of name. Trial commenced on July 30, 2007, before the same judge who had presided over the parties' divorce. At the parties' request, the district court took judicial notice of the divorce file. The GAL's report from the divorce case was admitted in evidence by stipulation. The GAL also appeared at the trial. With regard to Haley's name, both parties agreed the appropriate legal standard was the best interests of the child.

Rees testified that a name change would be in the child's best interest because "most every child carries their father's last name" and because "I am her father. And I think it would make the bond a little better." Rees also noted the GAL recommended the name change.

Denning maintained that a name change would not be in Haley's best interest because "she's had the name of Denning since the day she was born, and . . . she resides with me most of the time. I'm her mother."

At the close of evidence, the district court began by stating that it had reviewed the legal authorities provided by counsel, including *J.N.L.M.* The district court observed "there is no statute in Kansas . . . nor even case law to my knowledge . . . that says the child must take the father's surname." The district court suspected that "had [Rees'] name

been put down as the father, there would have at least been some insistence on the part of the people at the hospital that the father's name be the surname of the child." The court immediately added: "Now, that's tradition, it's not law."

The district court questioned whether *J.N.L.M.* was controlling precedent because the case was "dependent upon the situation in which a paternity action is filed where there had been no marriage either at the time of conception or at the time of birth or between those two dates." The court nevertheless concluded that *J.N.L.M.* "is of some help because it says if you think, Judge, that the best interests of the child governs here, then here are some things you can take into consideration."

The district judge summarized his view of the legal standard as follows:

> "So, I'm left with a situation in which tradition says the child has the father's last name. The law doesn't. We have no case law on what happens when a child is conceived during marriage, born after divorce and restoration of mom's maiden name; so I choose to use best interest."

The district court next turned to the nonexclusive list of factors in *J.N.L.M.* which, according to that case, "may" be used "[i]n considering whether a child's surname should be changed." 35 Kan. App. 2d 407, Syl. ¶ 3. The court discussed each factor, but it

found that the second factor, "the effect of a name change on the development and preservation of the child's relationship with each parent," was the most applicable to the present facts. 35 Kan. App. 2d 407, Syl. ¶ 3. The district court found the other factors, such as "the child's preference," or "the possibility that a different name may cause insecurity and lack of identity," 35 Kan. App. 2d 407, Syl. ¶ 3, were mostly inapplicable or neutral.

The district judge began his discussion of the second factor by stating that Denning "is right. I think she will probably have the custody of Haley." This meant that Haley "will have mom around most of the time. She will know that mom is her mother simply by human biology." In contrast, "[Haley] will have visits with Mr. Rees, she will have money from Mr. Rees, and could have Mr. Rees's name. And that's pretty much it."

Based on "all of the evidence I've heard in both cases," the district court stated its belief that "these parents . . . are going to have a hard time. Haley is going to have a hard time." The court did not "think changing the name is going to fix these problems," but it did find a name change:

> "will do something at least to establish Mr. Rees is here, he's here to stay. He's Haley's father. That's the way it is. That's the way it will be 18 years from now, 20 years from now, and 50 years from now. It will be binding

upon Mr. Rees. It will binding upon Ms. Denning. And how they deal with it is up to them. But at least Haley will know this is my father, I have his name. What he chooses to do with that relationship is up to him, and what [Denning] chooses to do with it is up to her. But my name is Rees and that reflects my heritage as much as me living with mom does."

The district judge concluded: "I think it boils down to what does the court think is in the best interest of this child. I think that having the father's name helps cement a relationship with the father, because it got off to a rocky start because of the unique circumstances surrounding this case."

Denning appeals.

Was the Name Change in the Best Interests of Haley?

The parties agree on appeal that the appropriate legal standard is the best interests of the child. See *M.L.M. v. Millen*, 28 Kan. App. 2d 392, 394-95, 15 P.3d 857 (2000); *Struble v. Struble*, 19 Kan. App. 2d 947, 949, 879 P.2d 37 (1994). The parties also recognize, however, that this court has applied an "interests of the parents and best interests of child" standard. We will first determine the proper legal standard to be employed in this case.

The interests of the parents and the best interests of the child standard was stated in *In re Application to Change Name*, 10 Kan. App. 2d 625, 629, 706 P.2d 480 (1985). The child in that case was given the natural father's surname during a marriage, and the name change issue arose some years later after a divorce and the death of the natural father. While discussing the law, this court recognized that other courts have recognized a "strong parental interest" in maintaining the surname of the child. 10 Kan. App. 2d at 628. "It is longstanding tradition in this country that a child carry the surname of his father. As a consequence, a number of courts have held that there is a protectable parental, generally paternal, interest in seeing that a child's name remains unchanged. [Citations omitted.]" 10 Kan. App. 2d at 627.

