

1988

Kathleen Hamby and the Utah State Department of Social Services v. Gail Jacobsen : Brief of Respondent

Utah Supreme Court

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Priscilla Ruth MacDougall, Mary C. Corporon, Kellie F. Williamse; Corporon & Williams; attorneys for appellant.

Lynn D. Wardle, Richard M. Taylor; attorneys for respondent.

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BRIEF

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DOCKET NO. 880026-CA

SUPREME COURT OF UTAH

STATE OF UTAH

Kathleen Hamby, and the State
of Utah, by and through Utah
State Department of Social
Services,

Appellants,

--vs.--

Case No. 860188

Gail Jacobson,

Respondent.

88-0026-CA

On Appeal from an Order and Ruling of the Fourth Judicial District
Court, Utah County, Judge Ray M. Harding, Presiding, in the divorce
action of Kathleen Jacobson, and the State of Utah, by and through
Utah State Department of Social Services vs. Gail Jacobson, No. 67,95

Brief of Respondent

Gail Jacobson

Priscilla Ruth MacDougall
346 Kent Lane
Madison, WI 53713
(608) 255-2971/(608) 274-6729

Lynn D. Wardle
1976 N. 85 W.
Orem, UT 84057
(801) 378-2617

Mary C. Corporon
Kellie F. Williamse
Corporon and Williams
1100 Boston Building
Salt Lake City, UT 84111
(801) 328-1162

Richard M. Taylor
P.O. Box 288
Spanish Fork, UT 84550-0288
(801) 793-3574

Attorneys for Appellant
Kathleen Hamby

Attorneys for Respondent
Gail Jacobson

FILED

JUL 21 1986

Clerk, Supreme Court, Utah

PRISCILLA RUTH MACDOUGALL

ATTORNEY AT LAW
346 KENT LANE
MADISON, WISCONSIN 53713

608-255-2971
608-274-6729

OCT 11 1988

COURT OF APPEALS

October 5, 1988

Mary T. Noonan
Clerk of Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

re: Kathleen Hamby and
the State of Utah v. Gail
Jacobson, No. 880026-A

Dear Ms. Noonan:

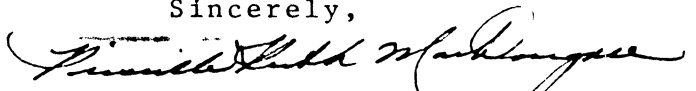
To my letter dated October 4, 1988, should be added the portion of the transcript at A-9 in the Respondent's brief. At oral argument there was discussion of the posture of the positions in the lower court.

"Mr. Taylor...his conduct is not such as would in any way be so unreasonable or outlandish that would require the Court in the interest of the children to take his name from them."

Enclosed are five copies of this letter which I, by this letter, certify that I am sending to all counsel in the case.

Thank you again.

Sincerely,



Priscilla Ruth MacDougall

cc: Kathleen Hamby
Corporon and Williams
Ray Gamon
Lynn Wardle
Richard Taylor

Lynn D. Wardle, Esq.
1976 N. 85 W.
Orem, UT 84057

FILED

801/225-9430

OCT 12 1988

Mary T. Noonan
Clerk of Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, UT 84102

October 10, 1988

COURT OF APPEALS

Re: Hamby v. Jacobson, No. 880026-A

Dear Ms. Noonan:

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure I submit the following supplemental authorities.

1. Point Argued: The Record Shows That Counsel for Both Parties Stipulated to Proceed on Proffers of Evidence.

"An informal conference was held in chambers between the Court and counsel during which counsel stipulated to make proffers on the record and submit memorandum in support of their respective positions as this matter is mainly a matter of law." Minute Entry, October 24, 1975 (R. 71).

2. Point In Brief: (Respondent's Brief at 12) Despite Appellant's Attempts to Suggest Otherwise The Record Shows that Mr. Jacobson Is Current In His Child Support Payments.

"MR. GAMMON: The mother has received some assistance from the State of Utah in the past. The defendant or father has paid that money to the State that was owing to the State. And so the State then is simply to state that we have been paid for all assistance that has been provided heretofore." Transcript of Trial, March 14, 1985 (R. 149)

3. Point in Argument: How Often Mr. Jacobson Has Visited His Children (Or Been Violently and Abusively Prevented From Doing So By Ms. Hamby) Since the Lower Court Entered Its Order.

Corbet v. Corbet, 472 P.2d 430, 431 (Utah 1970): "On appeal to this court we review the judgments and orders appealed from on the basis of the record upon which the trial court acted, and do not permit the supplementation of our record with matters not before the trial court."

Matter of Estate of Cluff, 587 P.2d 128 (Utah 1978): "However, those matters are not part of the record before us, and in accord with well-recognized rules of appellate review, we cannot consider them in connection with this appeal."

Pyle v. McClure, 563 P.2d 809, 811 (Utah 1977): "Conceivably, it could have changed the result, but it is not part of the record, it was not submitted to the trial court, and we do not consider it here."

See also Chapman v. Chapmap, 728 P.2d 121, 122 (Utah 1986); Watkins v. Simonds, 385 P.2d 154 (1963).

4. Point in Argument: Whether Remand for Further Proceedings Is Necessary.

Utah Code Annotated § 30-3-5(3): "The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary."

Ruling, February 21, 1986: "Finally, the court notes that the law provides that the children may petition for a name change if they so desire when they are old enough to make an intelligent decisions." (R. 103)

See also Hogue v. Hogue, 649 P.2d 51 (Utah 1982).

5. Point Briefed: Utah Does Not Authorize Joint Custody (Petitioner's Brief at 34); Point Argued: Utah Policy Re: Right of Noncustodial Father to Maintain Relationship With Child Following Divorce; This is a Type of Joint Custody.

In 1988 the Utah legislature amended Utah Code Annotated § 30-3-10.1 to -10.4 (1988) to enact the following statutory joint custody preference: **XEROXED COPY ATTACHED.**

Enclosed are five copies of this letter. I certify that I have mailed ^{today} a copy of this letter to: Richard Taylor, Priscilla Ruth MacDougall, Corporon and Williams, and Ray Gammon.

Sincerely,



Lynn D. Wardle
Counsel for Respondent

30-3-10.3. Terms of joint legal custody order.

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(2) may include an award of exclusive authority by the court to one parent to make specific decisions;

(3) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child. 1988

10.2. Joint legal custody order — Factors for court determination — Public assistance.

There is a rebuttable presumption, subject to section (2), that joint legal custody is in the best interest of a child.

The court may order joint legal custody if it finds that:

(a) both parents agree to an order of joint legal custody;

(b) joint legal custody is in the best interest of the child; and

(c) both parents appear capable of implementing joint legal custody

In determining the best interest of a child, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;

(d) whether both parents participated in raising the child before the filing of the suit;

(e) the geographical proximity of the homes of the parents;

(f) if the child is 12 years of age or older, any preference of the child for or against joint legal custody; and

(g) any other factors the court finds relevant.

The determination of the best interest of the child shall be by a preponderance of the evidence. The court shall inform both parties that an order of joint custody may preclude eligibility for public assistance in the form of aid to families with dependent children, and that if public assistance is relied upon for the support of children of the parties at any time subsequent to an order of joint legal custody, the order may be terminated under Section 30-3-10.4

The court may recommend that where possible the parties attempt to settle future disputes by a dispute resolution method before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

1988

30-3-10.3. Terms of joint legal custody order.

(1) An order of joint legal custody shall provide terms the court determines appropriate, which may include specifying:

(a) either the county of residence of the child, until altered by further order of the court, or the custodian who has the sole legal right to determine the residence of the child;

(b) that the parents shall exchange information concerning the health, education, and welfare of the child, and where possible, confer before making decisions concerning any of these areas;

(c) the rights and duties of each parent regarding the child's present and future physical care, support, and education.

(d) provisions to minimize disruption of the child's attendance at school and other activities, his daily routine, and his association with friends, and

(e) as necessary the remaining parental rights, privileges, duties, and powers to be exercised by the parents solely, concurrently, or jointly

(2) The court shall, where possible, include in the order the terms agreed to between the parties

(3) Any parental rights not specifically addressed by the court order may be exercised by the parent having physical custody of the child the majority of the time.

(4) (a) The appointment of joint legal custodians does not impair or limit the authority of the court to order support of the child, including payments by one custodian to the other

(b) An order of joint legal custody, in itself, is not grounds for modifying a support order

(5) The agreement may contain a dispute resolution procedure the parties agree to use before seeking enforcement or modification of the terms and conditions of the order of joint legal custody through litigation, except in emergency situations requiring ex parte orders to protect the child.

1988

30-3-10.4. Modification or termination of order.

(1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances, and

(b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child

(2) (a) The order of joint legal custody is terminated upon the filing of a motion for termination by:

(i) both parents; or

(ii) one parent, when notice of the motion is sent by certified mail to the other parent and an affidavit is filed with the motion, indicating the motion has been mailed as required by this subsection

(b) The order of joint legal custody shall be replaced by the court with an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court

(3) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party

1988

PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. Kathleen Jacobson. The plaintiff who filed the Complaint seeking a divorce in the district court was Kathleen Jacobson. As a part of the relief granted by the district court, her surname was changed from Jacobson to Hamby. By stipulation of the parties the title of this case on appeal has been changed to reflect the fact that her surname now is Hamby.

2. Gail Jacobson. The defendant below, Mr. Gail Jacobson, was the husband of Kathleen Jacobson until the court below granted the divorce decree sought by his wife. Mr. Jacobson is the father of two children by Kathleen, Kelly and Kevin.

3. State of Utah by and through Utah State Department of Social Services. Because Kathleen and the children had received some assistance from the State of Utah for a period of time, the State was joined as a plaintiff in the divorce suit below. Because Mr. Jacobson had paid back the state for all the assistance by the time of the divorce hearing, the State did not seek, nor did the district court enter, any judgment against Mr. Jacobson. (R. 149, Tr. 29.) The State has no interest in this appeal, has not filed any notice of appeal, has not participated in the case on appeal, and is not a real party in the case the appeal.

