

# Children's Law Center of Indiana



## Paternity

10/27/2006

In **In Re Change of Name of Fetkavich**, 855 N.E.2d 751 (Ind. Ct. App. 2006), the Court reversed and remanded the trial court's order granting Mother's petition to change the name of minor son to his stepfather's surname. The child was born in 1990. The parents were never married. Father's paternity was established in 1998. Father has provided financially for the child but has visited with him only ten or twenty times in the child's lifetime, and not at all since the summer of 2003. The child has always resided with Mother who married Stepfather in 1999. Mother and Stepfather have two children together. In June 2005, Mother filed a petition to change the child's last name to that of Stepfather. A hearing was held on November 9, 2005. Father, who was represented by counsel, requested separation of witnesses, which was granted. Father, was consequently ordered out of the courtroom until he had testified. Mother and the child testified that they wished to have the child's name changed. Father testified and offered evidence in opposition to the name change. The trial court issued an order granting the name change. Father appealed

**Inasmuch as IC 33-33-45-6(a) grants general jurisdiction to the Lake Superior Court, giving it "the same jurisdiction as the Lake Circuit Court in all civil and probate cases and matters whether original or appellate," the Lake Superior Court had subject matter jurisdiction to preside over the petition to change the child's name.** *Id.* at 753.

Father argued that, in accordance with I.C. 34-28-2-1 and 2, name change petitions may only be heard in circuit courts. *Id.*

**A judgment rendered by a court that lacks jurisdiction over the particular case is voidable and requires a timely objection or the lack of jurisdiction over the particular case is waived.** *Id.* at 754. Father waived the argument that the trial court lacked subject matter jurisdiction because Mother failed to comply with the statutory requirements for publishing notice of the name change request. The Court held that the waiver resulted from (1) Father's failure to cite to any authority in support of his argument in accordance with Ind. Appellate Rule 46(A)(8)(a), and (2) his failure to make a timely objection. *Id.* at 753-54.

**Father has a protectable interest in the child's name and a right to participate in any proceeding regarding the change of the child's name. Thus, Father is a necessary party to a proceeding regarding a change of the child's name.** *Id.* at 755. The Court noted that it is reversible error to extend the separation of witnesses to those who have a substantial interest in the subject matter. The Court held that, by sequestering Father with other witnesses, the trial court deprived him of the opportunity to assist his counsel during the proceeding and, as such, the trial court erred when it excluded Father from the courtroom. Accordingly, the Court remanded the case to the trial court, instructed it to vacate the order

granting Mother's request to change the child's last name, and directed it to conduct a new hearing in accordance with this opinion. Id. at 756.

In its discussion, the Court noted that the name change statutes do not require both parents of a minor child to be named as parties in a petition to change the minor's name; but that does not mean that both parents are not parties to the action. The Court stated that a father and mother enjoy equal rights with regard to naming their child. See Tibbitts v. Warren, 668 N.E.2d 1266, 1267 (Ind. Ct. App. 1996) ("upon a determination of paternity, both the mother and father potentially enjoy equal legal rights as parents with regard to issues of support, custody, and visitation. I.C. 31-6-6.1-10 (1993). We have applied this notion of equality to the naming of the child."); T.J.B. v. G.A.H. (In re Name Change of J.N.H.), 659 N.E.2d 644, 646 (Ind. Ct. App. 1995) ("Upon a determination of paternity, both the mother and father potentially enjoy equal legal rights as parents.... Hence, it is only reasonable to allow them equal rights in the naming of the child."). Id. at 755.

**The facts that the child has never borne the Father's last name and the Father is not the petitioner, have no bearing on Father's ability to enjoy I.C. 34-28-2-4(d)'s presumption in favor of a parent of a minor child who objects to the proposed name change if the parent has been fulfilling his or her obligations set forth in I.C. 34-28-2-4(d)(1).** Id. at 756. The Court quoted I.C. 34-8-2-4(d) which states:

(d) In deciding on a petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under IC 31-17-2-8. However, there is a 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 IC 31-15, IC 31-16, or IC 17 (or IC 31-1-11.5 before its repeal); and

(2) objects to the proposed name change of the child.

The Court directed that, after hearing the evidence, the trial court to determine whether the presumption applied in this case, "which will affect Mother's burden of proof and may also affect whether the trial court should grant Mother's petition to change [the child's] name." Id.