In re Application to Change Name is inapplicable to the present case. Rees' surname was never given to Haley. As for Denning, she unilaterally named Haley. If a parent may secure a protected interest by naming a child unilaterally, that parent has a superior right in naming. We see no support for this under *In re Application to Change Name*, and the result would run contrary to recent decisions in other jurisdictions which uniformly hold that parents have equal rights in naming their children. See *Jenkins v. Austin*, 255 S.W.3d 24, 27 (Mo. App. W.D. 2008) ("'Neither parent has the absolute right to confer his or her name upon the child.'"); *In re H.M.C.*, 876 N.E.2d 805, 808 n.5 (Ind. App. 2007) ("A father and mother enjoy equal rights with regard to naming their child.");

In re A.C.S., 171 P.3d 1148, 1151 (Alaska 2007) ("In our view neither parent should automatically have a superior right to determine a child's surname."); *Doherty v. Wizner*, 210 Or. App. 315, 322-23, 150 P.3d 456 (2006) ("The right to name a child is a privilege belonging equally to both parents."). As the Iowa Supreme Court has stated, "the mother does not have the absolute right to name the child because of custody due to birth. [Citations omitted.] Consequently, [she] should gain no advantage from her unilateral act in naming [the child]." *In re Marriage of Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993).

There may be situations where a father's acknowledgment of paternity is so far removed from the child's birth that a mother could not be said to have acted unilaterally in giving the child her own surname. In *J.N.L.M.*, an unmarried father "failed to show any significant interest in raising his child until filing the parentage action" some 2 years after birth. 35 Kan. App. 2d at 415. The name of the unmarried father in *J.N.L.M.* also could not be entered on the birth certificate without the mother's written consent. See K.S.A. 65-2409a(c); 35 Kan. App. 2d at 414. Under these facts, the *J.N.L.M.* panel applied the interests of the parents and the best interests of the child standard from *In re Application to Change Name*. See 35 Kan. App. 2d at 413.

In the present case, however, there was evidence that Rees never denied paternity, he sought paternity testing even before birth, he came to the hospital when notified of the

birth, and he asserted his rights after paternity was established. Moreover, Rees' name should have been entered as the father on the birth certificate because he and Denning were married at the time of conception. See K.S.A. 65-2409a(c). The district court referred to this while ruling: "[T]he person at the hospital told [Denning] that if there was a pending paternity action, that the father's name should not be put down. The person was wrong. In fact the statute said his name should have absolutely been put down on the form." Denning does not dispute this aspect of the district court's ruling.

The present facts, therefore, do not suggest a protected interest for either parent. Whatever the continued viability of the "interests of the parent and best interests of the child standard," it is not applicable here. The district court correctly held this case should be governed by the best interests of the child standard.

We review the district court's determination regarding the best interests of the child for abuse of discretion. See *J.N.L.M.*, 35 Kan. App. 2d 407, Syl. ¶ 1. "The party who asserts abuse of discretion bears the burden of showing it." *Vorhees v. Baltazar*, 283 Kan. 389, Syl. ¶ 2, 153 P.3d 1227 (2007).

"Judicial discretion will vary depending upon the character of the question presented for determination. Generally, a district judge's decision is protected if reasonable persons could differ about the propriety of the

decision, as long as the decision was made within and takes into account any applicable legal standards. An abuse of discretion may be found if a district judge's decision goes outside the framework of or fails to properly consider statutory limitations or legal standards. [Citations omitted.]" *State v. Green*, 283 Kan. 531, 545, 153 P.3d 1216 (2007).

Denning maintains that "while the district court ostensibly employed the best interest standard using the *J.N.L.M* factors, the court's actual analysis was a subterfuge that perpetuated the traditional paternal preference." By "traditional paternal preference" Denning means "the traditional bias in favor of paternal surnames," which she contends the trial court "illegally perpetuated . . . by according great and undue weight to [Rees'] and [the GAL's] belief that the bond between the father and child would somehow be developed/preserved if she was required to bear his name." Denning also contends the trial court "abused its discretion because, while it paid lip-service to the father's burden [of proof], it did not hold the father to this burden in any meaningful way."

Denning's primary contention is that the district court displayed a presumption in favor of tradition when it found that the father-child bond would be strengthened if Haley bore Rees' surname: "Other than their speculative and conclusory statements to that affect [*sic*] . . . Rees presented <u>no</u> evidence on this factor."

At the outset, Denning did not object to Rees' testimony or the GAL's report as speculative or conclusory at trial. Denning and Rees also gave very similar testimony when asked why Haley should bear their respective surnames. In essence, Denning said that she was the mother, and Rees said that he was the father. A reasonable person could conclude that both parents attached a symbolic yet real importance to a shared surname with Haley.

