

Children's Law Center of Indiana



Paternity

02/26/2009

In **Daisy v. Sharp**, 901 N.E.2d 627 (Ind. Ct. App. 2009), the Court reversed and remanded the trial court's order denying Mother's petition to change the name of her minor daughter to include Mother's surname. Mother and Father were never married. Mother and Father resided together, and with the child, for seven years after the child was born June 29, 1998. Mother and Father then separated and paternity in Father was legally established. Since then, the child has resided with Mother, and Father has exercised visitation. On August 29, 2007, Mother filed a petition to change the child's surname from Father's surname to a hyphenated combination of the Mother's and Father's surnames. Father was granted intervention and objected to the name change. At Mother's request, a guardian ad litem (GAL) was appointed for the child. Following a contested hearing, on March 13, 2008, the trial court denied Mother's petition and issued a written order. Following the denial of Mother's motion to correct error, Mother appealed.

Mother did not waive for appeal the issue of whether Father established the statutory presumption in IC 34-28-2-4(d) by failing to raise it at the hearing or to adequately raise it in her motion to correct error. *Id.* at 629. The Court held that, to preserve error at the hearing it was not necessary for Mother to call attention to any failure by Father to establish the statutory presumption. In this regard, the Court noted that (1) IC 34-28-2-4 governs when a parent seeks to change the surname of his or her minor child; (2) IC 34-28-2-4(d) provides that in its decision, the court shall be guided by the best interest of the child rule under IC 31-17-2-8, but there is a presumption in favor of the parent who objects to the proposed name change and who has been making support payments and fulfilling other duties in accordance with a decree issued under IC 31-15, IC 31-16, IC 13-17, or IC 31-1-11.5 before its appeal; and; (3) for the presumption to apply in this case, Father had the burden of establishing at the hearing that he had been making support payments and fulfilling other duties in accordance with a paternity decree. *Id.* Additionally, the Court concluded that, although Mother did not specifically address in her motion to correct error whether Father had established the statutory presumption, Mother's argument that the trial court had misapplied the name change statute was sufficient to avoid waiver of this issue. *Id.* at 630, 632. The Court recited the following arguments by Mother: (1) the trial court erred when it considered the factors in IC 31-17-2-8 in deciding whether to grant the name change; (2) the statutes regarding name changes do not apply in this case because they address a biological father's right to have his child carry his name, and the child in this case does and, if the petition were granted, would continue to carry Father's name; and (3) the judgment "is contrary to the evidence [, including the child's wishes as reported by the guardian ad litem,] and to the logical application of the current law to the petition filed which does not seek to supplant the biological father's name, but only to include the biological mother's name." *Id.* at 629-30.

The Court concluded that, because Father offered no evidence of his obligations under the paternity or other decree or that he had complied with it, Father did not establish the presumption in IC 34-28-2-4(d), and, thus, the trial court abused its discretion in finding that Father had established that presumption. *Id.* at 630-31. The Court opined that (1) a father and mother enjoy equal rights with regard to naming their child; (2) the name change statute provides that the court, when ruling on a petition to change the child's name, is guided by the best interest of the child, but also provides for a presumption in favor of a parent who objects to the name change and has been making support payments and fulfilling other duties in accordance with a decree issued under the appropriate statutes; (3) the presumption created by the name change statute is that it is in the best interest of the child to retain the name of the parent who makes support payments and fulfills other duties imposed by a dissolution, support or parenting time decree, if such parent objects to the proposed name change; (4) but the best interest of the child is always the primary concern with merely a presumption, if established by competent evidence, that the child's best interest is served in accordance with the wishes of the noncustodial parent who is paying support and is complying with a decree that defines the parent's obligations; and (5) the noncustodial parent may invoke the presumption by proving that he or she is paying support and is fulfilling other court-ordered parental duties. *Id.* at 630 (citations omitted). The Court noted that, here, Father testified that paternity had been established two years earlier, when he and Mother separated, and that he "pay[s] support regular; but Father did not offer into evidence a copy of a paternity decree or any other decree setting out his parental obligations or testify as to any parenting time schedule or other duties assigned to him under such a decree. *Id.* at 631.

The Court addressed the dissent's argument that Father had established the statutory presumption based on evidence that Father "pays support regularly, paid for the medical expenses for [the child's] birth, attends many of [the child's] activities, enjoys regular parenting time with [the child] and takes [her] on weekend trips." It distinguished cases cited by the dissent and noted that, (1) while the evidence cited by the dissent showed that Father had paid support and spent time with the child, there was no evidence in the record showing what Father's court-ordered obligations were, and (2) Father's payment of birthing expenses which predates the paternity decree, does not assist to establish the statutory presumption. *Id.* at 631.

The Court concluded that it must remand inasmuch as: (1) by finding that Mother had not rebutted the presumption set out in IC 34-28-2-4(d), the court implicitly found that Father had presented evidence to establish that presumption; (2) the Court has concluded that Father did not establish that presumption; and (3) as such, the trial court holding was contrary to law when it denied Mother's petition based on Mother's failure to rebut the presumption. *Id.* at 631. The Court instructed the trial court on remand to reweigh the evidence presented at the March 13, 2008, hearing, but without a presumption in favor of Father, to determine the best interest of the child. The Court stated that (1) Mother may prevail if she proves that the proposed name change is in the best interest of the child; (2) the best interest of the child is a question of fact; and (3) the evidence favoring the proposed name change must be clear and convincing. *Id.* at 631-32. In a footnote to its remand instruction, the Court noted that the proposed name change here does not seek to remove Father's name from the child's surname, but instead seeks to add Mother's own last name to the child's surname. *Id.* at 632 n.4.

Robb, J. dissented with separate opinion.