IN THE COURT OF APPEALS OF IOWA

No. 1-603 / 11-0119
Filed October 5, 2011

KENNETH BRETT PECKOSH,
Petitioner-Appellant,

vs.

LAURA J. WENGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Father appeals a district court order finding his challenge to his daughter's last name is governed by our name change statute, Iowa Code section 674.6 (2007). **AFFIRMED.**

Stephen A. Swift of Klinger, Robinson & Ford, Cedar Rapids, for appellant.

Joseph G. Bertroche Jr. of Betroche Law Office and Ronald L. Ricklefs, Cedar Rapids, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Kenneth Brett Peckosh appeals a district court order finding his challenge to his daughter's last name is governed by our name change statute, Iowa Code section 674.6 (2007). We affirm.

I. Background Facts and Proceedings.

Peckosh and Laura Wenger dated for six months and have never lived together. Peckosh was at the hospital when their daughter, Isabella, was born on September 10, 2008.

At the hospital the parties negotiated their daughter's name. On September 12, 2008, they signed a "Voluntary Paternity Affidavit." Their signatures were notarized by a hospital notary. In the affidavit, Peckosh acknowledged he is Isabella's biological father and gave permission for his name to appear "as the legal father on the birth certificate." Wenger, as birth mother, gave permission for Peckosh's name to appear "as the legal father on the birth certificate." *Peckosh's* handwritten responses (italicized below) on the affidavit state:

> **CHILD'S INFORMATION AS SHOWN ON BIRTH CERTIFICATE**: *Isabella Rose Wenger*
>
> . . . .
>
> **CHILD'S LAST NAME (surname) AFTER PATERNITY - Do not leave blank.** You may keep it the same as on the birth certificate, change it to the father's, or add the father's last name to it. *Wenger*
>
> **Father's Name** *Kenneth Brett Peckosh*

The back/second page of the affidavit informed the parties:

> **This Voluntary Paternity Affidavit is a legal action.**
> **Once it is processed, you must get a court order to change any information that you provided on the form.**
>
> . . . .

> **CHILD'S LAST NAME (surname) AFTER PATERNITY**. You must state what the child's legal last name (surname) will be after the paternity affidavit is filed. Iowa law gives you only three choices: 1) leave the child's last name the same as on the current birth certificate; 2) change the child's last name to the same as the father's last name; or 3) IF the child's last name is currently the same as the mother's, add the father's last name to it for a 2-word hyphenated last name.
>
> . . . .
>
> Either of you may cancel this affidavit by completing and filing a Recision of Paternity Affidavit form with the state Bureau of Vital Records. You have 60 days from the date of the last notarized signature on this form, or until a court order is entered regarding this child, whichever is the earlier.
>
> Contact the Bureau at [phone number] and ask for the paternity clerk to obtain a recision form.

Additionally, Peckosh signed the birth certificate as the father of Isabella Rose Wenger. Peckosh and Wenger both testified to their in-hospital discussions of Isabella's name. Peckosh stated:

> Laura and I agreed on Isabella as her first name. We each threw out a bunch of first names. I picked out Rose. And then the last name Wenger was . . . I thought about it and I wasn't too happy about it at first, but I just said fine. I didn't want to—I thought what's in a name at first, *and I agreed to that*. *And that's how I signed the birth certificate*, because I didn't want to really fight about it.

(Emphasis added.) Wenger testified:

> Q. And was it agreed on between you and Mr. Peckosh to use the surname Wenger? A. Yes, it was. He wasn't happy with it—about it at first, but he said that if he could choose her middle name, than I could have the last name.
>
> Q. Did you force him to accept the name of Wenger? A. No.
>
> Q. You were still in the hospital [?] A. Yes.
>
> . . . .
>
> Q. And was anybody else present when this [affidavit] was created or at least filled out? A. No. I think it was just us and Ben, his son, was there.
>
> Q. And you also had the opportunity to review the back page of this voluntary affidavit as well, did you not? A. Yes.
>
> Q. And it's got a paragraph designated directly to the child's last name? A. Yes.

> . . . .
>
> Q. And why did you not use the pattern that you'd used . . . of having the father's last name on it? A. Well, Brett and I were not together. . . . So I felt that Wenger should be her last name. And since we agreed that he got to choose her middle name, then I had her last name and that's what I figured we were in agreement on. And we both chose Isabella as a first name. I wanted two middle names, but he said that was stupid and why would you have your kid have two middle names . . . . So I compromised and let him choose the middle name, thinking that it was all right to have Wenger as the last name.
>
> Q. Did you have discussions about the idea that you might be getting [your son's] last name changed? A. Yes.
>
> Q. And did you tell [Peckosh] at that time frame that you anticipated that [your son's] last name was going to be changed to Wenger? A. I told him that was a possibility, yes . . . I wanted to have my kids have the same last name.

