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The Law on Naming Children: Past, Present and Occasionally Future

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At common law by custom a legitimate child received his or her father's surname at birth.[1] This is not surprising when one considers the low status which women enjoyed under the legal doctrines of the day. For example, upon marriage the husband became custodian of all of his wife's property, and he had the right to dispose of it as he wished.[2] A wife could not sue in her own name; a cause of action on her behalf could be brought only by her husband, and so on.[3] A society which viewed married women as having only slightly higher status than children would most certainly not have allowed children to bear their mothers' surnames. In addition, a society which viewed children as akin to their father's chattels[4] would not be likely to either require or permit those same children to bear their mothers' surnames.

In the United States, a few states enacted laws which followed the common law custom.[5] The vast majority of states did not resort to legislation, although apparently all states did recognize the common law custom. Apparently all still do.

Within the last ten or fifteen years there has been a profound change in the legal status of women; the change was brought about by a handful of key decisions by the Supreme Court of the United States.[6] State courts have by and large followed suit,[7] and, at present, women are more likely to be treated as equals with rather than as inferiors to men. What all of this means for naming customs has yet to be determined; a good argument can be made that state statutes requiring a legitimate child to take his or her father's surname at birth are vulnerable to constitutional attack on equal protection grounds. One court has expressed its approval of this approach in dicta,[8] but there is no hard case law since there have been few constitutional challenges to such statutes. One can surmise that most couples choose to follow tradition and give their children their father's surname at birth, or at least they do not feel moved to resort to the judicial system to solve any dispute they may have over naming a child. For those couples who do not wish to follow tradition, at least one influential state supreme

court (the Supreme Judicial Court of Massachusetts) has held that a married couple is free to choose whatever surname they wish for their child, even if it is not either of theirs, so long as they have no fraudulent intent.[9] The court expressly rejected arguments advanced by defendant city clerks that the public interest in maintaining accurate vital records should outweigh whatever interest individuals might have in naming their children. The court cited the common law principal of "freedom of choice" as well as the "private realm of family life which the state cannot enter" in support of its results.[10]

If this case is any indication, it appers that the law is moving in the direction of freedom of choice, *i.e.*, of allowing parents to choose whatever name they wish for their children. This system works admirably so long as both parents are in agreement; if they are not, it is likely that the dispute may find its way into a court of law for resolution.[11]

Assuming that courts ultimately find that a woman's constitutional right to equal protection is violated by state statutes or customs which require that children assume their fathers' surnames, judges would then face the problem of constructing a sex neutral scheme for naming children. Several solutions have been suggested, the most obvious of which would be to give the child a hyphenated name composed of the father's and mother's surnames.[12] For example, a child of Jane Smith and John Brown would be Baby Smith-Brown or Brown-Smith. Aside from the fact that hyphenated names present a formidable obstacle for young children just learning to write, there is the further problem of whose name – father's or mother's – should go first. If the parents are locked in litigation over the naming of a child in the first place, it is entirely possible that they may have strong feelings about who gets first billing. Precisely how a court might go about resolving such an issue is not clear, although one writer has suggested that the names be hyphenated in alphabetical order in order to provide a sex neutral approach to this thorny problem.[13] Aesthetic considerations might play a role; but since one person's art is often another's trash, a judge might be hard put to decide whether Brown-Smith or Smith-Brown was more aesthetically pleasing. Such matters do not easily lend themselves to the deductive logic which occasionally prevails in the judicial opinions. In addition, courts are not likely to be able to finesse the problem of choosing a first name by using a hyphen, so that issue is likely to continue to perplex trial and appellate judges.

Another suggestion that has been advanced is that the child's name should be an amalgam of each of the parents' surnames.[14] Thus, a child of Mary Miller and John Brown might be Baby Millbrown or Brownmill. In some situations, this solution might prove useful, but it is clear that not all names can be artistically amalgamated. And the issue of whose name

should go first is always potentially troublesome. Even for those names that can be combined, aesthetic issues of how they should be combined remain if the parties themselves cannot agree, and individual judges are not always possessed of finely tuned aesthetic senses which would enable them to reach solutions acceptable to all litigants concerned.

