

1988

Kathleen Hamby and the Utah Department of Social Services v. Gail Jacobson : Reply Brief

Utah Supreme Court

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BRIEF

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CKET NO. 880026-CA Supreme Court

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. 67,957.

Reply Brief and Addendum of Appellant

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Clerk, Supreme Court, Utah

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Introduction and Summary of Argument

Introduction

This case should be viewed honestly for what it is: an attempt by a noncustodial father who has not visited one child since the Appellant, Kathleen Hamby, left him in October, 1984, and who may not have even ever seen the other child, born in April, 1985, to impose his surname on the two children he sired with Ms. Hamby to whom he was briefly married.

The man, Gail Jacobson, is usually unemployed, has a drinking problem and is known for fighting. He physically abused the one child during the 10-11 months Ms. Hamby lived with him in marriage. He gave no testimony whatsoever, let alone testimony to the effect that his interest in having the children bear his name, rather than their mother's, was their interests, let alone their "best" interests. His counsel only "proffered" the following as his rationale for insisting that his offspring bear his last name:

"We also, of course, would dispute the legal conclusions as have been stated here and we would also have evidence that the defendant, while he wouldn't qualify for sainthood, nevertheless, 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. Even if it were, even if his behavior were negative in some respects, likewise the applicant's character and behavior is negative. We won't want to get into that. I think the Court indicated that would not be an issue. So we would submit it on that statement of our proffer that if he were called to make evidence that is what our evidence would be." (Respondent's Brief at A-9)(emphasis added).

Furthermore, far from accepting a neutral and equal burden of proof for both parties with respect to the children's "best interests," the trial court put the burden on Ms. Hamby to demonstrate why the children should not bear the paternal name. Mr. Jacobson's counsel argued the father's right to name marital children to the trial court and at the end of his Brief, the Respondent summarized the burden with which he would saddle Ms. Hamby to overcome the traditional finding for the patronymic:

"Appellant Kathleen Hamby failed to introduce sufficient evidence to justify the unorthodox, disruptive and potentially punitive selection of surnames [sic] upon which she was insisting."
Respondent's Brief at p.44.

Even under the traditional standards/factors developed by the courts in the past to prevent older children who were originally given their fathers' surnames, which their mothers also used, to assume stepfathers' names over the objection of their natural fathers, no trial court in the country in the 1980s should have awarded the right of naming the children to such a parent so that an appeal to a higher court would be necessary. The abuse of the trial court in this case is simply reprehensible. Yet, the instant situation is typical of cases occurring in trial courts across the nation as the law recognizes that men can no longer enjoy a superior right to name (marital) children. The Court is again referred to three articles and the cases and legal commentary cited in the same. MacDougall, "The Right of Women To Name Their Children," 3 Journal of Law and Inequality 91(1985); Foggan, "Parents' Selection of Children's Surnames," 51 Geo. Wash. L. Rev. 583 (1983), and Comment, "No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes the Paternal From the Parental Right To Name a Child," 58 N.D.L. Rev. 793(1982).

The purpose of this Reply is to respond to the numerous inaccuracies and distortions of the issues in and facts of the instant case, and the misconstructions and misusages of the law and legal commentary presented by the Respondent's venomous brief against Ms. Hamby, to discuss the custodial parent presumption in view of the Respondent's objection to and misunderstanding of it, and to inform the Supreme Court of Utah of recent cases involving the naming of infant or very young children.

The arguments of Ms. Hamby on behalf of herself and her children are discussed in her Initial Brief, are mostly not responded to by the Respondent, and are not reiterated herein except in response to some of the contentions in the Respondent's Brief.

Summary of Argument

Preliminarily, instead of moving the Supreme Court for an Order to strike all the references to Ms. Hamby's character and presumed motives and actions proffered by the Respondent's counsel throughout his Brief which are not supported by evidence of record, Ms. Hamby is requesting that the Supreme Court disregard the same in considering the appeal before it. These and other inexcusable errors made in Respondent's Brief respecting the issues and facts in the case will be pointed out in this Reply.