4. NB: Nonparties With Significant Interests. The two children of Ms. Hamby and Mr. Jacobson, Kelly and Kevin, were not formal parties to the proceedings below, nor was any guardian ad litem appointed to represent their interests. Kelly was approximately twenty-eight months old and Kevin was approximately

six months old when the hearing on petitions for name change was held and the judgment was entered from which this appeal was taken.

Mr. Hamby, the former spouse of Kathleen Hamby, may have some practical, if not legal, interest in whether two children which he did not father, which were born to his former wife several years after their divorce, are given the surname Hamby. He was not a party to the proceedings below.

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ISSUES PRESENTED FOR REVIEW

1. Did the district court commit reversible error in applying the "best interests of the child" standard to determine what the legal surname of two infant children of divorcing parents should be after the parents' divorce, and in rejecting Appellant's claim that she, as the custodial parent, had the unilateral right to determine the surname of the two infant children of the parties?

2. Did the district court abuse its discretion in determining that it would be in the best interests of the two infant children of the parties to be known by the surname Jacobson after their parents' divorce when the mother was awarded custody of the children, the mother chose to be known after the divorce by the surname of another former husband, Mr. Hamby, who was the father of an older child in her custody who uses the surname Hamby, and she wanted the two children of Mr. Jacobson who would be in her custody also to be known by the surname Hamby, but Mr. Jacobson wanted his children to bear the Jacobson surname, he was awarded visitation rights and ordered to pay support, the parties previously had agreed to change the birth certificate of their oldest child, born out of wedlock, to Jacobson, and the district court found, inter alia, that the relationship between the noncustodial father and his children would be strengthened by the children bearing the name Jacobson, that the mother-child relationship would not be harmed if the children had that surname, and that that the children would not

suffer embarrassment because of any alleged bad reputation associated with the surname of their father?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS

Constitutional Provision-United States

Amendment XIV, section 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitutional Provisions-Utah

Article I, section 2

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Article I, section 7

No person shall be deprived of life, liberty or property, without due process of law.

Statutes

U.C.A. 30-3-5. Disposition of property-Maintenance and health care of parties and children-Court to have continuing jurisdiction--Custody and visitation-Termination of alimony. (Pre-1985 version):

(1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

(As amended in 1985.):

(1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties and children, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

U.C.A. 30-3-10. Custody of children.

In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise. . . .

U.C.A. 42-1-1 to 3. Chapter 1. Change of Name.

U.C.A. 42-1-1. By petition to district court-Contents.

Any natural person, desiring to change his name, may file a petition therefor in the district court of the county where he resides, setting forth:

- 1) The cause for which the change of name is sought.
- 2) The name proposed.
- 3) That he has been a bona fide resident of the county for the year immediately prior to the filing of the petition.

42-1-2. Notice of hearing-Order of change.

The court shall order shay, if any, notice shall be given of the hearing, and after the giving of such notice, if any, may order the change of name as requested, upon proof in open court of the allegations of the petition and that there exists proper cause for granting the same.

42-1-3. Effect of proceedings.

Such proceedings shall in no manner affect any legal action or proceeding then pending, or any right, title or interest whatsoever.

Rules and Regulations

Guidelines for Reporting Name of Father and Surname of Child on the Birth Certificate (revised October 5, 1981) of the Bureau of Health Statistics, Utah Department of Health.

Surname of Child.

The surname to be given the child should be determined by the parents.

A. When the mother is married it is usual for the child to receive the surname of the husband (father). However, some recent immigrants into the United States and some subcultures within the nation have customs of assigning surnames which vary from the standard American tradition. The surname given the child should be determined by both parents. It clearly is not mandatory that the child have the father's surname. When the parents disagree as to the child's surname, the sole consideration should be the best interests of the child. This may be best determined by a court of competent jurisdiction.

Therefore, if the parents (husband and wife) are in disagreement regarding the surname of the child, it should be left blank on the birth certificate. It can be added later when the parents reach agreement by an affidavit to amend a record or if necessary, by court order.

B. When the child's mother is not married, she has considerable latitude in the name she gives the child. Even if the father is not named on the birth certificate, the mother may give the child a surname different than her own surname. Additionally, the mother may name the father on the birth certificate (by Acknowledgment of Paternity) and give the child a surname different than the father's.

C. The parents should be advised that by giving the child a different surname than that of the father, the birth certificate may appear to some persons as a birth which occurred out of wedlock.

STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings, and Disposition in the District Court.

The proceeding below commenced on or about October 29, 1984, when Kathleen Jacobson (now known as Kathleen Hamby) filed a complaint and an amended complaint seeking a divorce from her husband, Gail Jacobson. (R. 4 & 7.) The parties stipulated to all matters except one: they could not agree what surname their children (Kelly Lynn, who was born before they married, and Kevin D., who was en ventra sa mere and would be born two days after the divorce) would use after the divorce. (R. 31, 32 & 122-23, Tr. 2-3.) The matter came before Judge Bullock of the Fourth Judicial District for hearing on March 14, 1985. (R. 120.) Counsel for defendant moved for a continuance. (R. 123, Tr. 3.) Judge Bullock heard plaintiff's evidence (R. 125, Tr. 5), then granted the divorce according to the stipulation, ordered that Kelly would continue to have the surname Hamby "at this time" (R. 116), ordered that the unborn child would take the surname Jacobson when it was born, and ruled that the parties could apply for name changes after the unborn child had been born, that defendant could present evidence at that time, and the court "would preserve the issues with respect to both until that time." (R.149-52, Tr. 29-32.)

A divorce decree was entered on or about April 11, 1985. (R. 114.)

After the birth of their second child, both parties filed petitions to have the court change the surnames of the children: the mother wanting them both to bear the "Hamby" surname, and the

father wanting them both to bear the "Jacobson" surname. (R. 37 & 39.)

The matter was heard on October 24, 1985, before Judge Harding, to whom the case was assigned following the retirement of Judge Bullock. Counsel for both parties made proffers of evidence. (R. , 2d Tr. 1-8.)¹ After the parties submitted memoranda on the legal issue, the district court entered its Ruling noting many factors which it was taking into account and finding "that it is in the best interest of the parties minor children, Kelly Lynn and Kevin D., to be known by the surname Jacobson." (R. 102.) An Order to that effect was entered March 10, 1986. (R. 104.)

On or about April 7, 1986, Ms. Hamby filed a Notice of Appeal from that Order. (R. 109.)

B. Statement of the Facts Relevant to the Issues Presented for Review.

The critical facts in this case are essentially undisputed. (R. 75, 102, Tr. 2, 6.) Mr. Gail Jacobson and Ms. Kathleen Hamby married each other on or about November 29, 1983. (R. 75.) Each had been married previously. Kathleen had been married to a Mr. Hamby, and had a child by him which she was raising. After her divorce from Mr. Hamby, Kathleen continued to be known by the surname Hamby. So did her child.

¹ The transcript of this hearing was inadvertently omitted by Appellant from the Record. Counsel for the parties have stipulated, pursuant to Utah Rule of Appellate Procedure 11(h) that it be included in the record and on the Index of Record. As yet that has not been accomplished. References to this short transcript are indicated herein by "R. , 2d Tr.#." A copy of this transcript is included in the Addendum.

After her divorce from Mr. Hamby, Ms. Hamby became pregnant with a child by Mr. Jacobson. The child was born on or about June 14, 1983 out of wedlock, and Ms. Hamby named him Kelly Lynn Hamby on his birth certificate. (R. 75-76.) ("He was born out of wedlock and I gave him the name that I carried then." R. 127.) The parties agree that Gail Jacobson is the father of and has acknowledged paternity of Kelly Lynn Hamby. (R. 75-76, 139, , Tr. 19, 2dTr. 4.)

Approximately five months after the birth of Kelly the parties married each other. (R. 75.) During their marriage, Kathleen assumed the Jacobson surname. (She sued for divorce as Kathleen Jacobson and testified that she wished to resume the use of the name Hamby, by which she had been known prior to the marriage to Mr. Jacobson. R. 5, 126, 127; see also Affidavit In Support of Motion for Change of Title of Action.) (Defendant's counsel proffered evidence that during their marriage the oldest child of the parties, Kelly, like his mother, also was known by the surname Jacobson, but this is disputed. R. , 2d Tr. 5).

After their marriage, the parties agreed to change Kelly's surname to Jacobson, and Kathleen got the necessary forms and filled them out, leaving nothing to be done except to have them notarized. (R. 128, Tr. 8.) Ms. Hamby's counsel summarized it this way: "She would testify that some time after her marriage to Mr. Jacobson they did enter into an agreement to change the second child's name from Hamby to Jacobson, but that as far as I can ascertain that was never followed through with on the records of the State of Utah as far as an actual change being made in the

birth certificate." (R. , 2d Tr. 3.) Even though she was wary of her husband's motives for insisting on that Kelly bear his surname, she "still felt that for my child's sake it was the thing to do and I went ahead and signed them, but I didn't send them into the State because I was too confused as to whether I should give him that kind of a right to a child that he had been abusive towards" (R. 128, Tr. 8.) She agreed with her husband, Gail Jacobson, "to put his name on the birth certificate of the born child and have the unborn child when its born. . . . I feel that they should have their father's name on the birth certificate. That's for the children's sake." R. 132, Tr. 12.)

During the marriage of the parties to each other, Kathleen became pregnant with their second child. She was pregnant when she filed her complaint for divorce, and was due to deliver in just four weeks when the divorce hearing was held on March 14, 1985. (R. 132, Tr. 12.)

By stipulation, the parties agreed that after the divorce, Kathleen could resume using the surname of her previous husband, Hamby. They agreed that she would have custody of the children, and that Mr. Jacobson would have reasonable visitation rights with his two children. (R. 32.) They also agreed that for the health of the mother the divorce should become final upon entry (R. 136, Tr. 16). The court granted the divorce as stipulated by the parties. (R. 149. Tr. 29; R. 114.)