In October 2008, Peckosh filed a petition to establish custody, visitation, and child support. The petition did not request a name change and acknowledged Peckosh's paternity and identification on the initial birth certificate: "The Petitioner has executed a paternity affidavit, and the Petitioner's name is listed on the birth certificate." Peckosh sought joint physical care. Trial was set for September 2009.

In August 2009, Wenger sought a continuance. Peckosh resisted the continuance, stating: "This matter involves custodial orders for the minor child of the parties. . . . [Peckosh] executed a paternity affidavit, and [he] is listed as father of this child on the birth certificate." Peckosh did not raise the issue of Isabella's surname.

The September trial was continued. On September 4, 2009, trial was set for April 14, 2010 on the following issues: custody, child support, visitation, tax exemption, medical, and insurances. On September 10, 2009, Isabella turned one-year old.

On March 30, 2010, Wenger filed an application to amend the trial order to add attorney fees as an issue. On April 6, 2010, Peckosh filed an application to amend the trial order "by adding the child's surname as an issue to be determined by the Court." On April 13, 2010, the court added attorney fees as an issue and set a May conference to select a trial date. On May 27, 2010, the court's trial order listed "name change" as an issue for the November 3, 2010 trial. Peckosh requested Isabella's surname be changed from Wenger to Peckosh.

At the November 2010 trial, Wenger was questioned about hyphenating Isabella's last name:

> Q. Would you have an objection if the last name was hyphenated between your name and Brett's name? A. I have mixed feelings on that. At one point I could see where I would be okay with it. And at the other, he just wasn't supportive . . . . I don't know why it's becoming such a huge issue for him now when he didn't tell me his intentions were to change her last name after he got to choose her middle name. So—

At the conclusion of the trial, Peckosh changed his position and requested a hyphenated surname. In December 2010, the district court awarded Peckosh and Wenger joint legal custody of two-year-old Isabella with physical care to Wenger. The court established visitation and child support. Further,

> Brett asks that this Court order that [Isabella's] surname be hyphenated to include both parents' surnames. Laura resists Brett's request but not with the same fervor that she resists his request for shared care. This Court normally would find it to be in [Isabella's] best interests to carry Brett's name based on the significant role he and his family will continue to play in her life. However, the Court's review of *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 894 (Iowa 2009), gives it pause. There, a father who failed to raise the issue of the child's name in a paternity action where custody and visitation were decided was limited by claim

> preclusion to the grounds set out under Chapter 674 when bringing a name change petition. The [*Braunschweig*] Court said:
>
> > Pursuant to Iowa Code section 144.40, one of the consequences of a decree of paternity is that a new or amended birth certificate is to be issued. . . . [A] father who is not consulted in naming the child has a right to contest the name and the mother's unilateral act is given no effect. Although [the mother] clearly chose Carter's surname without [the father's] input or consent, a paternity action was brought by [the father], and one of the consequences of a decree of paternity is that a new or amended birth certificate is issued. *The creation of this new or amended birth certificate was no longer a unilateral act by [the mother], as [the father] chose to bring the action adjudicating his parental rights. He had the option of contesting Carter's surname at that time but did not*. Where a father brings an action to establish paternity and adjudicate his parental rights, the time and place to contest the child's surname is when the new or amended birth certificate is created. Anything after that time is a name change and governed under chapter 674. [The father] chose to have his parental rights adjudicated in 2004. He did not contest Carter's surname at that time; therefore, this action is governed by Iowa Code chapter 674.
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> . . . [I]t is clear that the issue before the Court is not an original determination of what [Isabella's] surname should be. Rather, it is a challenge to the initial determination of a child's name. Here, Brett fully participated in the naming of [Isabella] by filling out the paternity affidavit and giving up on his request to have Peckosh as part of her surname in exchange for a concession on her middle name. Thus, under *Braunschweig*, he is limited to the grounds for a name change under Chapter 674 . . . grounds he cannot hope to prove here. Thus, under the current record, this court does not find grounds to change [Isabella's] name.

(Emphasis added and citations omitted.)

Peckosh now appeals the surname issue; he does not appeal the district court's determinations of custody, physical care, and child support.

II. Scope of Review.

We engage in a de novo review of equitable disputes involving a child's surname. *Montgomery v. Wells*, 708 N.W.2d 704, 705 (Iowa Ct. App. 2005).

III. Merits.

The issue before us is whether Peckosh's challenge to Isabella's surname is an application for a name change or a petition for an initial determination of Isabella's last name. This distinction is important because the standards governing the two types of determinations differ significantly. If this action is an initial determination of Isabella's last name, "neither parent has a superior right in determining the child's last name" and the governing consideration is the best interests of the child. *See id*. at 707-08. "Each custodian has equal participation in decisions affecting 'the child's legal status.' We believe an infant child's name is an incident of the child's 'legal status.'" *In re Marriage of Gulsvig*, 498 N.W.2d 725, 728 (Iowa 1993) (citations omitted).

In contrast, if this is a name change, Iowa Code chapter 674 governs. For children under fourteen, this chapter requires the *consent of both parents listed on the birth certificate* or a waiver of consent for certain enumerated reasons (abandonment, failure to support the child without good cause, failure to object to name change after notice). Iowa Code § 674.6.

Peckosh argues the court acted inequitably in concluding section 674.6 is controlling and requests we utilize a "best interests" analysis and order the issuance of a new birth certificate with the name Isabella Rose Peckosh-Wenger. He acknowledges that after discussion with Wenger, he signed Isabella's birth certificate with the surname Wegner. However, he argues "the filling out of the

birth certificate . . . was not the equivalent of a prior court ordered proceeding." Peckosh contends his surname challenge qualifies as an initial determination of Isabella's surname because there has been "no prior judicial proceeding involving the name change." We are not persuaded and, after our de novo review of the record, conclude his challenge constitutes a name change rather than an initial determination of Isabella's last name.

We addressed the distinction between an "initial name determination" and a "name change" in *Montgomery*, 708 N.W.2d at 705-06:

> Angela Wells and John Montgomery . . . [were] never married, nor did they live together at the time of Bradyn's birth. Although John is not shown on the birth certificate, a paternity test indicated he was Bradyn's father. [John brought this action to establish paternity, custody, support and visitation.] Prior to trial, all issues had been resolved except for two: (1) . . . summer visitation and (2) whether Bradyn's surname should be changed from "Wells" to "Montgomery."
>
> . . . .
>
> Angela asserts that the district court did not have the authority to *change* Bradyn's surname in this case. . . . We note, however, that [John's] challenge to the naming of the child is not a request for a name *change* but rather is a challenge to the *initial* determination of a surname. When a parent unilaterally chooses a child's name, the other parent may request the court to examine the name issue—as "the mother does not have the absolute right to name the child because of custody due to birth." . . . ("This . . . is a name case *ab initio*. The child was not legally named on the birth certificate.") . . . Bradyn's surname was given to him, following Angela's unilateral supplying of a name on the birth certificate. It is therefore not an action to *change* Bradyn's surname but a challenge to the initial determination of the name Angela chose to record on the birth certificate.

(Citations omitted.) Under *Montgomery* and the circumstances of this case, Peckosh's challenge to the naming of Isabella is not a challenge to an *initial, unilateral* determination of her surname, but rather is a request for a name *change*. *See id*.

Importantly, Isabella's surname on her initial birth certificate was not a unilateral decision by Wenger. Rather, Peckosh had equal participation in determining Isabella's legal status/surname on this birth certificate. Peckosh cites no authority where a court uses a "best interests" analysis to change a surname *after* the parents jointly create the surname on the child's initial birth certificate. Accordingly, his current request for a new birth certificate is a request to change a component of Isabella's legal status that he jointly created and voluntarily conferred. "He had the option of contesting [Isabella's] surname . . . but did not." *See Braunschweig*, 773 N.W.2d at 894. Therefore, this action is governed by the standards of the name change statute, Iowa Code chapter 674. To hold otherwise would effectively remove minors from the requirements of Iowa Code section 674.6.

Costs are taxed to Peckosh.

AFFIRMED.

Doyle, J., concurs; Mullins, J., dissents.

MULLINS, J. (dissenting)

I respectfully dissent. The affidavit of paternity was not an "initial determination" of the name of the child. "Determination" is defined as "[a] final decision by a court or administrative agency." *Black's Law Dictionary* 480 (8th ed. 2004). The facts attendant to the execution of the affidavit of paternity and the statutory framework authorizing the affidavit do not satisfy the requirements of an initial determination. Thus, the district court should have considered the name change issue as an incident of "legal status" of the child pursuant to the provisions of Iowa Code sections 600B.40 and 598.41, not pursuant to Iowa Code chapter 674. *See Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 893-94 (Iowa 2009); *In re Marriage of Gulsvig*, 498 N.W.2d 725, 728-29 (Iowa 1993); *Montgomery v. Wells*, 708 N.W.2d 704, 707 (Iowa Ct. App. 2005).

