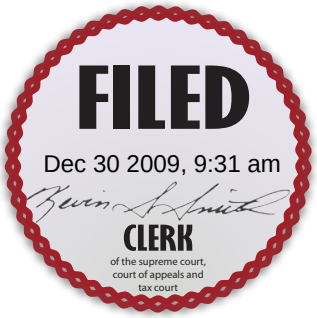

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF M.A.B. and C.B.	)	
	)	
BRANDIE E. BAUERLE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A04-0907-JV-432
	)	
WILLIAM A. TOLBERT, III,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION CIRCUIT COURT
JUVENILE DIVISION
The Honorable Louis Rosenberg, Judge
The Honorable Sheryl Lynch, Commissioner
Cause Nos. 49C01-0304-JP-860 and 49C01-0408-JP-2250

December 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Brandi A. Bauerle (Brandi), appeals the trial court's order changing the surname of her minor, nonmarital children to that of their father, William A. Tolbert, III (William).

We reverse and remand with instructions.

ISSUE

Brandi raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion in ordering the surname of her children to be changed to their father's.

FACTS AND PROCEDURAL HISTORY

Brandi and William had two children born out of wedlock: M.A.B., born on February 12, 2003; and C.B., born on May 12, 2004. On February 3, 2005, both parties appeared in person and a Judgment of Paternity and Support established that William was the father of both children. Brandi was awarded sole legal and primary physical custody of the children, and William was ordered to pay child support and was provided parenting time pursuant to the Indiana Parenting Time Guidelines. The Judgment of Paternity and Support also established that the children would retain Brandi's surname, Bauerle.

On May 24, 2006, William filed a Motion to Modify Custody. On October 25, 2006, William filed a Motion to Supplement Petition for the Modification of Custody, requesting that the children's last name be changed to his surname. On February 6, 2009, the parties attended mediation and resolved all of the issues except for the name change request. On

May 21, 2009, the trial court approved the parties' Consolidated Agreed Entry; however, the name change request was reserved to be determined by the court.

A hearing was held on June 17, 2009. During the hearing, both parties agreed that William is equally involved in the children's lives. William expressed his desire to have his children's last named changed to his last name, because as the only son in his family, he "would like for [his] Tolbert name to carry on through the generations." (Transcript p. 8). He also argued changing their last name to his would strengthen his relationship with his children. Brandi, on the other hand, argued that it would be too confusing for the children to change their last name, especially since M.A.B. would be entering first grade and has been known as "Bauerle" and C.B. would be entering kindergarten. The trial court issued an order granting William's request, finding in relevant part:

> (2) [William] is current on his child support.
>
> (3) [William] is exercising his parenting time and is equally involved with the children as [Brandi] at home and school.
>
> (4) The children are 6 years old and 5 years old and do not have a lengthy history of being known as "Bauerle" at school and with friends.
>
> (5) Father was told at the time of signing the Paternity Judgment on 02/03/05 that the last names of the children had to be [Brandi's] last name since she would not agree to [William's] last name. [William] was told by the prosecutor's staff he would come back to court at a later date.
>
> . . .
>
> (7) The court has considered relevant case law and the best interests of the children.
>
> (8) The court finds that having the children bear [William's] last name will promote the children's welfare which is in the best interests.

(9) The court finds that changing the children's last name to [William's] last name will not cause undue harm as the children are only 6 years old and 5 years old.

(Appellant's App. pp. 44-45).

Brandi now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Brandi contends that the trial court abused its discretion in ordering the surname of the parties' children to be changed to their father's. Specifically, she argues that William failed to present sufficient evidence that it would be in the best interest of the children to change their surname. William argues that "significant consideration is given to the father's interest in having his child bear the paternal surname in accordance with tradition." (Appellant's Br. p. 5).

When deciding on a petition to change the name of a minor child, "the court is guided by the best interest of the child under Ind. Code § 31-17-2-8." I.C. § 34-28-2-4(d). However, there is a statutory presumption in favor of a parent of a minor child who: "(1) has been making support payments and fulfilling other duties in accordance with a decree issued under [the dissolution, child support, or custody and parenting time statutes]; and (2) objects to the proposed name change of the child." I.C. § 34-28-2-4(d).

We have interpreted I.C. § 34-28-2-4(d) to apply to noncustodial parents, because "only noncustodial parents actually make support payments pursuant to the terms of a court

order." See *Petersen v. Burton*, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007)[1] ("Our research did not reveal any cases where the presumption has been applied to a custodial parent."); *see also Daisy v. Sharp*, 901 N.E.2d 627, 630-31 (Ind. Ct. App. 2009) (holding that the noncustodial father did not establish the presumption in I.C. § 34-28-2-4(d)(1) because he offered no evidence that he had complied with his obligations under the paternity decree). Under the plain language of I.C. § 34-28-2-4(d)(2), we note that the noncustodial parent who objects to the proposed name change enjoys a presumption in favor of keeping the name in its current form.