At the divorce hearing, the only dispute concerned the name by which the two children of the parties would be known after the divorce. Kathleen wanted the two children to be known after the

divorce by the name she had chosen for herself, Hamby (the name of her former husband); Mr. Jacobson wanted his children to be known by his surname, Jacobson. (R. 32.) Kathleen testified as to the reasons why she wanted their children to have the Hamby surname. She had custody of a ten year-old son from her former marriage, who had the surname Hamby. (R. 127, Tr. 7.) She was concerned that:

If the children don't have the same last name in the family I feel that it makes more insecurity, less family closeness. Mr. Jacobson has put me in a position now to raise three children by myself, because it's his choice not to be a husband I can stay with. And when I have to raise three children I need the best circumstances to raise those kids under that's possible; And I feel that having my whole family have the same last name brings the family closer together, there will be a lot less questions brought up at an earlier date for those little babies. They won't be wondering why their name is different until they are old enough to discuss it.

(R. 131, 32, T. 11, 12. Emphasis added.) She further testified (notwithstanding her stipulation regarding visitation) that she did not want Mr. Jacobson "to have any association with the child at all" after the divorce. (R. 140, Tr. 20.) She alleged that her husband "has always been known as a drinker and a fighter in town." (R. 133, Pr. 13.) And she indicated that she believed that she should have the right to choose the name of the children because "I have custody of them, and I'm their mother." (R. 141, Tr. 21.) But she agreed that "as the children get older, if they make the decision that they want their father's name, if he has been coming around and seeing them and being a father to them, I would never object to my children having their way when they are old enough to make a decision like that." (R. 140, 41, Tr. 20, 21.)

Appellant's counsel called a school psychologist to testify about children's names. (Of course, neither of the Jacobson children attended school; the oldest was only 21 months old, and the youngest was still en ventre sa mere.) Mr. Gaylon Downey, employed by Nebo School District, testified on the basis of the testimony Kathleen had given and on the basis of earlier conversations with her. He admitted that he had never talked with Mr. Jacobson about the matter, and had no conversation with him for three years (long before the children were born or the parties were married). (R. 142, Tr. 22.) He testified generally that when children

come from a family that has two different names, it disrupts somewhat the identity they have with themselves and also with the family. . . . Where if there's two names, it provides some kind of division in that unity that they are faced with whenever they fill out an application and whenever they state their name in class.

(R. 144, Tr. 24.) He stated that for children to have different names from their mother "could be a factor, it could hinder a child in their development" but "[i]t's never a sure thing because there are so many factors involved." (R. 146, Tr. 26.) He acknowledged that he dealt with a great many children in families where there had been divorces and the children had different surnames and in many of those cases the children were getting along well. (R. 147, Tr. 27.) Judge Bullock apparently did not place a great deal of weight upon the testimony of Mr. Downey, for the court specifically indicated at the conclusion of the hearing that it was entering its order "against the advice of a professional." (Tr. 152, R. 32.)

Mr. Jacobson was unavailable to testify at the divorce hearing because, as his attorney advised the court, he was an unemployed miner who recently had a chance to go out of state for a few days work. ("He's been unemployed all winter, and told me that if he passed this opportunity up he'd go to the bottom of the board, something to do with the union" R. 123-24, Tr. 3-4.) His attorney had requested that the hearing be continued. After allowing the plaintiff to present her evidence, the court entered an order essentially "preserv[ing] the issues with respect to both [children] until" after the birth of the second child, and allowing Mr. Jacobson to present testimony then. (R. 152, Tr. 32.) Thus, the court ruled that the oldest child would bear the surname Hamby, and the next child should be named Jacobson, for the time being.

At the divorce hearing Mr. Gammon, an attorney representing the State of Utah, appeared and advised the court that Mr. Jacobson had paid back the State all the money that was owing as a result of some assistance the State had provided Mrs. Jacobson in the past. (R. 149, Tr. 29.)²

On April 13, 1985, two days after the Divorce Decree was entered, the second child of the parties was born. (R. 76, 77.) Pursuant to the Divorce Decree, the child was given the surname of Jacobson. (Id.) The full name of this child is Kevin D. Jacobson. (Id.)

² The implication in Appellant's Brief that Mr. Jacobson was garnished because he failed to pay child support is misleading. The garnishment was to collect the judgment of \$252 for his ex-wife's attorney's fee. (R. 50, 115.)

After the birth of Kevin, both parties filed petitions to change the surname of the children: Ms. Hamby seeking to have both children given the surname Hamby, and Mr. Jacobson seeking to have both children named Jacobson. (R. 37, 39.) After objections and memoranda were exchanged, the parties stipulated to consolidate the petitions for hearing, and the court agreed. (R. 69.)

The matter came on for hearing on October 24, 1985. (R. 71.) "An informal conference was held in chambers between the Court and counsel during which counsel stipulated to make proffers [of evidence] on the record and submit memorandum [sic] in support of their respective positions as this matter is mainly a matter of law." (Id.) In his proffer, counsel for Ms. Hamby summarized the evidence that had been presented on behalf of his client in the earlier hearing. (R. , 2dTr. 4.) Counsel for Mr. Jacobson proffered evidence that while the parties were married and living together, Kelly did use and was known by the name of Jacobson, that the conduct of the defendant had not been so unreasonable or outlandish that the children ought not to bear his name, and that Kathleen's character and behavior was negative also. (R. , 2dTr. 5.) The court determined that there was no genuine issue as to the material facts, and asked counsel for the parties to file memoranda on the legal issues. (R. 71.)

On February 21, 1986, after the attorneys had filed their memoranda, the court issued its Ruling. (R. 102.) It provided, in pertinent part:

The court finds that it is in the best interest of the parties minor children, Kelly Lynn and Kevin D., to be known by the surname Jacobson.

The court bases this ruling on the following reasons: 1) the father-child relationship will be strengthened by the children bearing the name Jacobson while not harming the mother-child relationship, 2) there is no embarrassment [sic] or inconvenience associated with an explanation of why their mother's surname is different since divorce is a common occurrence, 3) the children are too young to be accustomed to the surname Hamby, 4) Hamby is not the mother's maiden name, 5) there is no embarrassment because of defendant's alleged bad reputation, and 6) the children will always be identified with at least one natural parent by being known as Jacobson.

. . . Of paramount concern to the court is the fact that Kevin and Kelly should both bear the same name to avoid any implication of illegitimacy which might arise if asked why brothers of the same natural father have different last names.

Finally, the court notes that the law provides that the children may petition for a name change if they so desire when they are old enough to make an intelligent decision.

(Id.) On March 10, 1986, the district court entered its Order that the infant children of the parties, Kevin D. and Kelly, should both bear the surname Jacobson. (106.)

SUMMARY OF RESPONDENT'S ARGUMENT

In applying the "best interests of the child" standard, the district court applied the proper legal standard to resolve the dispute between divorcing parents regarding the surname their children should use after the divorce. Although there is no Utah statute or case directly on point, that is the standard consistently specified in the statutes and cases specifying the legal standard to be used to resolve disputes concerning the welfare of minor children. Moreover, it is the standard specified by Utah Department of Health regulations as the standard to use in resolving disputes concerning the surnames of minors. And it is the standard adopted by virtually all of the American courts which have addressed the issue.

The district court properly rejected the Appellant's argument that as the custodial mother she had a right or presumptive right unilaterally to select the surname of the children in her custody. Not only would that approach be inconsistent with Utah case law, it has been consistently rejected by other American courts. And it would be contrary to public policy because it would discourage divorcing parents from reaching voluntary agreements regarding custody of their children.

In applying the "best interests of the child" standard in this case, the district court properly considered the facts and circumstances which prior decisions of this court, and relevant decisions of other courts, have indicated are appropriate. The court properly rejected any gendered-favoring (or any thinly-disguised gender-favoring) rule or presumptive rule, and astutely

and assiduously focused upon factors pertaining to the welfare of the two minor infants of the parties. The court properly resisted attempts by the appellant to decide the controversy from the perspective of the wishes or welfare of the contending adults.

Procedurally, there is no question that the district court had jurisdiction, incidental to and in connection with the divorce of the parties, to resolve the dispute concerning the surname of thier infant children. At the divorce hearing, after Ms. Hamby's evidence was presented, the district court properly delayed ruling on the issue, giving the parties a chance to reach an agreement themselves, and reserving Mr. Jacobson's right later to introduce evidence. Later the court properly received proffers of evidence (by stipulation of the parties), and asked for memoranda on the legal issues. After receiving those memoranda, the district court entered a fair and just Order. Since the district court did not abuse its discretion or enter a flagrantly unjust order, the Supreme Court of Utah should not substitute its judgment for that of the trial court, but should affirm the Order of the district court.

ARGUMENT

What's in a name? That which we call a rose
By any other name would smell as sweet.
William Shakespeare, Romeo and Juliet, II, i, 13.

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing,
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.
William Shakespeare, Othello, III, iii, 155.

I hate the man who builds his name
On ruins of another's fame.
John Gay, Fablels pt. I, "the poet and the rose," (1727)

I. The District Court Applied the Proper Legal Standard to Resolve the Conflict Between the Divorcing Parties Concerning the Surname Their Children Should Have.

A. A dispute between divorcing parents regarding the surname their children will have after the divorce should be resolved by the "best interests of the child" standard.

This district court applied the "best interests of the child" standard to determine the surname by which the children of these divorcing parents should be known after the divorce. (R. 102, 103.) In so doing, the district court properly applied a standard which completely conforms with the statutory, administrative and judicial precedent which unequivocally indicate that all disputes regarding the welfare of children should be resolved by the "best interests of the child" standard.

The Guidelines for Reporting Name of Father and Surname of Child on Birth Certificate (rev. Oct. 5, 1981) issued by the Bureau of Health Statistics, Utah Department of Health, specify: "When parents disagree as to the child's surname, the sole

consideration should be the best interests of the child. This may be best determined by a court of competent jurisdiction."

Numerous statutes specify that Utah courts are to follow the "best interests of the child" standard in resolving conflicts regarding the welfare of minor children. See, e.g., U.C.A. § 30-3-5 (in awarding visitation the court "shall take into consideration the welfare of the child"); U.C.A. § 30-3-10 (in determining custody and making related orders at the time of divorce "the court shall consider the best interests of the child"); U.C.A. § 78-3a-48 (juvenile court may approve voluntary termination of parental rights if "in the best interests of the parent and the child"); U.C.A. § 78-3a-39 (juvenile court may enter all reasonable orders concerning a child in its jurisdiction "which are for the best interests of the child"); U.C.A. § 78-30-9 (adoption order will be granted only if the court is "satisfied that the interests of the child will be promoted by the adoption"); U.C.A. § 78-45c-3 (1)(b) & (d) ("best interests of the child" is one factor in determining whether court may exercise child custody jurisdiction); U.C.A. § 78-45c-7 (3) (court should not exercise custody jurisdiction "if it is in the interest of the child that another state assume jurisdiction").

