IN THE COURT OF APPEALS OF IOWA

No. 1-285 / 10-1829
Filed June 15, 2011

Upon the Petition of

BENJAMIN EARL UKER,
Petitioner-Appellant/Cross-Appellee,

And Concerning

DANA LORI DOWDA,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

A father appeals a district court order declining to change the daughter's surname on her birth certificate from her mother's last name of Dowda to the hyphenated last name of Dowda-Uker. The mother cross-appeals, challenging the court's child support calculation. **AFFIRMED AS MODIFIED.**

Catherine Zamora Cartee, Davenport, for appellant.

Dennis D. Jasper, Bettendorf, for appellee.

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

TABOR, J.

"An old Roman maxim runs, 'Sine nomine homo non est' (without a name a person is nothing)." *In re Marriage of Gulsvig*, 498 N.W.2d 725, 730 (Iowa 1993) (Snell, J., dissenting). Benjamin Uker wants his daughter to be known by not just one surname, but two, joined by a hyphen. In this appeal from a district court order determining custody and child support between parents who were never married to one another, Benjamin seeks to change the name on his daughter's birth certificate from her mother's last name of Dowda to the hyphenated last name of Dowda-Uker. Naming disputes hinge on the best interest of the child. Because this child's best interests are promoted by having a tie to both her parents through their combined names, we grant the father's request to have his daughter's surname hyphenated as Dowda-Uker.

In her cross-appeal, Dana Dowda challenges the district court's child support calculation, arguing that the court should not have granted Benjamin a qualified additional dependent deduction for his child who was born between the time of the trial and the issuance of the district court's order on the parties' motions to reconsider. We find no cause for recalculating Benjamin's child support now that he has an additional dependent in his household.

Finally, we decline to address additional child support issues raised by Benjamin for the first time in his reply brief. We also decline to award Dana appellate attorney fees.

I. Background Facts and Proceedings

Dana Dowda gave birth to her daughter in October 2007. On the child's birth certificate, the mother listed the child's last name as Dowda[1] and did not identify Benjamin Uker as the father. Dana testified that she handled the birth certificate that way because Benjamin reacted negatively to the news that she was pregnant and told her he did not want to be involved with the child.

In November 2007, Dana identified Benjamin as the alleged father for child support recovery purposes. Benjamin requested genetic testing to establish his paternity. Once his paternity was established, Benjamin filed a petition to establish custody, visitation, and a change of their daughter's name. He asked for his daughter's last name to be changed from Dowda to Dowda-Uker and that her birth certificate be amended to reflect the new surname.

On August 4, 2010, the district court issued a decree granting the parents joint legal custody and awarding physical care to Dana with liberal visitation for Benjamin. The court ordered Benjamin to pay child support in the amount of $802.06 per month commencing on August 20, 2010. This amount reflected a credit for a qualified additional dependent based on testimony at the July 27, 2010 trial that he was expecting a baby with his wife in September 2010.

The court also addressed Benjamin's request to have his child's name changed, but framed the argument as follows: "The petitioner has requested that the surname of the child be changed to his surname." The court did not address

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[1] Dowda is the surname of Dana's ex-husband with whom she has two sons, who were ages eight and ten at the time of the custody hearing. Dana has physical care of the boys. The record shows the boys have a close relationship with their half-sister.

Benjamin's actual request that the girl's last name be hyphenated to combine both parents' surnames. The court concluded that the child's best interests were served by the continued use of her mother's surname.

Both Benjamin and Dana moved to amend or enlarge the court's ruling pursuant to Iowa Rule of Civil Procedure 1.904(2). Dana asserted that the court was mistaken in awarding a qualified additional dependent credit based on a child that was yet to be born. Benjamin asked the court to reconsider its ruling and "revise the minor's surname to 'Dowda-Uker.'" The court heard argument on the motions on October 6, 2010. The court issued its ruling on October 12, 2010. On the issue of child support, the court declined to modify its calculation, noting that "[t]he child for whom the qualified additional dependent deduction was allowed by this Court has been born since the trial date." On the issue of amending the birth certificate, the court confirmed its original determination.