Here, it is undisputed that William, as the noncustodial parent, has been making support payments and exercising parenting time with the children. However, William petitioned the trial court for a proposed name change; and Brandi, as the custodial parent of the children, objected to the children's name change. Thus, the statutory presumption does not apply to this case. In absence of the statutory presumption in I.C. § 34-28-2-4(d), William was required to show to the trial court that a name change was in the best interest of

[1] The court also state that:

> Limiting the application of this statutory presumption to noncustodial parents, primarily fathers, who object to proposed name changes may appear to be outdated in light of modern attitudes and practices regarding the surnames of children born out of wedlock. However, it is for the legislature, not the judiciary, to make any revisions it may feel are appropriate to this regard.

Id. at 1028-29.

the children. *In re Paternity of J.C.*, 819 N.E.2d 525, 528 (Ind. Ct. App. 2004). Absent evidence of the child's best interests, the father is not entitled to a name change. *Id*.

We review the trial court's order to change the name of a minor child under an abuse of discretion standard. *Paternity of M.O.B.*, 627 N.E.2d 1317, 1318 (Ind. Ct. App. 1994). An abuse of discretion will be found only where the decision is clearly against the logic and effect of the facts and circumstances before the court or the court has misinterpreted the law. *Id*. We will not reweigh the evidence, and will view the evidence in the light most favorable to the appellee. *Id*.

Brandi argues that William's desire to change the children's surname is similar to that of the biological fathers in both *Paternity of M.O.B.* and *Garrison v. Knauss*. In *Paternity of M.O.B.*, the trial court entered an order that the child assume the father's surname. *Id*. at 1318. The father, in arguing that it was in the best interest of his children to have his last name, testified that the minor was his only son and expressed the belief that his last name was "an honorable name which he would 'truly like' to have 'carried on.'" *Id*. at 1319. This court reversed the trial court's order, because the father "clearly failed to sustain his burden of proof that a name change was in the best interests of M.O.B.." *Id*.

Similarly, in *Garrison*, 637 N.E.2d 160, 161 (Ind. Ct. App. 1994), the father testified that it was in his children's best interest to have his surname "for-just for-that paternal feeling that they are my children." However, we reversed the trial court's decision to give the children the father's name because the father had not met his burden in proving that the name

change was in their best interest; rather, his explanation related to his own paternal feelings toward his children instead of the children's best interest. *Id*. at 161.

During the hearing, William testified that he wanted his children to bear his surname because:

> I feel that these children are wonderful children. They are my life. I don't know what I would do without them. I wake up, and I want to spend every waking minute of my life with them, because they mean so much to me. And I am one boy, out of six children that my father has. And it is a possibility that I may not have another son. And I would like for my Tolbert name to carry on through the generations.

(Tr. p. 8). William went on to testify that he believed the name change would strengthen the parent-child relationship with his children. While we do not doubt William's sincerity or commitment towards his children, we find that he has not met his burden of persuasion that it is in the best interest of the children to change their last name. William's statements that he wants his children to carry on the Tolbert name relate to his own desire rather than it being in the best interest of the children. Additionally, the fact that he believes the name change will strengthen the parent-child relationship relate to his own paternal feelings towards his children rather than in the children's best interest. *See Garrison*, 637 N.E.2d at 160 (citing *D.R.S. v. R.S.H.*, 412 N.E.2d 1257, 1268 (Ind. Ct. App. 1980)) (Judge Shields dissenting) ("If a name is important to the strengthening of the father-son relationship, it is just as logical to

say it is important to strengthening the mother-son relationship."). Taken together, both reasons are insufficient to warrant a changing of their surnames.

CONCLUSION

Based on the foregoing, we conclude that the trial court abused its discretion when it ordered that the children take their father's surname.

Reversed and remanded with instructions to restore the surname Bauerle to both children.

VAIDIK, J., concurs.

CRONE, J., dissents with separate opinion.

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BRANDIE E. BAUERLE,	)	
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Appellant-Petitioner,	)	
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vs.	)	No. 49A04-0907-JV-432
	)	
WILLIAM A. TOLBERT, III,	)	
	)	
Appellee-Respondent.	)	

CRONE, Judge, dissenting

I respectfully dissent. I believe that William's testimony regarding his desire to change his children's surname is more similar to that given by the father in *Petersen*, 871 N.E.2d 1025. In that case, my colleagues and I concluded that the father's testimony showed that he was "focused upon his son's best interests rather than his own" and that "the benefits that [the son] will experience from an increase in [the father's] paternal feelings should not be discounted simply because the feelings may also positively affect [the father]." *Id*. at 1031. The two are not mutually exclusive and often overlap. It is also worth noting that

William, unlike the father in *Petersen*, has consistently paid support and maintained contact with his children. While acknowledging that this is a close, fact-sensitive case, I believe that the trial court was in the best position to evaluate William's sincerity and commitment, as well as the best interests of his children, and I believe that we should not second-guess that evaluation in this case.