Likewise, numerous cases decided by the Utah Supreme Court unequivocally established "best interests of the child" as the legal standard for dissolving disputes regarding the custody and care of minor children. See, e.g., Hutchison v. Hutchison 649 P.2d 38, 40 (Utah 1982) "In a controversy over custody, the paramount consideration is the best interests of the

child . . ."); Hogge v. Hogge, 649 P.2d 51 (Utah 1982) (best interests of the child is the standard for determining modification of custody if a substantial and material change of circumstances is shown); Becker v. Becker, 694 P.2d 608 (Utah 1984) (best interests of the child standard is applicable to determine modification of custody after substantial change of circumstances); Lembach v. Cox, 693 P.2d 197 (Utah 1981) (to determine custody of child born out of wedlock best interests of the child standard is applied); see further Anderson v. Anderson, 172 P.2d 132 (Utah 1946); Pennington v. Pennington, 711 P.2d 254 (Utah 1985); Taylor v. Waddoups, 241 P.2d 157 (Utah 1952).

The question of what legal standard should be applied to resolve a dispute between divorced or divorcing parents regarding the surname of their children has been addressed to many other states, and in virtually all of the those states the courts have adopted the "best interests of the child" standard. "In determining whether a change in a child's name should be permitted or ordered against the objection, or without the consent, of one of the parents, the courts have usually recognized that the welfare of the child should be the controlling consideration, and that the determination of the issue is ordinarily a matter for the trial court's discretion. Annot., 92 A.L.R. 3d 1091, 1095 (1979 & Supp. 1985). See also Note The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests, 1979 Utah L. Rev. 303, 323 (hereinafter cited as "Note"). See generally Laks v. Laks, 25 Ariz. App. 58, 540 P.2d 1277, 1280

(1975) ("The persons who have the paramount interest are the children and their best interests are controlling."); In re Marriage of Schiffman, 28 Cal. 3d 640, 169 Cal Rptr. 918, 620 P.2d 579, 583 (1980) ("Henceforth, as in parental custody disputes, the sole consideration when parents contest a surname should be the child's best interests."); Jacobs v. Jacobs, 309 N.W.2d 303, 305 (Minn. 1981) ("the best interest must govern the resolution of the parents' quarrel"); In re Saxton, 309 N.W.2d 298, 300 (Minn. 1981), cert. denied, 455 U.S. 1034 (1982) ("the best interests of the child controlled the resolution of the issue"); Overton v. Overton, 674 P.2d 1089, 91 (Mont. 1983) ("the change of name and whether it was in the best interest of the child"); Firman v. Firman, 610 P.2d 178, 181 (Mont. 1980) ("Since there is no other statute in point, the Court must fall back on general principles, the most important of which in any proceeding concerning the relationship of a father and his child is the best interests of the child."); Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982) ("the standard to be used in the accomplishment of this task is the best interests of the child, the same standard used in all cases involving custody and visitation of minor children"); Cohen v. Cunningham, 480 N.Y.S.2d 656, 657 (App. Div. 1984) ("neither parent has a superior right to determine the surname of the child, and the question always is whether the best interests of the child will be served by the change."); Hurta v. Hurta, 605 P.2d 1278, 1279 (Wash. App. 1979) ("there is nothing in the record to show that the proposal was considered from the standpoint of the child, and it is the

child's best interests which control."). The only time a court has applied any other standard is when a state statute expressly addresses the issue and directs the standard to be applied. See, e.g., In re Meyer, 471 N.E.2d 718 (Ind. Ct. App. 1984) (Indiana legislation provides presumption that parent who makes child support and fulfills other decreed duties has priority). Spatz, 258 N.W.2d 814 (Neb. 1977).

Likewise, the more astute commentaries suggest that disputes regarding the name of a child "should ideally be analyzed in terms of what genuinely is in the child's best interests." Note, 1979 Utah L. Rev. at 328. In re Tubbs, 620 P.2d 384 (Okla. 1984).

B. The District Court Properly Rejected Appellant's Argument That the Custodian of a Minor Child Has the Right to Determine the Child's Name.

It has been the consistent position of Appellant Kathleen Hamby (R. 141, TR. 21, 2d Tr 4) and of her counsel (R. 82-84, Brief of Appellant 16) that because she is the custodial parent, she has the right to select the names of the children of whom she has custody, or at least the presumption of the law favors the names selected by the custodian. That right or presumptive right, cannot be said to have arisen by inference of the order awarding custody in this case, because the parties were disputing the surname of the children at the time the court awarded custody, and the court simultaneously "preserve[d] the issues with respect to both [children's surnames] until" a later date. (R. 152, Tr. 32.) The Appellant has not cited a single Utah statute or case that supports the claim that a custodial parent has the right or presumptive right unilaterally to select the

name by which a child will be known after divorce over the objection of the other parent. And despite enormous straining, she has been unable to cite any court anywhere which has adopted that position. The leading authority cited for her proposition is a concurring opinion of one justice stating what he thought the rule should be in a case in which the California Supreme Court expressly adopted another rule--the best interests of the child standard. In re Schiffman, 620 P.2d at 583, 585 (majority rule and Justice Mosk's concurring opinion). The overwhelming weight of authority rejects the custodial parent rule. "Giving the choice [of surname for children] to the custodial parent has generally been rejected by the courts." Note, 1979 Utah L. Rev. at 328 n. 113. Counsel for Appellant has acknowledged that "Appellate courts have not expressly adopted the custodial parent presumption, and one court to which it has been argued has expressly rejected it." MacDougall, The Right of Women to Name Their Children, 3 J.L. & Ineq. 91, 150 (1985) (hereinafter cited as "MacDougall"). The Nebraska Supreme Court recently declare: "We refuse to suggest or hold that a presumption exists in favor of the custodial." Cohee, 317 N.W.2d at 384. (But the court did indicate that the name desired by the custodial parent was one factor that should be considered. Id.) See also Young v. Young, 356 N.W.2d 823 (Ct. App. Minn. 1984); In re Schidlmeier, 496 A.2d 1249 (Pa. Super. 1985) (where the court "shied away from expressly articulating the presumption" even though Pennsylvania has an express regulation on the point. MacDougall, 3 J.L. & Ineq. at 151 n. 242.) Apparently legislatures in two states have adopted laws providing that the custodial parent has the right to

select the surname following birth. N.H. Rev. Stat. Ann. § 126-6-A(I)(A) (1984). (Appellant's brief states that the Wisconsin legislature has adopted a similar provision, but the most recent edition of the Wisconsin Statutes Annotated and Pocket Supplement, do not confirm that fact. Nevertheless, Appellant's council resides in Wisconsin and Respondent is willing to accept her assertion.) An executive department regulation in Pennsylvania likewise adopts the custodial parent presumption. 28 Pa. Admin. Code § 1.7(b) (1975). Many other legislatures have considered the question of naming children without adopting that position. See MacDougall, 3 J.L. & Ineq. at 154-155. In fact, legislatures in at least three states have adopted the diametrically opposite presumption that the support-paying (noncustodial) parent has the presumptive right to select or veto the name of a child after divorce. Ga. Code Ann. § 19-12-1 (1982); Ind. Code Ann. § 34-4-6-4(d) (Burns Supp. 1985); La. Rev. Stat. Ann. § 13:4751(B) (West Supp. 1985). See also In re Meyer, 471 N.E.2d 718 (Ind. Ct. App. 1984).

As the preceding discussion of legislation suggests, adoption of a rule that the custodial parent or the noncustodial parent has a right or presumptive right to select the surname of children after divorce is a legislative, not a judicial, policy-decision responsibility. Indeed, counsel for the Appellant recognizes that there is a "need for legislation." MacDougall, 3 J.L. & Ineq. at 154. This court should resist the plaintiff's invitation to legislate on the subject.

It would be very poor policy for this court to adopt the custodial parent rule or presumption urged by the Appellant. The rule would be contrary to the policy of this court against "fixed rigidities" in matters regarding the welfare of children. Bingham v. Bingham, 575 P.2d 703, 704 (Utah 1978). Moreover, the custodial parent rule or presumption would create a significant obstacle to parents voluntarily reaching agreements regarding custody of their children. Surely many parents who are willing to stipulate that their ex-spouses should have primary custody of their children would be reluctant to do so if the Utah Supreme Court ruled that the custodial parent had the right, or presumptive right, to select the name by which the children would be known following the divorce. The whole notion of giving one parent the authority unilaterally to determine this matter is unwise and arbitrary. Indeed, if the court were to adopt an arbitrary, unilateral rule, the better rule would be that adopted by the majority of states which have adopted legislation on this subject, i.e., that the noncustodial parent who is fulfilling his responsibilities of support and association with the child ought to have the primary role in determining the name by which the children are known. At least that arbitrary rule provides an incentive for noncustodial parents to support and maintain contact with their children. It is indisputable that it is in the best interest of the children of divorce to have a continuing relationship with their noncustodial parent. And while no court can force a noncustodial parent to assume the responsibility which he or she should exercise toward the children, the court

should be extremely reluctant to block the reasonable efforts by a noncustodial parent to maintain some tie (even a nominal tie) with his or her children.

II. The District Court Considered the Appropriate Factors in Determining What Surname Would Be in the Best Interests of the Children of These Parties.

A. The Factors Considered by the District Court Have Been Identified by This Court and Courts in Other States as the Appropriate Factors in Determining the Best Interests of Children.

The dispute in this case arose at the time of divorce. The divorcing woman wanted to resume using the surname of a former husband, to whom she had been married some time before her marriage to Mr. Jacobson and by whom she had one child who also bore the surname "Hamby." Mr. Jacobson did not object to his wife resuming the use of the surname "Hamby." However, she also wanted the two minor children which she and Mr. Jacobson had parented to bear the surname "Hamby." Mr. Jacobson objected to that, wanting them both to bear his surname, "Jacobson," after the divorce.

