

**IN THE COURT OF APPEALS OF IOWA**

No. 7-260 / 06-0451

Filed June 13, 2007

**ELIJAH LEE RAPP,**  
Petitioner-Appellee,

**vs.**

**JOY ABRAHAM,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Lee County, William Dowell, Judge.

Joy Abraham appeals from the district court's ruling on a petition for custody and visitation. **AFFIRMED.**

Nancy Lynn Robertson, Des Moines, for appellant.

David D. Butler, Des Moines, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**EISENHHAUER, J.**

Joy Abraham appeals from the district court's ruling on Elijah Rapp's petition for custody and visitation. She contends the court erred in ordering their child's surname be changed.

Elijah Rapp and Joy Abraham are the parents of Malachi Richard Abraham. Never married, the parties' relationship ended prior to Malachi's birth in October 2003. Elijah was not present at Malachi's birth, and the parties were unable to come to an agreement regarding visitation. Joy named the child using her surname when she filled out the birth certificate.

On February 8, 2005, Elijah filed a petition for determination of custody and visitation pursuant to Iowa Code section 600B.40 (2005). In his petition, Elijah requested that Malachi's surname be changed to Rapp and that Joy be ordered to pay court costs and his attorney fees. The parties came to an agreement regarding custody and visitation, and a consent decree establishing custody and visitation was filed on November 2, 2005.

On February 9, 2006, the district court filed an order determining the contested issues of the child's surname and the payment of court costs and attorney fees. The court determined it was in Malachi's best interest that his surname be changed and ordered a new birth certificate be issued, substituting the surname Rapp for Abraham. The court further ordered both parties responsible for their own attorney fees and assessed court costs to Elijah.

On appeal, Joy contends the court erred in changing Malachi's name as part of an action brought under chapter 600B. She further contends the court

erred in determining it is in Malachi's best interest to have his surname changed to Rapp. Elijah requests an award of his appellate attorney fees.

Our scope of review in an equitable action, including a surname dispute, is de novo. Iowa R. App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court but is not bound by them. Iowa R. App. P. 6.14(6)(g).

Joy first contends the district court did not have the authority under chapter 600B to change a child's name. This issue was not raised before the district court, and therefore is not preserved for our review.<sup>1</sup> *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (holding issues must be raised in the district court to be heard on appeal). However, this court has previously determined that a name change can be addressed in such actions when the challenge to the naming of a child is not a request for a name *change* but rather is a challenge to the *initial* determination of a surname. *Montgomery v. Wells*, 708 N.W.2d 704, 706 (Iowa Ct. App. 2005).

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. Consequently, she should gain no advantage from her unilateral act in naming the child. Therefore, when the court first entertains an action between the parents to determine their legal rights and relationships with each other and the child, the court may also consider the legitimacy of the child's original naming as part of its determination of the child's legal status and custody.

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<sup>1</sup> In its order, the court notes, "Neither Joy nor Elijah argues that the Court does not have subject matter jurisdiction and authority to act in this case with respect to Malachi's surname."

*Id.* (citations omitted). Here, the district court determined that the dispute is a challenge to the initial determination of Malachi's surname. Accordingly, the court had jurisdiction to order the surname changed.

We turn then to the issue of the propriety of giving the child his father's surname. In making this determination, our focus is the best interest of the child. *Id.* at 708. While there is no fixed list of factors to be considered in making this determination, the following factors have been considered:

- (1) Convenience for the child to have the same name as or a different name from the custodial parent.
- (2) Identification of the child as part of a family unit.
- (3) Assurances by the mother that she would not change her name if she married or remarried if the child maintains the mother's surname.
- (4) Avoiding embarrassment, inconvenience, or confusion for the custodial parent or the child.
- (5) The length of time the surname has been used.
- (6) Parental misconduct, such as support or nonsupport or maintaining or failing to maintain contact with the child.
- (7) The degree of community respect associated with the present or changed name.
- (8) A positive or adverse effect a name change may have on the bond between the child and either parent or the parents' families.
- (9) Any delay in requesting or objecting to name change.
- (10) The preference of the child if the child is of sufficient maturity to express a meaningful preference.
- (11) Motivation of the parent seeking the change as an attempt to alienate the child from the other parent.
- (12) And any other factor relevant to the child's best interest.

*Id.* at 708-09 (citations omitted). "[T]he determination of the child's best interest in a name dispute should be resolved by identifying and weighing various factors specific to each case." *Id.* at 709.

In considering the factors articulated above, we conclude the change in surname is in Malachi's best interest. While many of the factors do not strongly weigh in favor of one parent's surname over the others, several support the

name change. The child is too young to have a real appreciation of his surname, and therefore will not be harmed by its change. Although Joy had no plans to marry at the time of the hearing, she could not state that were she to marry, she would continue to use the surname of Abraham.

We also find that Malachi's bond to Elijah would be positively affected by change of surname, while Joy's bond would not be adversely affected. Malachi's bond with Joy has been established and is bolstered by the fact she has physical care of him. Elijah, on the other hand, is the noncustodial parent living in another city some distance away. Although he did not act admirably during Joy's pregnancy or immediately after Malachi's birth, he has taken the steps to establish a relationship with Malachi and accept his responsibilities as Malachi's father. The district court had the opportunity to observe the parties and expressed concern that Joy will not enthusiastically support Elijah's relationship with the child. We agree with the district court that in changing the surname, Malachi will have a stronger connection to Elijah and a sense of belonging to the Rapp extended family. For these reasons, we affirm.

Finally, Elijah requests this court order that Joy pay his appellate attorney fees. Appellate attorney fees are not a matter of right but rest within the sound discretion of the reviewing court. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). We decline to award Elijah his appellate attorney fees.

**AFFIRMED.**