Also preliminarily, although the transcript of court proceedings on October 24, 1985 should certainly be in the record of this case (as has been stipulated by the parties), testimony that has only been "proffered" through lawyers as conclusive without the benefit of clarifying questioning and the right of cross examination should not be accepted by any court of law as actual evidence. The Appellant asks the Supreme Court to disregard such unheard of "proffer" of evidence as actual evidence. The transcript is included in the Respondent's Brief, A-5--A-11.

Second, it should be noted that the parties are in agreement as to two issues:

1. The parties agree that the trial court had jurisdiction to determine the dispute between the custodial and noncustodial parents over the infants' names in this case pursuant to its continuing jurisdiction over the care, custody and control of children provided by Title 30, Chapter 3 of the Utah Code.

Except to point out that the Respondent is incorrect in stating on page 42 of his brief that "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;" this point will not be pursued further. The Supreme Court is referred to pages 29-32 of the Appellant's Initial Brief and "The Right of Women To Name Their Children," pages 133-136. To guide the trial courts of Utah in future cases, the Court is respectfully requested to articulate the authority of Utah's lower

courts to entertain similar cases in the future.

2. The parties are also in agreement that the legal standard for resolving a dispute between parents over their children's names is the "best interests of the child."

Respondent states as an issue whether the trial court committed reversible error in "applying" the "best interests of the child" standard and "rejecting" Appellant's claim of a unilateral right to name the children involved. This is not a correct statement of the issue.

Counsel for the Respondent either misunderstands or intentionally misconstrues the Appellant's position in this regard and the custodial parent presumption as set forth by Justice Mosk in In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980) as a means for applying the "best interests" standard. A presumption that the custodial parent acts in a child's best interests in determining what name a child should use, as well as in all other aspects of childrearing, is a sex-neutral means by which the standard of the "best interests of the child" can be judicially applied.

Third, in addition to ignoring the trend of the nation's courts in naming disputes to rule in favor of the custodial parent's choice of name in cases involving infant or very young children, the Respondent ignores the distinction between disputes between parents over the naming of infant/very young children and those between parents over the renaming of older children who were originally given the patronymic which both parents used with the children in a family unit for a substantial period of time.

This distinction between determining a child's name at birth, or when a child is an infant or very young, and changing it after the child has borne the name for several years, is all important. The standards and factors which were developed by courts and discussed by legal commentators before the 1980s as a means to keep older children from adopting the surnames of stepfathers over their natural fathers' wishes, -either

pursuant to an alleged "best interests" standard or in open deference to a divorced father's "right" to have his offspring continue to bear his surname--are simply not applicable to situations involving the initial/infancy naming of children. Respondent's use of caselaw involving older children is misplaced and misleading.

Further, the Respondent's contention that Ms. Hamby should be saddled with the burden of demonstrating why the children should not bear the paternal surname derives from the aforementioned caselaw which was developed to prevent older children's changes of name.

Fourth, a disturbing contention of the Respondent is that children should not use their mother's surname as a matter of policy if the mother's name was acquired during a prior marriage.

Even if Utah's Legislature were to adopt such a policy, it would be in direct conflict with the common law and the Constitution of the United States. See Doe v. Dunning, 87 Wash. 2d 50, 549 P. 2d 1(1976); Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979); O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981); Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 366 N.E. 2d 717(1977); Initial Brief, pages 21-28. Utah follows the common/constitutional law in this regard. The current Guidelines for Reporting Name of Father and Surname of Child on the Birth Certificate (revised October 5, 1981) state simply that "The surname to be given the child should be determined by the parents...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...and give the child a surname different than the father's."

Argument

I. Under any standard, the facts of this case do not support a finding that the children's best interests will be served by their bearing their father's, rather than their mother's, surname.

As set forth in the Introduction, the Respondent Gail Jacobson has not set foot in court in this matter: he(andhis counsel) has given absolutely no testimony about why the children in Ms. Hamby's custody should bear his, rather than their mother's, surname. His counsel argued to the trial court that as the biological father of the children involved, Mr. Jacobson has "a common law right to have the child bear his name if he's going to be ordered to support and determined to be the father of the child." R. 131. See also R. 147-148. At a subsequent proceeding on October 24, 1985, his counsel "proffered" the testimony set forth, supra.

