

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

IN RE: MITCHELL GREER LOTT

DANNY M. HIGHTOWER, JR.,

Plaintiff-Appellee,

Vs.

AMY LOTT,

Defendant-Appellant,

FROM THE JUVENILE COURT
OF SHELBY COUNTY, #F-8801

THE HONORABLE KENNETH
TURNER, JUDGE

VACATED AND REMANDED

C.A. No. 02A01-9507-JV-00155

R. Porter Feild, Burch, Porter &
Johnson of Memphis, For Appellant

Michael F. Pleasants of Memphis
For Appellee

MEMORANDUM OPINION¹

CRAWFORD, J.

This appeal involves a petition to legitimate and change the surname of a minor child.

Mitchell Greer Lott. Respondent-appellant, Amy L. Lott, appeals from the order of the Shelby County Juvenile Court that, *inter alia*, changed the child's surname to Hightower. The facts are undisputed.

On December 22, 1994, respondent-appellant, Amy L. Lott, gave birth to a child. The child's name was listed as Mitchell Greer Lott on the birth certificate. At the time the child was born, Ms. Lott and the child's father, Danny M. Hightower, Jr., were unmarried, and they disagreed on the surname the child should be given.

On February 10, 1995, Mr. Hightower, petitioner-appellee, filed a Petition for Legitimation in the Juvenile Court of Shelby County. In the petition, Mr. Hightower sought to legitimate the minor child, change the child's name to Mitchell Greer Hightower, and establish reasonable visitation rights. On February 28, 1995, Ms. Lott filed a Counter-Petition for Child Support. The counter-petition seeks relief only if the petition for legitimation is granted, and in that event, prays for all back child support from the date of the birth of the minor child, future

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

FILED

July 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

child support, health insurance on the minor child, and various medical expenses associated with the birth of the child. By order of March 6, 1995, the trial court referee ruled that Mitchell Greer Lott was the legitimate child of Danny M. Hightower, that Mr. Hightower must pay \$257.25 in monthly child support, that Mr. Hightower must pay \$216.45 for past medical expenses, and that back child support should be awarded to Ms. Lott in the amount of \$771.75. In the March 6th order, a ruling on the name change was reserved until March 20, 1995.

By order entered March 20, 1995, the trial court set visitation rights between the parties and ruled that the surname of the minor child should be changed to Hightower. Ms. Lott has appealed from this order and presents two issues for our review. Those issues, as stated in her brief, are:

1. [Whether] [t]he juvenile court judge erred by incorrectly allocating the burden of proof which requires a party seeking to change a child's surname to bear the burden of showing that the change is in the child's best interest.
2. [Whether] Mr. Hightower has . . . carried his burden of showing that changing the surname of the child is in the child's best interest.

T.C.A. § 68-3-305 (Supp. 1995) provides in pertinent part:

Father's name on birth certificate -- Surname of child. -- (a)
If the mother was married at the time of either conception or birth, or any time between conception and birth, to the natural father of the child, the name of the father shall be entered on the certificate and the surname of the child shall be entered on the certificate as that of the natural father, except that where the mother though married has retained the mother's maiden surname, then on sworn application of both parents, the child's surname to be entered on the birth certificate may be the maiden surname of the child's mother, or both surnames as the parents mutually agree.

(b)(1) If the mother was not married at the time of either conception or birth or between conception and birth, the name of the father shall not be entered on the certificate of birth, and the surname of the child shall be that of the legal surname of the mother. All information pertaining to the father shall be omitted.

The appellant asserts that the trial court erred in changing the minor child's name, because the referee incorrectly shifted the burden of proof by requiring appellant to show that the name change was not in the child's best interest. During the trial court proceedings, the referee stated:

Okay. Let me hear -- I generally favor that and I need to be convinced that it is not in the best interest of the child to bear his Father's name. I've said many times that it's the American way for a child to bear his father's name, to grow up with the father's name. All of us have our father's name, everyone in the courtroom today.

The appellant argues that the burden should be placed on petitioner to prove that the name change is in the child's best interest rather than requiring her (as a respondent) to prove that the name change is not in the child's best interest. We agree. *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. App. 1993). In *Barabas*, Judge Koch, speaking for the Middle Section of this Court, stated:

The courts should not change a child's surname unless the change promotes the child's best interests. [citations omitted] Among the criteria for determining whether changing a child's surname will be in the child's best interests are: (1) the child's preference; (2) the change's potential effect on the child's relationship with each parent; (3) the length of time the child has had its present surname; (4) the degree of community respect associated with the present and proposed surname; and (5) the difficulty, harassment, or embarrassment the child may experience from bearing either its present or its proposed surname. [citations omitted]. The parent seeking to change the child's surname has the burden of proving that the change will further the child's best interests. [citations omitted]

Id. at 287.

The appellant argues that under *Barabas* the ruling of the juvenile court changing the name of the minor child in this case from Lott to Hightower should be reversed, because there was no showing that the name change would be in the child's best interests. We agree. The record reflects that petitioner presented no evidence whatsoever to show that the child's best interests would be served by the name change.

Appellee also asserts that T.C.A. § 68-3-305 (c) and (d) require that the child bear the surname of his father. T.C.A. § 68-3-305 (c) and (d) (Supp. 1995) provide:

(c) In any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and the order of the court.

(d) In all other cases, the surname of the child shall be the legal surname of the mother.

The appellee argues that the above code provisions require that the child in this case bear

the surname Hightower, because the Shelby County Juvenile Court determined the issue of paternity of the child. Although paternity was determined, the determination was made in a legitimation proceeding instituted by the father. The provisions of T.C.A. § 68-3-305 (c) and (d) apply to paternity proceedings which can be commenced by the mother, and such proceedings can indicate the mother's willingness to have the child bear the father's name. In any event, T.C.A. § 68-2-205 (c) and (d) do not mandate that the child bear the father's surname. The best interests of the child should govern this determination.

The order of the trial court is vacated. Since no proof was presented in the trial court, this case is remanded for further proceedings to allow the petitioner to introduce evidence consistent with the holding of this Court in *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. App. 1993). Costs of the appeal are assessed against the

appellee.

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE