

NOTICE  
Decision filed 05/29/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140022-U

NO. 5-14-0022

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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<i>In re</i> MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
KAITLIN R. FITZPATRICK,	)	Jefferson County.
	)	
Petitioner-Appellant,	)	
	)	
and	)	No. 12-D-230
	)	
ANTHONY J. FITZPATRICK,	)	Honorable
	)	Timothy R. Neubauer,
Respondent-Appellee.	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Welch and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* That portion of the circuit court's judgment of dissolution of marriage granting the respondent's request to have the surname of the parties' minor child changed is reversed where the basis for ordering the name change was the perceived misconduct of the petitioner rather than the best interests of the minor.

¶ 2 The petitioner, Kaitlin Johnston, formerly known as Kaitlin Fitzpatrick (Kaitlin), appeals an order of the circuit court of Jefferson County dissolving her marriage to the respondent, Anthony Fitzpatrick (Anthony). Her argument on appeal is that the circuit court erred in ordering her to change the surname of the parties' minor child from

Johnston to Fitzpatrick. Anthony has not filed a brief on appeal. For the following reasons, we reverse that portion of the circuit court's judgment requiring Kaitlin to change the child's surname and remand the cause to the circuit court with directions.

¶ 3

### BACKGROUND

¶ 4 Kaitlin and Anthony were married on June 18, 2011. They separated on November 13, 2012, and on December 6, 2012, Kaitlin filed a petition for dissolution of marriage. The parties' son, A., was born on December 13, 2012, and Kaitlin provided A. with her maiden name as his surname. In his answer to the petition for dissolution, Anthony requested, *inter alia*, that A.J.'s name be changed to A.F.

¶ 5 On January 10, 2013, an agreed temporary custody order was entered giving Kaitlin custody of A.J. except for every other weekend, when Anthony was to have custody. A settlement conference was held on August 8, 2013. The parties executed a stipulation and waiver of the two-year separation period, a marital settlement agreement, and a joint parenting agreement, thereby resolving all issues except that of A.J.'s surname. The joint parenting agreement provided that Kaitlin and Anthony would have joint custody of A.J., with Kaitlin being the primary residential custodian.

¶ 6 On September 19, 2013, a written judgment of dissolution of marriage was entered, which incorporated the marital settlement and joint parenting agreements, and which restored Kaitlin's maiden name of Johnston. A hearing was then held on the issue of A.J.'s surname.

¶ 7 Prior to the hearing on the name-change issue, Kaitlin's attorney had filed a memorandum in support of Kaitlin's position. Kaitlin testified that she had reviewed the

memorandum and certified that everything alleged therein was true and correct. According to the memorandum, Anthony attended a few doctor's appointments with her early in the pregnancy, but stopped going midway through the pregnancy. Anthony left Kaitlin in November 2012, and moved in with another woman, with whom he had been having a romantic relationship. Kaitlin moved in with her parents. Prior to A.J.'s birth, Anthony made no inquiries as to Kaitlin's welfare, and he did not offer any assistance. Subsequent to A.J.'s birth, Anthony did not contact Kaitlin regarding the child's welfare until the initiation of dissolution proceedings. Kaitlin's parents had been married 27 years and they had extensive family living in the area. Kaitlin's parents and sister provided both emotional and financial support for Kaitlin and A.J. Kaitlin had no criminal history, but Anthony had pled guilty to criminal trespass in 2005 and had pled guilty to criminal damage to property in 2004.

¶ 8 On cross-examination, Kaitlin acknowledged that Anthony had been seeing A.J. regularly since the temporary custody agreement. She admitted that Anthony had come to the hospital the night A.J. was born but that she had refused to allow him to see A.J. When she left the hospital she told Anthony that he could visit A.J. at her parents' home, but he was uncomfortable doing so. Anthony has been paying child support, but not regularly. Kaitlin expressed her concern that A.J. would be teased because of Anthony's criminal record and that it would be easier for her to make doctor's appointments if A.J. had her surname. She admitted that some members of her family had been arrested.

¶ 9 Anthony testified he went to the hospital the night A.J. was born but was not allowed to see him. Kaitlin allowed him to see A.J. after he was born, but only on

Sundays for a couple of hours and only at her parents' home. Anthony did not feel comfortable there so he stopped going. He resumed visitation as soon as the parties entered into the visitation agreement. Anthony had no other children and wanted A.J. to have his surname to carry on the family name. Anthony was concerned that others might think that A.J. was illegitimate if he did not have Anthony's surname. Anthony had not committed any crimes since getting married.