Peckosh and Wenger signed an affidavit of paternity pursuant to the provisions of Iowa Code sections 144.13, 144.40, and 252A.3A. Section 144.13 contains the general provisions for birth certificates, and in subsection (3) requires in relevant part:

> If the mother was not married at the time of conception, birth, and at any time during the period between conception and birth, the name of the father shall not be entered on the certificate of birth . . . . If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

Section 144.40 further provides in relevant part:

> Upon request and receipt of an affidavit of paternity . . . pursuant to section 252A.3A, . . . , the state registrar shall establish a new certificate of birth to show paternity if paternity is not shown on the birth certificate. Upon written request of the parents on the affidavit of paternity, the surname of the child may be changed on the certificate to that of the father. . . .

Section 252A.3A then provides in relevant part:

> 1. The paternity of a child born out of wedlock may be legally established by the completion, filing, and registration by the state registrar of an affidavit of paternity only as provided by this section.
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> . . . .
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> 6. . . . For the purposes of legal establishment of paternity under this section, paternity is legally established only upon filing of the affidavit with and registration of the affidavit by the state registrar . . . .
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> . . . .
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> 8. An affidavit of paternity completed and filed with and registered by the state registrar pursuant to this section has all of the following effects:
>
> *a*. Is admissible as evidence of paternity.
>
> *b*. Has the same legal force and effect as a judicial determination of paternity . . . .
>
> *c*. Serves as a basis for seeking child or medical support without further determination of paternity . . . .
>
> . . . .
>
> 12. *a*. A completed affidavit of paternity may be rescinded . . . .
>
> *b*. . . . [U]pon registration of a timely recision form the state registrar shall remove the father's information from the certificate of birth, and shall send a written notice of the recision to the last known address of the signatory of the affidavit of paternity who did not sign the recision form.

Wenger argues that Peckosh should not have signed the affidavit of paternity if he did not agree with the child's name as stated on the affidavit, or that he could have rescinded the affidavit if he had regrets about the name. Those arguments, together with a reading of the statutes listed above, lead to the inescapable conclusion that in order for Peckosh to have rights and responsibilities as a father to the child he was required to sign the affidavit; and if he had rescinded the affidavit, he would have been removed from the birth certificate.

Assuming for the sake of this opinion that he did not approve of the surname that Wenger had chosen, absent his powers of persuasion, he had no authority or influence over the naming of the child. For him to refuse to sign the affidavit with a name to which he did not agree carried with it the consequences of being unable to assume parenthood while the child was still an infant. While it is true that he had another choice, a paternity lawsuit, his legal status would have remained as a non-father until his lawsuit wound its way through the litigation process and he was able to obtain a court decree. That option would understandably pose a substantial risk that mother would deny him access (or at least substantial access) during the pendency of the litigation. Peckosh was placed in the unenviable position of having to decide in the first few days of the child's life whether he was going to be involved with the child from the beginning of life, or risk denial of involvement until litigation was resolved. At that moment, in the first forty-eight hours of Isabella's life, he gave up on the name battle to win the war of being named father and assuming certain rights and responsibilities.

It is clear from the foregoing that the primary purpose of the affidavit of paternity is to identify the father to be named on the birth certificate. Case law declares that "the mother does not have the absolute right to name the child because of custody due to birth." *Gulsvig*, 498 N.W.2d at 728. While that is a principle applied in court proceedings, the practicalities of unwed parenthood are that the mother of the child is always known and is always present at childbirth, thus placing her in a superior position when providing information for a birth certificate. Father, if known and present prior to issuance of the birth certificate, may assert parenthood, but will be denied the right to be named as father if

mother decides, for whatever reason, that he should not be named. So, if he refuses to sign the affidavit of paternity because he does not agree with the child's name, he continues to be without parental rights (subject to the right of subsequent litigation). Mother can then proceed to name the child and obtain a birth certificate that shows her as mother and no one as father. (Conversely, one can envision a mother who would prefer to have paternity established soon after birth. In such a case, the father might be in a negotiating position to unduly influence the naming of the child.)

Under the facts of a case such as this, with the competing interests and the negotiations that necessarily ensue, the naming decision memorialized in an affidavit of paternity should not be considered an "initial determination" of the name of a child born to a mother and father who were not married to one another. Either parent should be permitted to raise the issue in the context of determining the "legal status" of the child pursuant to Iowa Code sections 600B.40 and 598.41 and the applicable case law.[1]

I would reverse the district court and remand for the trial court to decide this case based on its determination of the best interests of the child.

[1] When deciding best interests of the child, the trial court may also consider the circumstances surrounding the signing of the affidavit of paternity.