Each parent might be given the right to choose one name for the child – as a matter of insuring equality.[15] While this solution has surface appeal, a court would still be faced with the problem of allocating the choices. If both parents wish to select the surname, by what principle should the choice of surname be allocated to either mother or father? Perhaps a flip of the coin might be the best sex neutral way to resolve the problem, but that method is not favored by courts, so it remains unclear how the choices might be allocated in a sex neutral way.

There are at least two other possible ways to resolve a dispute between two parents who are unable to agree on a name for their child. The author of a draft Model Name Act has suggested that in the event of a dispute, the child should bear the surname of his similarly sexed parent – i.e., a girl should bear her mother's surname and a boy his father's.[16] Since each sex would have an equal chance prior to conception of giving a child his or her surname, this scheme should pass constitutional muster.

Another suggestion is to allow the parent who is to have custody of the child to name the child.[17] Aside from the fact that this scheme would only work for non-intact families, it is not clear what would happen if a change of custody were ordered. Would a name change automatically follow? Presumably not, but then the child would possess a name different from that of his or her custodian, and one of the objectives of this approach would be defeated in those situations in which custody does not remain in one parent throughout the child's minority. In addition, it is not clear how the naming should be accomplished in the case of joint custodians. If the joint custody arrangement is merely a cover for the traditional arrangement in which one parent is the primary caretaker and the other merely a visitor, then the child should bear the name of the primary caretaker under this scheme. In true joint custody situations, in which the parents share time equally, there might be a problem, but it is submitted that the number of cases in which a joint custody arrangement for an infant exists at the time of his or her birth is likely to be small to nonexistent, so joint custody should not present a serious problem. In addition, on the other hand, this solution has the benefit of allowing the child to bear the surname of the person with whom he lives. To the extent that this is an important consideration – and litigants seeking to change their children's names commonly argue it is[18] – this rule makes a good deal of sense.

ILLEGITIMATES

As a historical matter, when they were recognized as belonging to anybody, illegitimates were recognized as belonging to their mothers; hence, they assumed their mother's surnames at birth.[19] Judging from the dearth of reported cases, it appears that by and large mothers have been content to bestow their own surnames on their illegitimate offspring and, presumably, they remain free to do so to this day. If the approach of the Massachusetts court discussed previously is widely adopted,[20] the mother of an illegitimate child should be able to bestow whatever name she wishes on her child, so long as she is not doing so in an effort to defraud anyone. Conceivably, litigation might arise if she were to attempt to give her child the name of a man she claims to be the father but who himself denies parenting the child. To take the most extreme case, suppose that a woman were to name her child "John J. Smith, Jr.," and, further, that John J. Smith, Sr. was a prominent citizen. Would Smith, Sr. have any legal recourse assuming he denied paternity? From Smith, Sr.'s perspective, in addition to the embarrassment of having a "Junior" named after him who is not a "Junior," in the eyes of some members of the community this state of affairs may reflect poorly on Smith, Sr.'s morals even in our sexually permissive society. So, John Smith, Sr.'s most effective argument were the issue to be presented in a court of law would be that the mother's naming of the child represents an effort to defraud the public and he would be likely to win in the absence of a convincing explanation by the mother as to why the name was chosen.

Now, suppose that the mother did not seek to affix "Junior" to her child's name, but was satisfied to call him John J. Smith. Would this situation differ from the previous one? From Smith, Sr.'s perspective, this situation would be only slightly less objectionable depending on the commonness of his name. If Smith, Sr.'s name is quite common, then members of the community are less likely to identify him as the father and he has less of a basis for complaint; but assuming a reasonable likelihood of confusion, what rights might Smith, Sr. have? There is at least one case in which a court rejected a man's attempt to bar his ex-wife from giving her child his surname.[21] Despite the fact that the child was not his, the court held that he did not have an exclusive right to his own surname and could not bar others from using it. It is important to note, however, that this case involved only a surname; perhaps the court might have reacted differently had the ex-wife attempted to give the child the husband's whole name – first, last, and middle.[22] In any event, it seems likely that

the male's right to injunctive relief in our hypothetical model would depend upon the court's assessment of the mother's motives. As before, even though the male may not have an exclusive right to the use of his name, the fact that the mother duplicated his name in toto might constitute proof of her fraudulent intent and cause a court to attempt to bar her from doing so.