In resolving this dispute between two parents regarding the names by which their infant children would be known after the divorce, the district court explicitly noted and considered nine factors: (1) the relationship between the father (noncustodial parent) and the children; (2) the relationship between the mother (custodial parent) and the children; (3) the degree of embarrassment or inconvenience the children would experience having a surname different from that used by their mother; (4) the very young age of the children and the length of time by

which they had been known by their surnames; (5) the fact that the surname selected by the mother for them was not a family (genealogical-biological family); (6) any embarrassment that would be associated with the use of the surname because of the bad reputation of it; (7) the stability of the identification which the respective surnames represented; (8) the implication of illegitimacy which might arise from the use by biological siblings of different surnames; and (9) the fact that the children when older may petition for a name change on their own.

The district court obviously had given careful consideration to memoranda filed by the attorneys before making this decision. The factors relied upon the district court are very similar to the factors which the Utah Supreme Court identified in Hutchison v. Hutchison as relevant to the determination of the best interests of the child in custody disputes. There the court declared:

Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition. (These factors are not necessarily listed in order of importance.)

649 P.2d at 41.

The factors relied upon by the district court are also similar to those endorsed by other courts which have stated that disputes between divorcing parents concerning the surnames of their children are to be governed by the best interests of the child standard. For instance, the California Supreme Court declared:

Under the test thus revised the length of time that the child has used a surname is to be considered. . . . If, as here, the time is negligible because the child is very young, other facts may be controlling. For instance, the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit are all pertinent. The symbolic role that a surname other than the natural father's may play in easing relations with a new family should be balanced against the importance of maintaining the biological father-child relationship. "[T]he embarrassment or discomfort that a child may experience when he bears a surname different from the rest of his family" should be evaluated. . . .

In re Marriage of Schiffman, 620 P.2d at 583. See also Cohee, 317 N.W.2d at 384; Note, 1979 Utah L. Rev. at 329-30; Annot. 92 A.L.R. 3d at 192-93.

The district court's concern for the impact of the choice of name upon the relationship between the child and the noncustodial father was particularly appropriate. In determining the best interests of a child

courts look most frequently at the impact the change will have on the father-child relationship. The starting point for this analysis is the assumption that "[s]ociety has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships." The courts' concern is with the effect a name change will have on that fragile relationship.

It has been recognized that change of a child's paternal surname may foster an unnatural barrier between father and child and erode a relationship that should be nurtured. . . . Where the parents of a child are

divorced and his mother has his custody, the bond between father and child is tenuous at best, and that bond may be weakened if not destroyed by a change of the minor's name. . . . It has been said that such a change would lend aid to estrangement of father and child, contrary to the best interest of the child, and constitute a step toward complete severance of the father-child relationship. . . .

. . . .

. . . [A decree changing a child's name] approaches, even though it does not reach, the permanent deprivation attendant upon adoption. But the step from change of surname, in view of its erosive effect on the parental and filial relationship, may be a short one. Erosion may be destructive, not just damaging.

Note, 1979 Utah L. Rev. at 325, quoting Carroll v. Johnson, 565 S.W.2d 10, 14-15 (Ark. 1978); Accord, West v. Wright, 283 A.2d 401 (Md. 1971); Robinson v. Hansel, 223 N.W.2d 138 (Minn. 1974).

"It . . . has been generally recognized that the interests of the [noncustodial] parent . . . in maintaining a parental bond with the child is entitled to significant consideration" Annot. 92 A.L.R. 3d at 1095. See also Id. at 1106. Many courts have specifically noted this factor as a significant consideration in their analysis of the best interests of the child in change of name conflicts. See, e.g., In re Marriage of Schiffman, 620 P.2d at 583; In re Marriage of Omelson, 445 N.E.2d 951 (Ill. App. 1983); Burke v. Hammonds, 586 S.W.2d 307 (Ky. App. 1979); Firman v. Firman, 610 P.2d at 178; In re Newcomb, 472 N.E.2d 1142 (Ohio App. 1984); Ex Parte Stull, 280 S.E.2d 209 (S.C. 1981); Brown v. Carroll, 683 S.W.2d 61 (Ct. App. Tex. 1984). The evidence in the record shows that Mr. Jacobson wanted his children to bear his name; that the parties made an agreement to that effect, and that he has consistently opposed the attempt

by his ex-wife to call the children by the surname of her prior husband, Hamby. It also reflects that, despite the economic frustrations of being an unemployed miner, he has done his best to provide child support, and at the time of the divorce hearing had paid back the state of Utah for all the sums it has provided for his children and wife.

The district court appropriately considered the effect which the surname of the children would have upon their relationship with their custodial mother. Utah courts have a profound "commitment to stability and security and a child's custodial placement." Becker, 694 P.2d at 611. However, it is worth noting that courts have not emphasized this factor unduly "because mothers, usually given custodial preference in the past, generally had more regular contact and could maintain a psychological relationship [with the children] without the need for the tie a surname provides." In re Marriage of Schiffman, 620 P.2d at 584. Nevertheless, it is a significant factor, and Judge Harding appropriately took it into consideration in determining the surname by which the children would be known after the divorce of their parents in this case.

The silence of the record on this point, however, is deafening. There is absolutely no evidence that the mother-child relationship would be harmed in any respect. And that was the conclusion reached by the court. The mother had a child by a previous marriage who went by the surname "Hamby." During the marriage of the parties, the mother went by the surname "Jacobson." Thus, during the time she was married to Mr.

Jacobson and lived with him, the mother had a different surname than her oldest child. There is no hint in the record that that caused any harm to their relationship. Moreover, the school psychologist who testified, who was aware of the situation of the parties, did not indicate that he was aware of any facts or circumstances that would give rise to the suggestion that the relationship between Ms. Hamby and her children would be harmed if the children bore a surname different than the one she chose to go by. (R. at 144-49, Tr. 24-29.)

The misconduct of the noncustodial parent which might cause the children to suffer the shame of "guilt by association" is a valid factor to consider in determining the surname by which the children should be known after divorce. Note, 1979 Utah L. Rev. at 330. In re Newcomb, 472 N.E.2d 1145. But, "[t]he misconduct an ex-husband must engage in to forfeit his naming rights must be heinous." MacDougall, 3 J.L. & Ineq. at 139. Thus, murder, In re Christjohn, 428 A.2d 597 (Pa. Super. 1981), or incest and incarceration, W.V.H., 246 A.2d 501 (N.J. Super. 1968) are the types of conduct which could cause the children such great embarrassment as to rule out the use of noncustodial father's surname. But the court will not reach that conclusion lightly, or on the basis unilateral allegations of one divorcing parent who is angry at the other. "In In re Christjohn . . . the trial court took extensive psychological testimony as to the damage the murder did to the child." MacDougall, 3 J.L. & Ineq. at 139, n. 187.

In this case, the mother testified that the father of the children "had a reputation as a drinker and a fighter" (R. 133, Tr. 13) and she further alleged (without any corroboration) that he had physically injured the child. However, counsel for Mr. Jacobson proffered evidence that "his conduct is not such as would in any way be so unreasonable or outlandish that it would require the Court in the interest of the children to take his name from them." (R. ; 2d Tr. 5.) He further offered to introduce evidence that the mother's "character and behavior is negative." (Id.) Thus, this factor was not decisive.

The importance of the surname of the children to identify them with their extended genealogical and biological family is a relevant consideration. "[C]ourts occasionally mention the desirability of a child maintaining his paternal surname so that he may know his parentage." Note, 1979 Utah L. Rev. at 325. See also In re Presson, 451 N.E.2d at 970 (only son and only grandson on father's side). See also Brown v. Carroll, 683 S.W.2d at 63.

In this case, the name "Jacobson" links the children with one of the two families from which they are descended, and of which they are a part. Jacobson is the genealogical and biological paternal family. On the other hand, "Hamby" links the children with the family that is not a part of their biological or genealogical heritage. It is the name of a former husband of their mother. There was absolutely no evidence presented why it would be in the best interests of the children to take the name of their mother's former husband at the cost of losing any identity-connection with both of the genealogical-biological

families of which they are a part. The isolation and abandonment, the symbolic withdrawal from extended family, is not to be discounted.

The court properly considered the age of the children and the length of time they had been known by their surnames. Certainly continuity is an important factor in assessing the best interests of very young children. Hogge, 649 P.2d at 51; Becker, 694 P.2d at 608. The length of time a child has used a surname is a factor that other courts and commentators have noted. Note, 1979 Utah L. Rev. at 326, 327; MacDougall, 3 J.L. & Ineq. at 131; In re Marriage Schiffman, 620 P.2d at 583 ("If, as here, the time is negligible because the child is very young, other factors may be controlling."); Cohee, 317 N.W.2d at 381.

In this case, the oldest child was less than 2 1/2 years old at the time Judge Harding conducted the hearing on the cross petitions for name change. At the time of birth out of wedlock, the child had been given the name Hamby, the name his mother was then using. Mr. Jacobson's counsel offered to present evidence that during the marriage the child had been known by the surname his mother used during the marriage, Jacobson. (R. ; 2d Tr. 5.) (Plaintiff would dispute that fact. Id.) The youngest child was less than six months old at the time of the hearing. At birth he had been given the surname Jacobson. Since it is undisputed that the mother assumed the surname Jacobson during her marriage to Mr. Jacobson, it is very likely that their oldest child, an infant, was also known by the surname Jacobson. But, in any event, both children were so young that it is unlikely

that either of them had any personal identification with the surname that they were given. Nor is it likely that their friends identified them with that surname. Thus, at the time the district court entered its order on the cross petitions for change of name, the age and length of time factors were negligible.

Another factor which it was appropriate for the court to consider was the degree of embarrassment or inconvenience which the children would incur from having surnames that were inconsistent from their mother's or other members of their own family. In re Marriage of Schiffman, 620 P.2d at 583; Cohee, 317 N.W.2d at 384.

Another factor the courts examine is the embarrassment, confusion, and inconvenience a child may experience among his peers because he bears a different surname than the rest of his new family. This situation most commonly arises after a child's parents divorce and his mother, the custodial parent, remarries. The courts, however, almost uniformly recite the litany 'minor embarrassment or emotional upset [is] not sufficient to require that a change of name be granted' and minimize the severity of the problem by pointing out that the situation has become relatively common in a society where divorce and subsequent remarriage are so prevalent.