¶ 10 Kaitlin was then called as a rebuttal witness. In response to the court's inquiry, Kaitlin testified that she gave A.J. her maiden name because Anthony had left her and had shown no interest in A.J. until dissolution proceedings began. She further stated that she intended to use her maiden name after the divorce.

¶ 11 At the conclusion of the hearing the court took the matter under advisement.

¶ 12 On September 26, 2013, the circuit court entered a supplemental judgment ordering A.J.'s name to be changed to A.F. The court found that Anthony had exercised his visitation with A.J., loved him, and provided child support for him, and that Anthony had not abused or neglected him. The court further found that "[t]he Petitioner-Mother has expressed no discernible, logical or rational basis to name these married parties' son with her maiden surname" and that it was "clear to this Court that the primary reason that Petitioner-Mother named the parties' son with her maiden surname was as a malevolent, misdirected act to punish the Respondent-Father for his past marital misconduct \*\*\* [p]ut simply, the Petitioner-Mother completely ignored the minor child's best interests in naming him." (Emphasis in original.) Kaitlin's motion to reconsider was denied. Kaitlin appeals.

¶ 13

## ANALYSIS

¶ 14 On appeal, Kaitlin argues that pursuant to section 21-101 of the Code of Civil Procedure (735 ILCS 5/21-101 (West 2012)), a parent may only change a minor's name if he or she demonstrates by clear and convincing evidence that the change is necessary to serve the minor's best interests, and that Anthony failed to meet this burden. As noted above, Anthony did not file a brief on appeal. However, the issues are not complex, and we will consider the merits of the appeal pursuant to the standards of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 15 There are two methods by which a parent may seek to change the name of their child. A parent may file a petition pursuant to section 21-101 of the Code of Civil Procedure (735 ILCS 5/21-101 (West 2012)), which provides that the minor's name should be changed only where the court finds by clear and convincing evidence that the change is in the minor's best interests, and which sets forth a list of relevant factors for the court to consider. However, seeking to change a minor's name pursuant to section 21-101 is appropriate only where there is no custodial dispute regarding the name change. *In re Wright*, 363 Ill. App. 3d 894, 897 (2006). A noncustodial parent is not authorized to bring a petition to change their child's name under section 21-101. *In re Marriage of Charnogorsky*, 302 Ill. App. 3d 649, 659 (1998).

¶ 16 A parent may also seek to change a minor's name in proceedings under the Illinois Marriage and Dissolution of Marriage Act (Act). "[C]hanging a child's name is a matter incident to custody of the child" (*In re Marriage of Presson*, 102 Ill. 2d 303, 307 (1984)), and a court with jurisdiction over dissolution proceedings may resolve a dispute over a

name change (*In re Wright*, 363 Ill. App. 3d at 896). Seeking a name change pursuant to the Act is appropriate "when a party with joint custody seeks a name change over the objection of the other joint custodian." *Id.* The minor's surname can only be changed if the name change is in the child's best interest, and the test to be applied is identical to the standard employed in awarding custody under section 602 of the Act (750 ILCS 5/602 (West 2012)). *In re Marriage of Presson*, 102 Ill. 2d at 307.

¶ 17 In the present case, Anthony sought to change the minor's name pursuant to the Act. In *Presson*, our supreme court held that when determining the best interests of the minor, "the court should consider the expressed wishes of the child and of both parents, the stated reasons for the proposed change, the child's age and maturity, the nature of the family situation, the strength of the tie between the child and each parent, any misconduct toward or neglect of the child by the parent opposing the change, and the name by which the child has customarily been called." *Id.* at 309.

¶ 18 Reviewing the court's order, we find that instead of considering the factors set forth in *Presson* or section 602 to determine whether it was in the minor's best interests to be named A.J. or A.F., the circuit court instead focused on Kaitlin's motivations for giving the minor her maiden name and on her failure to justify doing so. Although an order for a name should not be reversed unless it is contrary to the manifest weight of the evidence (*In re Petition of Howard*, 343 Ill. App. 3d 1201, 1205 (2003) (citing *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-15 (1995))), we find that the circuit court's order changing A.J.'s name to A.F. must be reversed and the cause remanded for the circuit court to make

its determination employing the *Presson* factors and those factors set forth in section 602 of the Act which are relevant to the issue of a name change.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, we hereby reverse the order of the circuit court of Jefferson County and remand with directions consistent with this order.

¶ 21 Reversed and remanded with directions.