Denning emphasizes the district court's comments regarding tradition, but viewed in context, the court was only acknowledging the importance society attaches to shared surnames. And the district court made clear that regardless of tradition, the law provides that the best interests of the child is the standard to be considered. Moreover, in the present case the parties no longer share a surname, and the trial court resolved their dispute based on its finding that Haley would be best served by sharing a surname with Rees. The *reasoning* behind that finding, that a shared surname would strengthen the father-child relationship, would apply equally to the mother-child relationship.

The district court's decision for Rees was also based on another consideration–Denning was the custodial parent. To rule such a consideration out of bounds simply because it would tend to favor the noncustodial parent would destroy the trial court's ability to determine a child's best interests under the facts of each case. The

mere fact that the noncustodial parent in the present case was the father does not establish a paternal bias.

For example, in *In re Change of Name of Barker*, 155 Ohio. App. 3d 673, 674, 802 N.E.2d 1138 (2003), a couple with three children divorced and the mother remarried. The mother's petition to change the surname of the children to that of her new husband was denied by the trial court. On appeal, mother argued her former husband's evidence was speculative, the children had identified with their new family, and they had begun to use their new surname, which they also preferred. Applying an abuse of discretion standard, the Ohio appellate court held the name change was not in the best interests of the children. 155 Ohio App. 3d at 675-77. The Ohio court ruled in part on an expectation that a change in surname would exacerbate an already-existing "disassociation of the Children with their biological father." 155 Ohio App. 3d at 676-77.

Denning also attempts to raise a negative inference from the district court's alleged failure to consider the sixth *J.N.L.M.* factor, which she maintains "clearly favored . . . her interest, as the custodial parent, in having the child keep and share the mother's surname as a member of her household." She identifies this as another example of "[t]he paternal bias inherent" in the trial court's analysis.

The district court, however, did discuss the sixth *J.N.L.M.* factor, "the motive or interests of the custodial parent." 35 Kan. App. 2d 407, Syl. ¶ 3. In particular, the district court stated that "somebody involved in a divorce with a pending paternity action shouldn't have the singular responsibility or ability to make this call [naming the child], anymore than the father should have the singular responsibility or ability to make this call and exclude his name if that is what his desire was at the end." The trial court found that Denning's decision to name Haley without input from Rees showed "at best a disregard for the relationship between the father and daughter." The trial judge did not emphasize this factor, however, and he concluded the parent's motives were similar: "I think that the motives of both parents are animosity towards each other, period. So don't get the idea that I'm taking sides on saying that there's a bad motive on one side and a good motive on the other."

Considering the record as a whole and the trial court's rulings in context, we do not see a paternal bias. The district court correctly employed the best interests of the child standard and we can find no abuse of discretion in the district court's application of this law to the facts of this case.

Denning's second contention is a conclusory argument that the district court failed to apply the preponderance of the evidence standard of proof. Denning points to no

specific instance, only arguing the district court "granted [Rees'] name change based on insufficient evidence that the name change was in Haley's best interest." Of course, the fact the district court's decision was in Rees' favor does not prove, in itself, that the court failed to hold him to his burden of proof. We next consider whether the district court's decision was supported by sufficient evidence.

Continuing to assert judicial bias, Denning argues "there was simply not sufficient evidence presented upon which the court could determine that the name change was in the child's best interest."

"The function of an appellate court is to determine whether the court's findings of fact are supported by substantial competent evidence . . . . Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion. [Citations omitted.]" *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 915-16, 157 P.3d 1109 (2007). "[A]n appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *In re Estate of Hjersted*, 285 Kan. 559, 571, 175 P.3d 810 (2008).

Denning summarizes her argument as follows: "[T]he district court ignored objective evidence that use of [Denning's] name would benefit the child, while accepting

at face-value [Rees'] purely speculative, self-centered assertions that adoption of [his] name would somehow enhance the father-child bond." In essence, Denning asks us to reweigh the evidence which is beyond our standard of review. Denning also ignores the GAL's report which, after applying the *J.N.L.M.* factors, concluded that a change of name would most likely not affect the mother-daughter relationship at all but that a change of name to Rees' name would most likely foster the father-daughter relationship. This led the GAL to conclude the proposed name change "would be in Haley's best interest."

The district court impliedly found it was in Haley's best interests to have a relationship with both of her parents. Denning does not dispute this on appeal. The district court explicitly found that Denning's role as the custodial parent would strengthen her own relationship with Haley. Denning also does not dispute this. The remaining question was whether a name change would serve Haley's best interest by strengthening Rees' relationship with the child. The district court found that it would, and that holding, based on the evidence of record, was supported by substantial competent evidence.

Affirmed.