The other major issue which is likely to arise in this area concerns not the unwilling father, but the father who wishes his illegitimate child to bear his name. What rights does such a father have when the child's mother wishes to name the child herself? Over the last decade the Supreme Court of the United States has been expanding the rights of the illegitimate child. This development has had the effect of expanding the rights of the illegitimate father as well. In general, it can be said that the more the illegitimate father behaves like a legitimate father, the more likely it is that he will be treated like a legitimate father in a court of law.[23] This case law cannot be applied automatically to the case of an illegitimate father who wishes to have a say in naming his child however. In all those cases in which an illegitimate father's rights have been analogized to those of the legitimate father, the illegitimate father had a substantial long-term relationship with his child;[24] each of the father litigants had behaved like a father over a long period of time. In the case of the illegitimate father who wishes to have a say in naming his child, the litigation is likely to occur shortly after the child's birth. It is, as a practical matter, quite difficult for a man to develop a substantial relationship with an infant in such a short period of time. Presumably, such actions as paying the mother's confinement expenses, living with the mother, etc., might be indicative of his intention to behave like a legitimate father; but given the inherent difficulty "naming" cases present, courts may be tempted to try to avoid the issue entirely by finding that the father does not have an established relationship with the child sufficient to give him the same status as the legitimate father. In any event, such cases are relatively rare.

Once the illegitimate has been legally named by his or her mother, the illegitimate father in a sex neutral system theoretically should experience difficulties similar to those experienced by the mother who wishes to change her children's names following a divorce as discussed in the next section. Yet some courts may prove more amenable to allowing an acknowledged father who is paying child support to have the child bear his name on a kind of quid pro quo theory.[25] All of this is purely speculative at best since the case law is scant to non-existent.

CHANGING CHILDREN'S NAMES

Most litigation concerned with children's names has arisen in cases in which one parent seeks to change a child's surname. The most common fact pattern involves a divorced remarried mother with custody who wishes to change her child's surname to that of her second husband, the child's stepfather. If the children's father (her "ex") agrees, there will be no problem, but that is infrequently the case and vigorous litigation commonly ensues.[26] One group of courts holds that the child's father has something in the nature of a property right in the child retaining his name, and refuses all requests for a name change unless the mother is able to demonstrate that the child's father is not "worthy", *i.e.*, that he has been guilty of some form of parental misbehavior, such as child abuse or failure to pay child support, *etc.*[27] For this group of courts, a change of name constitutes a punishment which is to be imposed only upon a father who is guilty of serious parental misconduct. The child's welfare does not enter into the court's calculus at all.

Courts which reject the property rights approach have chosen to focus on a "best interests" standard, *i.e.*, they will allow a change of name if the person seeking the change is able to demonstrate that the change would be in the child's best interests.[28] "Best interests" courts have tended to focus on the father-child relationship perhaps on the theory that "what's good for dad is good for the kids." Such courts are likely to deny a name change on the ground that it would have the effect of destroying the father-child relationship;[29] these courts equate maintenance of the father-child relationship with the child continuing to bear the father's name. While there may be a germ of truth in this, one cannot escape the conclusion that much of what passes for a "best interests" analysis is merely "property rights" in another guise.[30]

At times mothers seeking name changes have sought to meet their burden of demonstrating the change would be in the child's best interests by introducing evidence that the child suffered from embarrassment, inconvenience, and confusion by virtue of the fact that his name differed from that of his stepparents. Such arguments have, with few exceptions, generally not been successful.[31] An argument based on the need or desire of the child to integrate himself or herself into the new family has generally been rejected in favor of the father's overriding interest in having the child bear his name.[32]