Benjamin filed an appeal and Dana filed a cross-appeal.

II. Scope of Review and Foundational Principles

We engage in a de novo review of equitable disputes involving a child's surname. *Montgomery v. Wells*, 708 N.W.2d 704, 705–06 (Iowa Ct. App. 2005). We give weight to the district court's factual findings, especially when considering the credibility of witnesses, but are not bound by them. *Id*.

Ultimately, our focus is on the best interests of the child when determining what surname should be assigned. *Gulsvig*, 498 N.W.2d at 729. Our courts have abandoned the out-dated notion that a child should always bear the last name of his or her father. *Id*. On the flipside, "a mother does not have an

absolute right to name a child due to custody at birth." *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888, 894 (Iowa 2009) (explaining that a father who is not consulted in the naming of a child can contest the name and "the mother's unilateral act is given no effect"). Combining both parents' last names into a hyphenated surname for the child may be an equitable solution, but not in every case.[2] *Gulsvig*, 498 N.W.2d at 729; *see* Richard J. Lussier, *Delaney v. Appeal from Probate: When is a Dual Surname in the Best Interest of the Child?* 9 Conn. Prob. L.J. 161, 167 (1994) ("Adoption of a dual surname is not always in the best interest of the minor child.").

We review child-support awards de novo, *Dye v. Geiger*, 554 N.W.2d 538, 539 (Iowa 1996), though we evaluate the district court's interpretation of the child support guidelines for errors at law. *In re Seay*, 746 N.W.2d 833, 834 (Iowa 2008).

III. Discussion

A. Determining Name to be Placed on Birth Certificate

Our review of the district court's decision is a bit hampered by its mistaken interpretation of Benjamin's request as one to substitute Uker for Dowda on his daughter's birth certificate; the father actually requested to hyphenate the two surnames. Hyphenation is a different animal. The district court did not consider the pros and cons of combining the parents' surnames. Nevertheless, we will do so in our de novo review.

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[2] This appeal addresses an initial name determination governed by Iowa Code sections 598.41 and 600B.40 (2009)—like the issue addressed in *Montgomery*. This is not a name-change case controlled by Iowa Code section 674.6—like the situation in *Braunschweig*.

Almost twenty years ago, our supreme court recognized a trend toward judicial acceptance that "a hyphenated name of both parents' surnames may best serve the interest of a child." *Gulsvig*, 498 N.W.2d at 729 (citing *In re Name Change of Andrews*, 454 N.W.2d 488, 493 (Neb. 1990); *see Laks v. Laks*, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975)[3]); *Cohee v. Cohee*, 317 N.W.2d 381, 384 (Neb. 1982); *Rio v. Rio*, 504 N.Y.S.2d 959, 965 (N.Y. Trial Term 1986). But the *Gulsvig* court rejected hyphenation as a resolution in the situation before it, opining that "selecting a hyphenated name in this case would pour salt in the wounds of one or both of the parties and eventually would affect [the child]." *Id*. at 729. It is unclear from the *Gulsvig* opinion why the court feared a negative impact on the parents or child from a hyphenated last name.

During the years since the court decided *Gulsvig*, more courts have recognized the benefits of using a hyphenated surname for a child whose parents live separately. *See, e.g.*, *In re A.C.S*., 171 P.3d 1148, 1153 (Alaska 2007) (finding combined surname solution "worthy of serious consideration"); *Ronan v. Adely*, 861 A.2d 822, 826–27 (N.J. 2004) (finding that adding mother's surname was "consistent with the public policy" expressed in state-health department regulations that resolved disagreements between parents regarding naming of children by selecting hyphenated name based on alphabetical order of parents' surnames); *In re Eberhardt*, 920 N.Y.S.2d 216, 222 (N.Y. App. Div. 2011) ("Considering . . . the fact that the mother is seeking only to add her

