Paternity

08/17/2007

In **Petersen v. Burton**, 871 N.E.2d 1025 (Ind. Ct. App. 2007), the Court affirmed the trial court's denial of Mother's motion to correct error as to the trial court's order changing her child's surname to that of his Father. The child was born to Mother on October 8, 2002. On October 24, 2002, Father filed to establish paternity, provide support of the child, and to change the child's surname from that of the Mother to that of the Father. The trial court established paternity and, on September 12, 2003, issued an initial order regarding custody, parenting time and child support in which it also found that "at this time [it is not] in the best interest of[the child] for his name to be changed. Father has developed no relationship, provided no support – either emotionally or financially, and presented no evidence regarding why it would be in the child's best interest for the child to carry the surname of [Father]." The trial court further stated that it would reconsider if Father presented evidence regarding the stated concerns of the trial court. On April 3, 2006, Father filed a petition to revisit the issue of the name change of the child and it was set for hearing on July 10, 2006. However, a June 30, 2006 chronological case summary (CCS) entry indicates that the name change issue was to be heard on August 16, 2006. At the July 10, 2006 hearing, the trial court heard argument from Father on the name change issue, but Mother was not prepared because of the June 30, 2006 CCS entry. On July 17, 2006, the trial court issued an order finding that "a [name] change is in the Child's best interest based on Father's testimony that sharing his name will increase the emotional bond between Father and the Child." On July 27, 2006, Mother filed a verified motion for relief from order, for reconsideration, and for rehearing. On August 14, 2006, Mother also filed a motion to correct error. At an August 16, 2006 hearing both of Mother's motions, both parties were given the opportunity to present evidence regarding the name change. On October 2, 2006, the trial court denied Mother's motion to correct error. Mother appealed.

The Court held that, in determining whether to grant a petition for name change of a minor child, the presumption created in IC 34-28-2-4(d) favoring the parent 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," does not apply to Mother, the custodial parent, in this case. Id. at 1028. Mother argued that the statutory presumption at IC 34-28-2-4(d) was in her favor, that the trial court should have given her the benefit of this presumption, and, thus, Father should have been required to present "clear and convincing evidence" supporting the name change. The Court agreed with Father's argument, however, that "as the statute currently stands, the

presumption applies only to noncustodial parents who satisfy the statutory requirements. In this regard the Court noted: (1) while custodial parents certainly provide financial support and perform other duties for their children it is only noncustodial parents who actually make support payments pursuant to a court order – a clearly stated requirement of the plain language of IC 34-28-2-4(d); (2) "on the rare occasion that this Court has applied the statutory presumption at issue, it has been applied in favor of a noncustodial father who objected to the name change proposed by his child's custodial mother; (3) the Court's research did not reveal any cases where the presumption had been applied to a custodial parent; and (4) 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, but it is for the legislature, not the judiciary, to make any revisions it may feel are appropriate in this regard. Id. at 1028-29.

The trial court did not err in denying Mother's motion to correct error as to the trial court's order changing the child's surname to that of his Father. Id. at 1031. The Court stated that, in the absence of a statutory presumption, the Father was simply required to present sufficient evidence to support his petition and show that the name change was in the child's best interests. The Court noted that the reasoning of In Re Paternity of Tibbitts, 668 N.E.2d 1266, 1267-69, applied here. In Tibbitts, the court stated: "However, the indicators that complying with Father's request is in the child's best interest are that he does pay support, has visitation and participates in the life of his child. Moreover, he wants the child to share his name. This is conduct that society wants to encourage of men who father children outside of marriage." Id. at 1269. The Court opined that, here, (1) as the trial court stated, "Father's 'performance,' while not flawless, does demonstrate a genuine desire to form a parent-child relationship with [the child];" (2) Father has consistently paid child support and portions of his arrearage as ordered by the trial court since July 2004, albeit that the payments are made through wage garnishment; and (3) Father has also exercised visitation on a fairly regular basis in the one-year period leading up to this hearing. The Court also quoted portions of Father's testimony regarding why he petitioned for a name change, which indicated that (1) Father believed it would increase the emotional bond that Father shared with his son; (2) it "lets him know who his father is;" and (3) "I don't want to have my son go through life not being connected with his father as an identity…I want him to be proud of the name. I want him to be proud of who his father is." Petersen at 1030. The Court disagreed with Mother's contention that Father's testimony in support of his petition expressed only his "paternal feelings" and resembled the fathers' explanations in In Re Paternity of M.O.B., 627 N.E.2d 1317 (Ind. Ct. App. 1994) and Garrison v. Knauss, 637 N.E.2d 160 (Ind. Ct. App. 1994) where the appeals court found that the trial court had abused its discretion in ordering the children to assume their father's surname because the father's desire to change his children's surname was based on the best interests of the father rather than the best interests of the children. Petersen at 1030-31.