Note, 1979 Utah L. Rev. at 325-26. See also Annot., 92 A.L.R. 3d at 1100; MacDougall, 3 J.L. & Ineq. at 148. Thus, most courts have considered this factor, but have concluded that it is not controlling in the absence of evidence of extraordinary embarrassment, confusion or problem. See generally, Laks, 540 P.2d at 1278; West v. Wright, 283 A.2d at 404; Young, 356 N.W.2d at 823; Robinson, 223 N.W.2d at 141; In re Newcomb, 472 N.E.2d at 1142; Brown, 683 S.W.2d at 61; Flowers v. King, 237 S.E.2d 111, 114 (Va. 1977).

In this case there was no evidence of any exceptional circumstances. There was no evidence that there had been any problem, embarrassment, confusion or inconvenience for the 10 year old child of Mrs. Jacobson by her earlier marriage, named "Hamby," while that child belonged to the "Jacobson" family and had a surname different from his mother, stepfather, and half brother. Moreover, Ms. Hamby has been known by three different names during the past years. She has been married twice, and each time assumed the surname of her husband upon marriage. If she should marry a third time, there is no reason to believe that she would not assume the surname of her third husband upon marriage. The inconvenience to the children of having a different surname than their half-brother and mother might not be as great as the embarrassment of having a different surname than either their father or mother, should Ms. Hamby remarry. Lassiter-Geers v. Reichenbach, 492 A.2d 303, 307 (Md. Ct. Spec. App. 1985). It was appropriate for the district court to note the potential instability of surname that would be created if it acceded to the Appellant's request that the children of Mr. Jacobson should be given the surname "Hamby."

It was also appropriate for the court to consider the significance of two children who were full brothers to one another, born of the same mother and father, having different surnames from each other. "We have also expressed a preference to keep siblings together." Pennington v. Pennington, 711 P.2d 254, 256 (Utah 1985); Hutchison, 649 P.2d at 41; Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979). In this case, both the

mother and the father want their two children to bear the same name as each other. The only disagreement is to which name that shall be.

It was appropriate for the district court to be concerned about the stigma or embarrassment associated with illegitimacy which the children might experience. Because of the unique circumstances associated with the religious practice of polygamy by the early settlers of the territory, Utah has been the leading jurisdiction in the United States to extend legal compassion and concern for the welfare of "illegitimate" children. (In Cope v. Cope, 137 U.S. 682 (1891) the United States Supreme Court upheld the Utah Territorial law giving illegitimate children the right to inherit from their fathers, noting: "While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity." (137 U.S. at 684.) U.C.A. § 78-30-12 today explicitly provides that an illegitimate child may be adopted (legitimated) by its biological father "by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child. . . ." And the most well-established method of "acknowledging" an illegitimate child is for the father to give the child his name. See generally Slade v. Dennis, 594 P.2d 898 (Utah 1979); State Ex Rel Baby Girl M., 476 P.2d 1013 (Utah 1970); Rohwer v. District Court, 125 P.2d 671 (Utah 1912); See also Mace v. Webb, 614 P.2d 647 (1980). In the Guidelines for

Reporting Name of Father and Surname of Child on Birth Certificate (revised Oct. 5, 1981) the Bureau of Health Statistics, Utah Department of Health notes: "The parents should be advised that by giving the child a different surname than that of the father, the birth certificate may appear to some persons as a birth which occurred out of wedlock." Thus, it was entirely appropriate for the district court to take this factor into account.

The district court properly considered the ability of the children to change their own names when they become mature. "Under the common law a person can change his surname without any formal legal proceeding, so long as his purpose is not fraudulent and the change does not infringe upon another's rights. All states, however, provide a statutory method for effecting a change of name. . . . Most jurisdictions [interpret] the statutory procedure as being supplemental to, and not supplanting the common law." Note, 1979 Utah L. Rev. at 316, 317. See also MacDougall, 3 J.L. & Ineq. at 104. This factor has been considered by other courts in resolving disputes between parents regarding the surnames of their children. Firman, 610 P.2d at 181; Brown, 683 S.W.2d at 61; In re Newcomb, 472 N.E.2d at 1142; In re Saxton, 309 N.W.2d at 302.

Utah has a change of name statute which provides a clear and easily accessible procedure for change of name. U.C.A. § 42-1-1, 2, 3. Since the children in this case were both under the age of three, it was both prudent and appropriate for the district court to take into account the fact that they would have the opportunity (undoubtedly heavily influenced by their custodial

mother) when they reached an age of discretion to initiate a proceeding to change their surname if they wanted to do so.

it should be noted also that both parties in this case expressly agreed that the children should bear the surname of Mr. Jacobson. (R. 31, 32, 40, 41, Tr. 11, 12, 20, 21; R. ; 2d Tr. 3.) Unilateral action of a custodial mother to change the surname of a child in derogation of an agreement ought not to be endorsed by the court. Gershowitz v. Gershowitz, 491 N.Y.S.2d 356 (App. Div. 1985).

B. The District Court Properly Did Not Employ Any Gender-based Presumption in Resolving the Dispute Concerning the Surname of the Children of These Divorcing Parents.

Judge Harding did not in any way rely upon any gender-based presumption in resolving the dispute between these parents concerning the surname their children should bear. Neither his Ruling nor his Order, nor the transcript of the hearing he held, contains any hint or shadow of sex-bias.

The gender-neutral approach taken by the district court below is exceptionally astute and progressive. By contrast, the highest courts in at least 15 jurisdictions, and appellate courts in another 14 states "have accepted the standard that the father has a 'primary' and a 'protectable' 'natural' or 'time-honored' right superior to that of the mother to name his children." MacDougall, 3 J.L. & Ineq. at 137. See also Annot. 92 A.L.R. 3d at 1105-06; Note, 1979 Utah L. Rev. at 323, 328.

The more enlightened, rational approach is that neither parent has a superior right to name the child. See, e.g., In re Schiffman, 620 P.2d at 583; Cohee, 317 N.W.2d at 383; In re

Saxton, 309 N.W.2d at 300; Jacobs, 309 N.W.2d at 304. See also Note, 1979 Utah L. Rev. at 309-11, 15, 32-33. Although equal protection challenges on the paternal surname custom have been notably unsuccessful, MacDougall, 3 J.L. & Ineq. at 157, as a matter of policy (wholly apart from constitutional law) a gender-based rule of parental preference in determining surnames of children would provoke controversy not only in society, but would encourage litigation among hostile divorcing parents.

Ironically, it is the Appellant, Kathleen Hamby, who is urging the court to adopt a sex-based rule, or a thinly-disguised gender preference. Appellant's counsel contends for "the right of women to name their children." MacDougall, 3 J.L. & Ineq. 91. That would violate equal protection because it would constitute direct gender discrimination. Note, Utah L. Rev. at 315.

The Appellant's assertion that custodial parents should be given the right, or presumed right, to choose the surname of their children is a thinly-disguised attempt at gender discrimination. It is a well-known fact that approximately 90 percent of all children living with just one parent are living with their mothers. Bureau of Census, Current Population Report, Population Characteristics Services, P-20, No. 380, Marital Status and Living Arrangements, March, 1982, at 4 (1983). A legal preference for custodial mothers would smell just as much of sex discrimination as a legal presumption in favor of noncustodial fathers.

The enlightened approach followed by Judge Harding, who declined to adopt or apply a male or female favoring rule or

presumption, should be commended and endorsed by the Utah Supreme Court. Indeed, this court should say, as the Montana Supreme Court recently did: "The District Court's findings and conclusions state nothing to the effect that husband has any preference or natural right to have his [children] bear his surname. The child's best interests does not involve the equality of the sexes. The findings and conclusions stress the best interests of the child. Therefore we find the Appellant's argument without merit." Overton v. Overton, 674 P.2d 1089, 1091 (Mont. 1983).

C. This Court Should Not Substitute the Feminist Perspective for the Best Interests of the Child.

Kathleen Hamby and her counsel in this case have missed the crucial issue. The issue in this case is not as Appellant's counsel suggests, a matter of "The Right of Women to Name Their Children." MacDougall, 3 J.L. & Ineq. 91. As noted above, that "right" arguably violates the 14th Amendment of the United States Constitution, and the Utah Constitution, as a rule of blatant sex discrimination.

Determining the surname of children is not to be decided as a matter of the mere extension of the rights of the adult parents. The court is not merely an umpire awarding a prize to one of two competing adults. Children are not mere chattels to be possessed by custodial mothers or abandoned by disinterested, noncustodial fathers.

The record reveals a punitive motive on the part of Appellant, Kathleen Hamby. She testified: "Mr. Jacobson has put me in a position now to raise three children by myself, because

it's his choice not to be a husband that I can stay with. (R. 131, 32; Tr. 11, 12.) (Ironically, while she blames Mr. Jacobson for not being "a husband that I can stay with" it was Kathleen Jacobson who filed the suit for divorce, not Mr. Gail Jacobson.) She also expressed her opposition to Mr. Jacobson having any association with the children at all after the divorce. (R. 139, 140; Tr. 19, 20.) (But see Id. at 140, 141; Tr. 20, 21: "as the children get older, if they make the decision that they want their father's name, if he has been coming around and seeing them and being a father to them") She also blamed her husband for a physical injury which the oldest infant has. (R. 138; Tr. 8.) And she was very anxious to have the divorce entered immediately, without any waiting period ("I'm begging the court to make the divorce final today so that I can have this baby. I've suffered this pregnancy the whole time facing this divorce. . . ." R. 136; Tr. 16.)

The demeanor of Mrs. Jacobson when she appeared before the court at both hearings, is not captured by the record. But if her demeanor matched her words, she demonstrated substantial hostility toward the father of the children, her ex-husband. The name she wanted to give the two children of Mr. Jacobson was the surname of her former husband (against whom Mr. Jacobson compared during his marriage to the Appellant). It is also noteworthy that when she divorced her former husband, she did not insist upon changing the name of the child they had, whose custody was awarded to her. Since the surname by which a child should be

known after his parents divorce ought not to be resolved on the basis of spite, punishment, or animosity, the attitude and statements of the Appellant detract from the weight and credibility of her contention that the children should bear the surname of her former husband, "Hamby."