As might be expected, courts are not inclined to place much stock in the child's opinion unless he or she is close to maturity; often the child is not

even consulted as to his desires, although some states by statute do require such consultation.[33]

Courts seem to be reluctant to allow name changes except in certain limited circumstances. Precisely why this is so is unclear. It can be justified on the ground that each child becomes accustomed to one name; to change his or her identity may be potentially unsettling particularly to an older child. Further, since the petition to change is often initiated by a custodial parent following a divorce, judicial skepticism about the purity of the custodial parent's motives may in part underlie the judicial reluctance to allow changes easily. In addition, there is undoubtedly a notion left over from a bygone era that children somehow remain the property of their fathers. If a father pays child support it is reasoned he should receive some quid pro quo for his investment. Requiring the child to continue to bear his father's name may, in the court's view, be a fitting exchange for his continuing financial support.[34]

ADOPTION

Since there was no adoption at common law, all of the incidents of this relationship are governed by state statute[35], and most states allow courts entering adoption decrees to change the child's name at the time the adoption is processed.[36] It is likely that most children will be given the surname of the family they are being adopted into, although theoretically other choices are of course possible. Under the Massachusetts precedent discussed previously,[37] even adoptive parents ought to be free to choose whatever name they wish for their child; however, parents who are asking a judge to approve their adoption of a child may be reluctant to ask the same judge to deviate from custom and give the child a surname other than that of his adoptive father. Thus, one might expect to find widespread adherence to custom – the child bearing his or her father's surname – in adoption cases, although few statutes expressly require this result.[38] Furthermore prospective adoptive parents who disagree about what name their new child shall bear would likely experience a hostile response from a judge who may be reluctant to approve an adoption when the two prospective adoptive parents are not "together enough" to agree on what name the child shall bear.[39] All in all, it seems likely that in cases of adoption parents will most often abide by custom.

Once the child has been formally adopted any proposed name changes would be handled as in the case of any other child.

Notes

[1]The custom prevailed in the United States until fairly recently. See Secretary of the Commonwealth v. City Clerk, 373 Mass. 197, 189, 366 N.E.2d 717, 725 (1977).

[2]L. Kanowitz, *Women and the Law* 36 (1969).

[3]Ibid.

[4]H. Krause, *Family Law* 177 (1977).

[5]See Thornton, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests,* 1979 Utah L. Rev. 303, 306 n. 17 (1979) [hereinafter cited as Note, Children's Surnames].

[6]Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Kirchberg v. Feenstra, 450 U.S. 455 (1981).

[7]*E.g.,* Cates v. Foley, 247 So.2d 40 (Fla. 1971); Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

[8]Laks v. Laks, 25 Ariz. App. 58, 61, 540 P.2d 1272, 1280 (1975).

[9]Secretary of the Commonwealth v. City Clerk, 373 Mass. 178, 366 N.E.2d 717 (1977).

[10]*Id.* at 185, 366 N.E.2d at 723.

[11]Courts are reluctant to settle disputes in ongoing marriages, see *e.g.,* McGuire v. McGuire, 157 Nev. 226, 59 N.W.2d 336 (1953) so it is likely that such disputes would be resolved by a court of law only in those instances in which the couple had separated.

[12]Note, Children's Surnames 311.

[13]Ibid. It appears that the alphabet is sex neutral — while "man" comes before "woman", "female" comes before "male". And although "boy" precedes "girl" this slight edge would not appear to constitute an intentionally discriminatory act.

[14]Letter from Una Stannard to Frederica K. Lombard (June 6, 1982).

[15]It is not clear what would happen to the middle name under such a scheme. Perhaps the child could be given two middle names, or none at all. Alternatively the parent who is to select the first name could be allowed to select the middle name on the theory that the ability to select the surname is so much more valuable that the other parent should receive more than the right to provide the first name.

[16]Dannin, *Proposal for a Model Name Act,* 10 U. of Mich. J. of Law Reform 153, 173-74 (1976).

[17]Note, Children's Surnames 312.

[18]See note 31 and accompanying text. Cf. Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138, 141 (1974) (custodians experience difficulty in obtaining insurance coverage, college scholarship, children suffered harassment because of different names, but court refuses to order change).