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[3] The Arizona appellate court found merit in the contention that a hyphenated name is an "appropriate recognition of the interests of both parents in a child's name," but ultimately concluded that the mother failed to sustain her burden of proving the children's names should be changed following divorce. *Laks*, 540 P.2d at 1280.

surname to the child's current surname, this is not a difficult case."); *In re Willhite*, 706 N.E.2d 778, 782-83 (Ohio 1999) ("A combined surname is a solution that recognizes each parent's legitimate claims and threatens neither parent's rights. The name merely represents the truth that both parents created the child and that both parents have responsibility for that child.").

Keeping this case law in mind, we turn to the factors our court has compiled to gauge the best interests of a child in an initial naming dispute. While we do not consider this a "fixed list of factors"—we divine insight from these eleven considerations:

> (1) Convenience for the child to have the same name as or a different name from the custodial parent.
> (2) Identification of the child as part of a family unit.
> (3) Assurances by the mother that she would not change her name if she married or remarried if the child maintains the mother's surname.
> (4) Avoiding embarrassment, inconvenience, or confusion for the custodial parent or the child.
> (5) The length of time the surname has been used.
> (6) Parental misconduct, such as support or nonsupport or maintaining or failing to maintain contact with the child.
> (7) The degree of community respect associated with the present or changed name.
> (8) A positive or adverse effect a name change may have on the bond between the child and either parent or the parents' families.
> (9) Any delay in requesting or objecting to name change.
> (10) The preference of the child if the child is of sufficient maturity to express a meaningful preference.
> (11) Motivation of the parent seeking the change as an attempt to alienate the child from the other parent.

Montgomery, 708 N.W.2d at 708-09 (citations omitted).

We start from the premise that neither the father nor the mother has engaged in any kind of misconduct that would undermine an argument to have

the child bear his or her name. Benjamin's initial resistance to the idea that he conceived a child with Dana has long since fallen by the wayside. The record shows he is now a doting, committed, and responsible father. Dana's unilateral decision to give her daughter the last name of Dowda and to not list Benjamin on the birth certificate was justifiable under the circumstances. She has since been cooperative in allowing Benjamin and his family to spend time with the child. The record shows that she is a capable and loving parent. We reject any suggestion that Benjamin's request or Dana's objection to the idea of a hyphenated surname for their daughter reveal a motivation to alienate the child from the other parent.

Both parties can legitimately claim certain factors tilt the balance in their favor. Weighing on the side of keeping the single surname Dowda is the convenience for Dana whose two young sons from her prior marriage have their father's last name of Dowda and the confusion that could ensue if their half-sister had a different last name from the rest of that family unit. *See* Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 Ind. L.J. 893, 931 (2010) (discussing "how confusing it can be for schools and doctors' offices to keep straight hyphenated last names, or children with last names that are different than the parent's name"). While the two-year-old child was too young to express a meaningful preference for either Dowda or Dowda-Uker, the district court recognized that she had a "rudimentary awareness of and

an identification with her present surname and that it is identical to her mother and half-siblings with whom she resides."[4]

Nothing in the record suggests that Dana intended to change her surname from Dowda. The mother testified that she had no plans to remarry and explained that her use of her maiden name on a social networking website was simply an effort to reconnect with high school classmates and former co-workers who knew her by that name.