Most of the cases involving a conflict between parents over the surname of their children arise "after a child's parents divorce and his mother, the custodial parent, remarries." Note, 1979 Utah L. Rev. at 325. In this case, the controversy does not arise upon remarriage, when the children arguably have been integrated into a new family and another father-figure has replaced their natural father. The controversy arises because the custodial mother wants to terminate and cut-off all ties which the noncustodial father has with his children.

If the sole question were the best interests of Kathleen Hamby, she might arguably persuade the court that the children should bear her surname because she would be happier, avenged or so forth. But that is not the question the district court asked, nor is it the question that this Supreme Court should consider. Rather, the focus is on the best interests of the child. And that was the sole principle followed, and the controlling principle applied, by the district court below.

III. The District Court Did Not Abuse Its Discretion in Ordering the Children of These Divorcing Parents to Take the Surname "Jacobson."

A. The District Court Had Jurisdiction to Determine in a Divorce Proceeding the Surname by Which the Children of the Divorcing Parents Would be Known After the Divorce.

U.C.A. § 30-3-5 provides that the district court may enter

such orders in relation to the children . . . as may be equitable" at the time the district court entered the divorce decree. (At the time the District Court heard the subsequent cross petitions regarding change of name this statute had been amended, but this language remained unchanged. See also U.C.A. § 30-3-10 ("The court shall make such order for the future care and custody of the minor children as it may deem just and proper."). U.C.A. § 30-3-5 has been very liberally construed, and grants continuing jurisdiction to the court. See Karren v. State Dept. of Social Services, 716 P.2d 810 (Utah 1986); Dehm v. Dehm, 545 P.2d 525 (Utah 1976). Other courts, likewise, have held that it is proper for a court on divorce to retain jurisdiction to later resolve a dispute regarding the surnames of the children of the divorcing parties. Lassiter-Geers v. Reichenbach, 492 A.2d 303, 305 (Md. Ct. Spec. App. 1985).

The Appellant urges the court to hold that the lower court had jurisdiction to resolve the dispute regarding the names of the children. Respondent agrees that the district court had jurisdiction. The jurisdiction of the lower court has never been contested by anyone. There is no jurisdictional issue for the Supreme Court of Utah to decide.

B. The District Court Did Not Abuse Its Discretion in Entering Its Order in This Case.

Application of the best interests of the child standard in any case regarding the welfare of children is most appropriate for the trial court. As this court recently stated concerning application of the best interest of the child standard in custody disputes: "Assessments of the applicability and relative weight of the various factors in a particular case lie within the

discretion of the trial court. 'Only where trial court action is so flagrantly unjust as to constitute an abusive discretion should the Appellant forum interpose its own judgment.'

Hutchison, 649 P.2d at 41. See also Jorgenson v. Jorgenson, 599 P.2d 510, 12 (Utah 1979); Nilson v. Nilson, 652 P.2d 1323 (Utah 1982); Christensen v. Christensen, 528 P.2d 1297 (1981).

Likewise, the court has declared: "In reviewing child custody and support proceedings, we accord substantial deference to the trial court's findings and give it considerable latitude in fashioning appropriate relief. We will not disturb that court's acts unless the evidence clearly preponderates to the contrary where there has been an abusive discretion." Woodward v. Woodward, 709 P.2d 393 (Utah 1985). And this is the standard generally applied in other states when an appeal is brought from a decision resolving a dispute between parents regarding the surname of a child. See, e.g., Flowers, 237 S.E.2d 111, 113 (Va. 1977); In re Marriage of Presson, 451 N.E.2d 971, 72 (L. App. 1983) ("The standard applied in cases involving a minor child's change of surname is whether, considering the welfare of the child, the trial court abused its discretion in arriving at its decision.").

The issue arose below on cross petitions incidental to the divorce decree. Kathleen Jacobson failed to offer sufficient evidence to persuade the court that it would be in the best interests of her children that they should bear the surname of her prior husband, who was not the father of the children. Before Judge Harding, both counsels stipulated to proceed on proffers of evidence. (R. 102, 71, ; 2d Tr. 2).

The procedural approach followed by the lower court was excellent. At the time the divorce hearing came before Judge Bullock, the only remaining disagreement between the parties was what the children's surnames would be. Mrs. Jacobson was anxious to have the divorce become effective immediately, and Mr. Jacobson was willing to accede to that wish. The court entered its order granting the divorce but preserving the status quo regarding the names of the two minor children. That gave the parties an opportunity to work out their disagreement. If they could not, the court retained jurisdiction to resolve the issue after Mrs. Jacobson delivered her child. After the birth of the child, both parties filed petitions regarding the change of names. At the hearing, the parties stipulated to introduce proffers of evidence. The court then, without ruling, asked for briefs on the legal question. After those briefs were submitted and the court carefully considered them, the District Court entered its ruling applying the "best interests of the child" standard and specifying numerous significant factors which it took into account in this particular case. The court promptly entered its Order that the children should bear the surname "Jacobson."

The district court found that there was no dispute as to any material facts. In this court, there does not appear to be any dispute as to the facts either. Appellant Kathleen Hamby failed to introduce sufficient evidence to justify the unorthodox, disruptive and potentially punitive selection of surnames upon which she was insisting.

CONCLUSION

The district court applied the correct legal standard to resolve the controversy between two divorcing parents concerning the surname which their two infant children would take after the divorce by focusing on the best interests of the children. The district court properly rejected the appellant's contention that the custodial parent has the right or presumptive right unilaterally to choose the surname by which the two infant children fathered by the man she is divorcing shall be known after the divorce, over the objection of the father.

The district court properly rejected appellant's contention that the two infant children should bear the surname of one of her previous husbands, who was not the father of the children, even though appellant herself chose to be called by that surname after the divorce. The district court's determination that the children should bear the surname of their father, who desired the children to bear his surname, and who was awarded visitation rights, was correct inasmuch as the court properly determined that it would strengthen the relationship between the children and their noncustodial father, would not harm the relationship between the children and their custodial mother, and would not embarrass or humiliate the children to carry the surname of their father because of any alleged bad reputation, would not cause undue inconvenience to them, and would preserve their ties with at least one of their biological-genealogical families.

Therefore, Respondent Gail Jacobson respectfully requests the Utah Supreme Court to affirm the order of the district court to award Respondent costs, and attorneys fees.

Respectfully submitted this 17th day of July, 1986.

Lynn D. Wardle

Lynn D. Wardle
Co-counsel for Respondent

Richard M. Taylor

Richard M. Taylor
Co-counsel for Respondent

CERTIFICATE OF MAILING. I certify that I mailed four copies of the foregoing Respondent's Brief, U.S. postage prepaid, this 18 day of July, 1986, to counsel for Appellant: to Priscilla Ruth MacDougall, 346 Kent Lane, Madison, WI 53713 (2 copies), and to Mary C. Corporon and Kellie F. Williams, Corporon & Williams, 1100 Boston Building, Salt Lake City, UT 84111 (2 copies). Co-counsel for Respondent, Lynn D. Wardle, 1976 N. 85 W., Orem, UT 84057 also retained two copies.

Richard M. Taylor

ADDENDUM

1. Order of District Court, March 10, 1986, in Jacobson v.
Jacobson A1
2. Ruling of District Court, Feb. 21, 1986, in Jacobson v.
Jacobson A3
3. Transcript of Proceedings, Oct. 24, 1986, in Jacobson v.
Jacobson A5

1 RICHARD M. TAYLOR 3207
2 TAYLOR & TAYLOR
3 ATTORNEYS AT LAW
4 375 NORTH MAIN STREET
P. O. BOX 388
SPANISH FORK, UTAH 84660-0288
(801) 798-3574
Attorneys for Defendant

FILED
JUN 10 11:45:56

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6 IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
7 STATE OF UTAH
8 -----

8 KATHLEEN JACOBSON, :
9 AND THE STATE OF UTAH :
10 by and through Utah State :
11 Dept. of Social Services, :
12 Plaintiffs, :

11 vs. :

ORDER

12 GAIL JACOBSON, :

13 Defendant. :

Civil No. 67,957

14 -----
15 This matter came on for hearing October 24, 1985 before
16 the Honorable Ray M. Harding upon plaintiff's petition to change
17 the surname of Kevin Jacobson to Kevin Hamby and upon defendant's
18 petition to change the surname of Kelly Hamby to Kelly Jacobson.

19 The Court heard proffers of testimony from plaintiff and
20 defendant and counsel for the parties stipulated that the Court
21 may consider the petitions before it upon such proffers and upon
22 memoranda to be filed. The parties filed the memoranda and the
23 Court having considered the same it is therefore

24 ORDERED, ADJUDGED AND DECREED as follows:

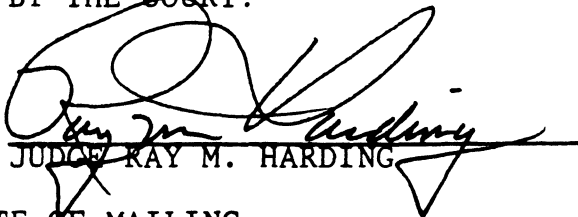
25 1. Kevin D. Jacobson born April 13, 1984 shal

1 continue to bear the surname of defendant Gail Jacobson.

2 2. Kelly Hamby born June 14, 1983 shall bear the
3 surname of Jacobson and shall be known as Kelly Jacobson.


4 DATED this 10th day of March, 1986.

5 BY THE COURT:

6
7 
8 JUDGE RAY M. HARDING

9 CERTIFICATE OF MAILING

10 I hereby certify I mailed a true and correct copy of
11 the foregoing to Mr. Donald E. Elkins, Attorney at Law, 60 East
12 100 South No. 200, Provo, UT 84601, postage prepaid on the 28th
13 day of February, 1986.

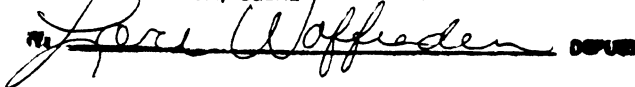
14
15 
16 Secretary

17 -2-

18
19 STATE OF UTAH | ss
20 COUNTY OF UTAH |
21 I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT
22 OF UTAH COUNTY, UTAH, DO HEREBY CERTIFY THAT THE
23 ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF
24 AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH
25 CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS

21 19 DAY OF March, 1986
22 WILLIAM P. HUISH, CLERK

23 
24
25

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

KATHLEEN JACOBSON,)	Case Number 67957
Plaintiffs,)	
vs.)	RULING
GAIL JACOBSON,)	
Defendant.)	