[19]H.D. Krause, *Illegitimacy: Law and Social Policy* 32–33 (1971).

[20]See note 9 *supra* and accompanying text.

[21]In re McGehee, 147 Cal. App.2d 25, 304 P.2d 167 (1956).

[22]Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972); Gomez v. Perez, 409 U.S. 535 (1973); Matthews v. Lucas, 427 U.S. 495 (1976); Trimble v. Gordon, 430 U.S. 762 (1977); Lalli v. Lalli, 439 U.S. 259 (1978).

[23]Compare Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammad, 441 U.S. 380 (1979) with Quilloin v. Walcott, 434 U.S. 246 (1978).

[24]In Stanley, *supra* note 23 the father had an 18-year relationship with the children; in Caban the father lived with the children and their mother for four years and continued to visit with the children on a regular basis as long as their mother permitted him to do so.

[25]This argument is often advanced as justification for failure to pay child support, *viz.,* a supporting father might argue "as long as my visitation rights are interfered with I should not have to pay child support." Such an argument could easily find its way into opinions dealing with name changes.

[26]Although theoretically everyone has the right to assume whatever name he or she wishes without judicial action so long as the new name is not taken for purposes of defrauding creditors, etc., the child, being legally incompetent for many purposes, will have to act through the custodial

parent. While in theory a change could be effected for the child without judicial intervention, there have been several cases in which the non-custodial parent has been successful in blocking such self-assumed name changes so that it may be wiser for a parent to apply to the courts in the first instance in order to change his or her child's name. See Hall v. Hall, 30 Md. App. 214, 351 A.2d 917 (1976) (mother enjoined from telling others to call child by stepfather's name); Laks v. Laks, 25 Ariz. App. 58, 540 P.2d 1277 (1975) (mother enjoined from hyphenating names of children after divorce).

[27]*E.g.*, Hall v. Hall, 30 Md. App. 214, 351 A.2d 917 (1976); W v. H, 103 N.J. Super. 24, 246 A.2d 501 (Super. Ct. Ch. Div. 1968) (father guilty of incest with two daughters forfeits right to have child bear surname). See also Note, Children's Surnames at 324.

[28]As an example of a "best interests" statute see Va. Code Ann. §8.01-217 (cum. Supp. 1982). See also Dannin, *supra* note 16 at 166.

[29]H. Clark, *Domestic Relations* 1110 (3d ed. 1980); Note, Children's Surnames at 325.

[30]Note, Children's Surnames at 327.

[31]Compare Johnson v. Coggins, 124 Ga. 603, 184 S.E.2d 696 (1971) Court allows change, evidence of emotional disturbance brought about by fact child's name not same as stepparents) with In re Spatz, 199 Neb. 332, 258 N.W.2d 814 (1977) (change denied despite claims that child suffered emotionally).

[32]*E.g.*, Flowers v. Cain, 218 Va. 234, 237 S.E.2d 111 (1977); Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974) (evidence that child used stepfather's name and looked on him as father not persuasive when natural father exercised visitation rights).

[33]See, *e.g.*, Bruguier v. Bruguier, 12 N.J. Super. 350, 79 A.2d 497 (1951) (high school student allowed to change name over natural father's objections); Note, 44 Cornell L.Q. 144 (1958).

[34]See note 25 *supra*.

[35]H. Clark, *supra* note 29, at 603.

[36]For a list of the various state provisions see Note, Children's Surnames 337–42.

[37]Secretary of the Commonwealth v. City Clerk, 373 Mass. 178, 336 N.E.2d 717 (1977).

[38]Compare Conn. Gen. Stat. Ann. §45–66a (1981) (court allowed to change name of person adopted as requested by adopting parents) and Ind. Code Ann. §16–1 — 16–16 (1979) (child allowed to take name prayed for in petition) with Cal. Civ. Code § 228 (West 1982) (child to take family name of person adopting).

[39]Comment, *Surname Alternatives in Pennsylvania*, 82 Dickinson L. Rev. 101, 118 (1977).