IN THE COURT OF APPEALS OF IOWA

No. 8-986 / 08-0729
Filed March 11, 2009

JOSHUA RICHARD BRAUNSCHWEIG,
Petitioner-Appellee,

vs.

SUMMER RAE FAHRENKROG
f/k/a SUMMER RAE FRANK,
Respondent-Appellant.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy, Judge.

A mother appeals a district court order changing the last name of her son to match the last name of the child's biological father. **REVERSED AND REMANDED.**

James Van Dyke of Van Dyke & Werden, P.L.C., Carroll, for appellant.

Joshua Walsh of Gailey & Walsh Law Office, Newell, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Potterfield, JJ.

VAITHESWARAN, P.J.

Summer Fahrenkrog, formerly Summer Frank, appeals a district court order changing the last name of her son from "Frank" to "Braunschweig," to match the last name of the child's biological father, Joshua Braunschweig. We reverse and remand.

I. Background Facts and Proceedings

Summer Frank gave birth to a baby boy. She obtained a birth certificate listing only her name as a parent and listing the child's last name as Frank. Paternity testing later established Joshua Braunschweig as the father.

Approximately fifteen months after the child's birth, Braunschweig filed a petition to establish custody and visitation rights. Braunschweig identified the child by the last name of Frank and did not seek to have his own last name given to the child.

The parties resolved the action by stipulating that Summer Frank would assume physical care of the child and Braunschweig would receive liberal visitation rights. The stipulation referred to the child's last name as Frank and made no mention of a different last name. The stipulation was approved by the district court.

When the child was three, Braunschweig filed a new petition under a different court number "to place natural father's name on birth certificate and to change child's surname." In her answer, Frank admitted paternity and admitted that Braunschweig's name could be added to the birth certificate, but denied that the child's last name should be changed.

Following a hearing, the district court determined that Braunschweig's petition sought an initial determination of the child's last name rather than a name change. The court further concluded that it was in the child's best interests to have Braunschweig's last name.

Frank appealed. Our review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Gulsvig*, 498 N.W.2d 725, 727-28 (Iowa 1993).

II. Analysis

Frank contends the district court acted inequitably in concluding that Braunschweig's petition sought an initial determination of the child's last name rather than a change of his last name. This distinction is important because the standards governing the two types of determinations differ significantly. If this is an initial determination of a child'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. *Montgomery v. Wells*, 708 N.W.2d 704, 707-08 (Iowa Ct. App. 2005). If this is a name change, Iowa Code chapter 674 (2007) governs. For children under fourteen, this chapter requires the consent of the parents listed on the birth certificate or a waiver of consent for certain enumerated reasons. Iowa Code § 674.6.

On our de novo review of the record, we conclude Braunschweig sought a name change rather than an initial determination of the child's last name. Braunschweig petitioned for an initial determination of his rights vis-à-vis his son in a separate action filed two years earlier. At that time, he could have asked the court to review the last name on the child's birth certificate. *See Gulsvig*, 498 N.W.2d at 728 (holding the court's authority to determine a child's custody

included the authority to determine a child's name as an incident of the child's legal status). Braunschweig did not ask the court to make that determination but instead proceeded as if the child's last name was Frank.

When Braunschweig petitioned the court two years later, his petition was styled a petition "to change child's surname." The caption accurately described the nature of the action. The child's legal status and his parents' rights to him were determined in the custody action. *See Montgomery*, 708 N.W.2d at 706 (stating "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") (emphasis added). The second petition sought to change a component of the child's legal status. That petition was governed by the standards of the name change statute, Iowa Code chapter 674. To hold otherwise would allow multiple filings, effectively removing minors from the ambit of the name change statute.