Having considered the memoranda and argument of the parties, and having taken the matter under advisement, the court hereby grants defendant's petition and denies plaintiff's petition. The court finds that it is in the best interest of the parties minor children, Kelly Lynn & Kevin D., to be known by the surname Jacobson.

The court bases this ruling on the following reasons:

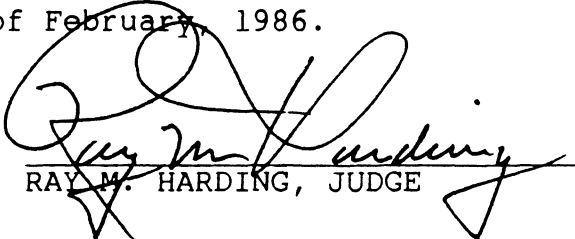
1) the father-child relationship will be strengthened by the children bearing the name Jacobson while not harming the mother-child relationship, 2) there is no embarrassment or inconvenience associated with an explanation of why their mother's surname is different since divorce is a common occurrence, 3) the children are too young to be accustomed to the surname Hamby, 4) Hamby is not the mother's maiden name, 5) there is no embarrassment because of defendant's alleged bad reputation, and 6) the children will always be identified with at least one natural parent by being known as Jacobson.

The court finds unpersuasive plaintiff's arguments that it would be beneficial for Kevin and Kelly to be known by Hamby as their mother and stepsister are. Were custody to change, Kevin and Kelly would be faced with the same situation plaintiff now seeks to avoid. Furthermore, were plaintiff to remarry Kevin and Kelly would again have a surname other than that of at least one of their custodial parents. Of paramount concern to the court is the fact that Kevin and Kelly should both bear the same name to avoid any implications of illegitimacy which might arise if asked why brothers of the same natural father have different last names.

Finally, the court notes that the law provides that the children may petition for a name change if they so desire when they are old enough to make an intelligent decision.

Defendant's counsel to prepare an appropriate order.

DATED this 21st day of February, 1986.


RAY M. HARDING, JUDGE

cc: Richard M. Taylor
Donald E. Elkins

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

--ooOoo--

KATHLEEN JACOBSON, Ø

Plaintiff,

Civil No. 67,957

-vs-

Ø

TRANSCRIPT OF

GAIL JACOBSON,

PROCEEDINGS

Defendant. Ø

--ooOoo--

ORIGINAL

October 24, 1985

UTAH COUNTY COURTHOUSE
Provo, Utah

BEFORE:

THE HONORABLE RAY M. HARDING, JUDGE.

APPEARANCES:

For the Plaintiff: DONALD E. ELKINS, ESQ.
60 East 100 South, Suite #200
Provo, Utah 84601

For the Defendant: RICHARD M. TAYLOR, ESQ.
TAYLOR & TAYLOR
275 North Main Street
P.O. Box 288
Spanish Fork, Utah 84660

--ooOoo--

WHEREUPON, the following proceedings were had:

A5

A5

1 P R O C E E D I N G S

2
3 THE COURT: Good morning, ladies and
4 gentlemen. This is the time set for the hearing in the
5 case of Jacobson v. Jacobson, Civil No. 67,957.

6 The matter is before the Court on the plaintiff's
7 petition. The record may reflect that the Court has
8 conferred briefly with counsel in chambers prior to this
9 proceeding and the Court feels the best way to proceed
10 this morning would be by way of proffered statements of
11 factual evidence which, I believe, is essentially
12 undisputed and that the principal issue is a matter of
13 law that will require briefs by counsel to be submitted
14 and the Court make its determination based on those briefs.

15 Mr. Elkins?

16 MR. ELKINS: Your Honor if the plaintiff,
17 my client Mrs. Kathy Hamby, were to testify this morning
18 she would testify the following facts: That Hamby,
19 the name she goes by now, is the name from a prior
20 marriage; that she has one older child who goes by that
21 name Hamby.

22 THE COURT: What is the age of the child?

23 MR. ELKINS: Kathy, how old is your oldest
24 child?

25 THE PLAINTIFF: Eleven.

1 the records of the State of Utah. She would testify that
2 both those things were done; that in fact the middle
3 child still maintains the name of Hamby, while the third
4 child when it was born did have the name of Jacobson
5 affixed to the birth certificate and that still remains
6 so on the records of the State of Utah. She would further
7 testify that she feels as a custodial parent it's her
8 right to have the name of the children be as she desires
9 so that at least all her family would have the same name.
10 That will be one of the issues that we will be speaking
11 about in the briefs submitted. She would further testify
12 that she feels that Mr. Jacobson, due to prior action on
13 his part, is unfit to have his name attached to the child
14 and that were it attached to the younger child or the
15 second child that it might create problems for them which
16 would not be in their best interests, and that she would
17 finally testify that she thinks that having all of her
18 children bear the same name as she would be in their best
19 interests and that that is what she would request of the
20 Court.

21 THE COURT: Very well then, Mr. Taylor?

22 MR. TAYLOR: Briefly, Your Honor, our
23 facts will essentially be the same as stated by Mr. Elkins
24 with the exception that the child -- I think the child is
25 about four years old, isn't it?

1 MR. ELKINS: He is eleven years old,
2 Your Honor.

3 She would further testify that she conceived
4 another child with Mr. Jacobson, the defendant in this
5 matter, prior to the time of their marriage; that when
6 that child was born the name Hamby was given to him on
7 his birth certificate. Since that time he's been known
8 by the name of Hamby. She would testify that some time
9 after her marriage to Mr. Jacobson they did enter into
10 an agreement to change the second child's name from Hamby
11 to Jacobson, but that as far as I can ascertain that was
12 never followed through with on the records of the State
13 of Utah as far as an actual change being made in the birth
14 certificate. She would further testify that during the
15 time of her marriage to Mr. Jacobson another child was
16 conceived and that she brought a complaint for divorce
17 against Mr. Jacobson prior to the birth of that last child;
18 that she was granted a divorce in a hearing before Judge
19 Bullock in this Court; that as part of the divorce decree
20 the parties were told that the second child by the name
21 of Hamby, who is the natural child of Mr. Jacobson, was
22 instructed to maintain the name of Hamby, at least on a
23 temporary basis, and that the new child that was to be
24 born after the granting of the divorce was to have the
25 name of Jacobson affixed to his or her birth certificate on

1 (Discussion off the record.)

2 The child is three years old, the oldest child.

3 THE COURT: Two.

4 MR. TAYLOR: Only two. Then we have an
5 infant. There are those two. The two year old did use
6 the name and was known by the name of Jacobson during the
7 time the parties lived together as a married couple.

8 THE PLAINTIFF: That is not true.

9 MR. TAYLOR: That is our answer.

10 THE COURT: Well --

11 MR. TAYLOR: We also, of course, would
12 dispute the legal conclusions as have been stated here
13 and we would also have evidence that the defendant, while
14 he wouldn't qualify for sainthood, nevertheless, his
15 conduct is not such as would in any way be so unreasonable
16 or outlandish that would require the Court in the interest
17 of the children to take his name from them. Even if it
18 were, even if his behavior were negative in some respects,
19 likewise the applicant's character and behavior is
20 negative. We won't want to get into that. I think the
21 Court indicated that would not be an issue. So we would
22 submit it on that statement of our proffer that if he
23 were called to make evidence that is what our evidence
24 would be.

25 THE COURT: All right. Very well. I

1 don't feel there is any material dispute as to the issues
2 of fact in this case. However, as I indicated to counsel
3 in chambers, it is a case in which I need your assistance
4 in the law. I feel it is a legal issue and I would
5 appreciate, Mr. Elkins, since it's your petition that you
6 file a memorandum. I don't want to restrict you in the
7 number of pages, Mr. Elkins, but I don't want a two hundred
8 page brief. If you could limit it to ten or fifteen pages.
9 I would allow you over the five pages prescribed by the
10 rules.

11 How long do you need to complete that memorandum?

12 MR. ELKINS: Your Honor, I think I can
13 have that prepared within fifteen days if that would be
14 appropriate.

15 THE COURT: All right. Let's have that
16 submitted to the Court within fifteen days and a copy to
17 Mr. Taylor.

18 Mr. Taylor, how long would you like to have to
19 respond?

20 MR. TAYLOR: I would like at least fifteen
21 days and also if the Court will allow me that fifteen days
22 I would like approval from the Court now that in the event
23 that I need the extra time I can, by stipulation, obtain
24 it from Mr. Elkins without asking.

25 MR. ELKINS: We have no objection to that.

A.C.

1 We would like to have the matter fully presented to the
2 Court.

3 THE COURT: All right. Fifteen days then
4 in which the defendant will have then to respond. If
5 you need additional time you may have it upon stipulation
6 of Mr. Elkins.

7 MR. TAYLOR: I have several major matters
8 in Federal Court that are coming up soon. I am a little
9 concerned about my time.

10 THE COURT: All right. That will be fine
11 then. That will be the order, gentlemen.

12 MR. ELKINS: Thank you.

13 THE COURT: Likewise, Mr. Taylor, I will
14 not limit you in your length of response, although I would
15 like not over, say, ten or fifteen pages. Let's keep it
16 within reasonable bounds.

17 Thank you.

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1
2 REPORTER'S CERTIFICATE
3

4 This is to certify that I, STANLEY C. ROUNDY, am
5 an Official Court Reporter in the State of Utah; that I
6 was present during the proceedings in the before-entitled
7 cause; that thereat I reported in shorthand the proceedings
8 and testimony given; that thereafter I dictated my notes
9 so taken to a typist working under my direction who then
10 transcribed the same into typewriting; that said transcript
11 is set forth in the foregoing pages, numbered from 2 to 7,
12 inclusive, and consitutes to the best of my ability a true
13 record of the proceedings had.

14 Dated this 16 day of June, 1986.

15
16 
17 _____
18 Official Court Reporter
19
20
21
22
23
24
25

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