Tipping the scales toward assigning a hyphenated last name is the stronger affinity that adding the surname Uker would give the child with her father and his family. *See In re Marriage of Douglass*, 252 Cal. Rptr. 839, 845 (Cal. Ct. App. 1988) (upholding the trial court's "Solomon-like determination that the birth certificate should state both surnames in a hyphenated form" and opining that bearing the surname of the noncustodial parent helps "the child identify with that parent"); *Andrews*, 454 N.W.2d at 493 (expecting hyphenated surname will help children "identify themselves as a part of a family unit in relation to both sides of their family, maternal and paternal, and will facilitate and nurture the children's attachment to both parents and the families of their parents"); *Eberhardt*, 920 N.Y.S.2d at 222 (holding that hyphenated name would serve as "a symbolic reminder of, and source of identification and association with, both her father and her mother"). While the girl's association with her older half-brothers on the

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[4] The child's awareness of her name does not work exclusively in the mother's favor. Record evidence also supports the notion that the child desires a connection with her father's surname. Alyssa Uker, Benjamin's wife, testified that her stepdaughter has referred to herself by her father's last name when staying at their house and they tell her that they would love to have her be "a Uker" someday.

Dowda side of the family is important, it does not take precedence over her connection with her new half-sibling on the Uker side of the family.

The factor concerning the degree of community respect associated with the parents' respective surnames also weighs on the side of adding Uker to the girl's last name. On this point, the district court noted: "The petitioner's surname carries some level of respect within the community by virtue of the petitioner's athletic[5] and professional accomplishments, although no opprobrium attaches to the respondent's surname." Hyphenating her last name would allow the child to profit from the good reputation that both of her parents enjoy in the community.

After examining the totality of the circumstances, we conclude that the child's best interests would be promoted by changing the name on her birth certificate to the hyphenated surname of Dowda-Uker as requested by Benjamin.

We believe the administrative convenience that comes through sharing the family name of Dowda with her mother and half-brothers is substantially outweighed by the positive effect changing her name to Dowda-Uker would have on her bond with her father and his side of the family. We are persuaded by the following legal scholarship:

> [N]oncustodial parents who cannot have daily contact with their children nevertheless feel that their children are part of their families. They do not want to see their children "adopted" away from them into another family, even if only via a surname. The child may feel that [he or she] belongs to two families, particularly if [the child] has frequent contact with the noncustodial parent. Whether or not [the child] sees [the] father often, the dual surname will help [the child] to remember that [the child] belongs to [the] father as well as to [the] mother.

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[5] Uker was a stand-out wrestler for the University of Iowa, contributing to national championship teams in the late 1990s.

> In addition to protecting the family's right to self-determination, a presumption favoring a dual surname would protect the child's interests. A dual name would help the child to identify with both parents, a state of mind that child psychologists say is essential to the child's adjustment to divorce. At the same time, sharing a name with the custodial family may give the child a greater sense of security.

Beverly S. Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 Va. L. Rev. 1303, 1349–50 (1984).

We recognize that requiring a child to bear a hyphenated last name may not be a perfect solution. This child will have a distinctive surname not shared with anyone on either side of her family, though it is not clear that this distinction will be detrimental to her. *See id.* at 1350-51 (citing several studies that show that "persons with unusual names have a greater sense of self-worth than do people with ordinary names, perhaps because the former have a greater sense of uniqueness"). Another commentator—who considered the practice of giving children a hyphenated last name by combining the mother's and father's surnames to be "a considerable improvement over using just the father's surname"—nevertheless pointed out: "Of course, in seven generations someone could have a name composed of 28 surnames connected by 27 hyphens." Omi Morgenstern Leissner, *The Problem that Has No Name*, 4 Cardozo Women's L.J. 321, 407 n.70 (1998).

But given the alternatives here, we believe that giving the child a hyphenated last name will strengthen the relationship with her father and his family without jeopardizing the bond to her mother or half-brothers. The adjustment to the hyphenated name should not be difficult for the child, who is still a preschooler. Having a name that connects her with both of her parents is

in her long-term best interests. We modify the trial court's ruling to reflect this change.