Iowa Code section 674.6 states in pertinent part:

> If the petition includes or is filed on behalf of a minor child under fourteen, both parents as stated on the birth certificate of the minor child shall file their written consent to the name change. If one of the parents does not consent to the name change, a hearing shall be set on the petition . . . . At the hearing the court may waive the requirement of consent as to one of the parents if it finds:
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> 1. That the parent has abandoned the child;
> 2. That the parent has been ordered to contribute to the support of the child or to financially aid in the child's birth and has failed to do so without good cause; or
> 3. That the parent does not object to the name change after having been given due and proper notice.

As noted, consent is a prerequisite to a name change. *See In re Marriage of Quirk*, 504 N.W.2d 879, 881-82 (Iowa 1993). Frank was the only parent on the birth certificate and she did not consent. Therefore, the district court could change the child's name only if one of the enumerated conditions for a waiver was satisfied. It was uncontested that Frank did not abandon the child, as she was his primary caretaker from the time of his birth. *Id.* at 882. It was also undisputed that she contributed to his support and that she objected to the change of his name. As none of the factors for waiver were met, the child's last name could not be changed.

III. Attorney Fees

Frank requests the payment of appellate fees. The application is denied. We reverse and remand for entry of an order of dismissal.

REVERSED AND REMANDED.

Vaitheswaran, P.J., and Eisenhauer, J. concur. Potterfield, J. dissents.

POTTERFIELD, J. (Dissenting)

I respectfully dissent, being convinced that the district court correctly ruled that Braunschweig was not precluded from challenging the initial surname unilaterally given to his son by Frank. The district court relied on our opinion in *Montgomery v. Wells*, 708 N.W.2d 704, 706 (Iowa Ct. App. 2005), to find that Braunschweig was entitled to challenge the initial determination of his child's surname. The majority opinion now focuses on the word "first" in *Montgomery* to conclude that a parent may not challenge the initial determination of a child's last name if the parents previously litigated any of "their legal rights and relationships with each other."

The *Montgomery* court decided that the district court has authority to resolve a name dispute between unmarried parents under Iowa Code chapter 600B, stating:

> 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.

Montgomery, 708 N.W.2d at 706 (citations omitted).

I do not find that the court's use of the word "first" is necessary to the *Montgomery* ruling, particularly since *Montgomery* involved a first action on the part of the unmarried parents. The facts here present a more typical procedural

history that includes several actions between the parents to resolve their legal rights and responsibilities, beginning with a paternity determination.

Following a paternity test confirming his belief that he was the father of the child, Braunschweig asked the court to determine his and Frank's rights regarding custody, visitation, and support of their child. The parents resolved Braunschweig's petition by stipulation, agreeing to share joint legal custody; that Frank would have physical care; and that Braunschweig would have liberal visitation, would pay child support, and provide health insurance. The court issued a decree approving the parents' agreement, "confirming" paternity and stating that child support had been "addressed in a separate action." The record does not reflect specifically what separate actions already had been brought to the district court.

Braunschweig then exercised his rights and met his responsibilities as the child's father and joint legal custodian. He returned to court when he and Frank could not agree on their child's surname, which Frank had chosen unilaterally. The majority now finds that, even as a joint custodial parent, he forfeited his ability to challenge the initial determination of his child's surname by not litigating that issue in the first action brought to court. The majority would limit his procedural options to a name change petition under Iowa Code chapter 674, a petition subject to Frank's veto. *See In re Marriage of Gulsvig*, 498 N.W.2d 725, 728 (Iowa 1993) (discussing the right of a joint legal custodian in equal participation in decisions affecting "the child's legal status" under Iowa Code section 598.41(2) and finding that a child's name is an incident of the child's legal status). *Montgomery* requires consideration of the factors arising from the

passage of time between a first action by a parent and a subsequent challenge to an initial naming. *Montgomery*, 708 N.W.2d at 708-09. Here, the district court carefully weighed the age of the child and the length of time during which he had become aware of his last name. The court found that those factors were less important than the reality that the child was the only person in his household, including his mother, stepfather, and half-brother, with the name Frank. I would affirm the ruling of the district court.