B. Child Support Credit for Child Born After Trial

Dana cross-appeals the district court's award of a qualified additional dependent credit to Benjamin in its August 4, 2010 ruling. Dana argues that the court erred in awarding the credit before Benjamin's second child was born. Alyssa Uker testified at the July 27, 2010 hearing that they were expecting a baby in September 2010. On August 16, 2010, Dana filed a motion to amend, asserting that Benjamin "does not have another qualified additional dependent although admittedly, his wife is currently pregnant." The court addressed the motion to amend in an October 12, 2010 ruling, as follows:

> The respondent . . . objects to the Court's use of a qualified dependent deduction in the calculation of the petitioner's net income for child support calculation purposes as the child to whom such a deduction is attributable remained in utero at the time of trial. The child for whom the qualified additional dependent deduction was allowed by this Court has been born since the trial date.[6] Nothing in *Vutov* discloses the status of the pregnancy at the time of the trial therein. Under the circumstances presented to this Court at the time of trial, the Court concluded that allowance of the deduction was appropriate. The Court's view is unchanged.

"To establish a qualified additional dependent deduction, the requesting parent must demonstrate a legal obligation to the child[ren] under Iowa Code section 252A.3." Iowa Ct. R. 9.7. A child is defined in chapter 252A.2 as "a child actually or apparently under eighteen years of age, and a dependent person

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[6] It is not clear from our record how the district court knew that the child was born. The motions to amend were argued before the court on October 6, 2010, but no transcript of that hearing appears in the appellate record. Nevertheless, Dana does not contest the district court's factual statement in her brief.

eighteen years of age or over who is unable to maintain the person's self and is likely to become a public charge." Iowa Code § 252A.2(2) (2009).

Without any citation to authority, Dana asserts: "The fetus to be born to Ben is not a child on the date of the hearing." We can envision possible arguments to challenge this assertion. *See In re Marriage of Witten*, 672 N.W.2d 768, 775 (Iowa 2003) (noting that Iowa cases considering legal status of a fetus "focus on the purpose of the law at issue"); *see also Dunn v. Rose Way, Inc.*, 333 N.W.2d 830, 833 (Iowa 1983) (holding that term "minor child" as used in rule of civil procedure providing that parents may sue for expenses and loss of services, companionship, and society resulting from injury or death to minor child included a fetus). But Benjamin does not contest the premise of Dana's argument, instead responding as follows:

> If it was improper for the District Court to award Mr. Uker the qualified additional dependent credit at the time of trial, that impropriety was cured when the District Court issued its final order on October 12, 2010 after Mr. Uker's second child was born.

We agree with Benjamin that if the court awarded the qualified additional dependent credit prematurely, the application of the credit is now proper given the birth of his second child. Approximately one month elapsed between the court's original order in August and the baby's birth in September 2010. Dana does not argue for recoupment of any difference in the support payment for that month based on the credit. We affirm the district court on the child support issue.

C. Other Child-Support Issues

In his combined appellant's reply brief and cross-appellee's brief, Benjamin raises two issues concerning the district court's child support order that

were not presented in his initial appellant's brief. Specifically, he argues that he should receive credit for paying his daughter's comprehensive health insurance and the court should clarify the commencement date for the child support amount ordered in the August 4, 2010 ruling.

Because these claims are not in reply to Dana's cross-appeal issue, they should have been raised in his opening appellant's brief. Our supreme court has long held that an alleged error not presented in the original brief may not be raised afterward by reply brief. *See Fisher v. McCarty*, 197 Iowa 369, 370, 195 N.W. 608, 609 (1923). We decline to consider issues raised for the first time in a reply brief. *See Brown v. First Nat'l Bank*, 193 N.W.2d 547, 551 (Iowa 1972).

D. Attorney Fees on Appeal

Dana asks for appellate attorney fees. Such an award is within the discretion of the appellate court. *See Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). "Whether such an award is warranted is determined by considering 'the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal.'" *Id*. (citation omitted). Considering these circumstances, we decline to obligate Benjamin for Dana's attorney fees for the appeal. Costs are assessed equally between the parties.

AFFIRMED AS MODIFIED.