The Rēspōndent is a man who is usually unemployed, who has a drinking problem and reputation for fighting, who has been in arrears in his child support obligations in the past and who physically abused and caused injury to one of the children during the brief time he lived with Ms. Hamby in marriage. At the time of the evidentiary hearing in March, 1985, Mr. Jacobson had not even visited the child since Ms. Hamby left five months prior thereto (R. 140, Reply Brief, A-140). There is no evidence that Mr. Jacobson has even ever seen, let alone visited with or cared for, the child born subsequent to the hearing in March, 1985! At the October 24, 1985 proceeding, several months later, his counsel did not even "proffer" that he has.

The Respondent repeatedly claims that Ms. Hamby and Mr. Jacobson agreed to name the children with the name Jacobson (see, e.g. Respondent's Brief at pages 9, 28 and 37). Ms. Hamby's live testimony does not at all, however, support that contention. Indeed, although such an agreement during the marriage would have no bearing on a determination of the child's best interests months later, Ms. Hamby was in court two days before delivering her last child testifying that she considered it in the children's best interests to bear the same name as the rest of her family unit, Hamby,

and not Jacobson. At the evidentiary hearing Ms. Hamby testified about agreeing to send paternity papers into the State (R. 128, 132; Reply Brief, A-9 and A-13) in order to put Mr. Jacobson's name on the child's birth certificate as the father (R. 132; Reply Brief, A-13). She testified about writing to the State about the name and being told she did not have to change the child's birth certificate name in order for him to benefit from any Social Security benefits from Mr. Jacobson in the event of death. R. 137-138; Reply Brief, A-18-19).

Respondent's attempt to create an agreement such as present in a clause of a ~~court approved~~ separation agreement at issue in Gershowitz v. Gershowitz, 491 N.Y.S. 2d 356 (1985) (Respondent's Brief at p. 37), is a distortion of the facts.

Even in yesteryear when courts always found a way to find for the patronymic as being in the child's "best interests" or as a "right" of the father, under the facts of this case it is unlikely that Mr. Jacobson could have prevailed in imposing his name on the children he sired with Ms. Hamby. This case should not have reached the appellate level; any fair minded trial court should have seen the horror of the situation and approved the mother's judgment instead of causing her to appeal to a higher court.

Or so the Appellant would hope. The traditional cases of yesteryear, and those which follow them, which legal commentators are united in criticizing as having made it virtually impossible for divorced/remarried women to change their children's names over the objection of their ex-husbands, seldom involved infant children. This discriminatory caselaw involving older children, which Respondent cites throughout his brief in support of his position that the children should bear his, rather than their mother's name,² developed in factual contexts not relevant to naming children at birth or when they are very young. See Initial Brief at page 26.

² E.g., Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277(1975); In re Spatz, 258 N.W. 2d 814(Neb.1977); In re Tubbs, 620 P. 2d 384 (Ok1. 1980).

A. Respondent ignores the fact that the trial court did not support his conclusions with evidentiary findings.

Just stating that something is so does not magically make everything right in the world. The trial court stated factual conclusions, but no facts upon which they were based. The conclusions are not supported by the evidence in the case; indeed, they are contrary to it.

Significantly, the trial court made no finding that Mr. Jacobson has/had expressed any interest in the children or, indeed, even seen the child born in April, 1985. The trial court's findings were oriented only towards perpetuating the patronymic as a general principle.

To argue that the trial court made genuine findings of fact borders on the ludicrous.

B. The "proffer" of evidence by the parties' lawyers on behalf of their clients cannot be considered as record evidence.

The transcript of the proceedings last October, 1985 has been admitted into the record by stipulation since the filing of the Initial Brief. In it the lawyers' "proffers" of what their clients would testify to if they actually testified are transcribed.

Surely, such "proffers" of evidence are not acceptable as actual evidence in Utah courts. Appellant knows of no procedural or evidentiary authority in Utah or elsewhere that provides that "proffers" of evidence by lawyers on behalf of clients without the benefit of clarifying questioning or the right of cross examination be admitted into evidence. The Rules of Practice in the District Courts and Circuit Courts of the State of Utah and the Fourth Judicial District Court Administrative Orders Effecting Procedures and Practice contain none.

If there is authority for such a practice in Utah, the Supreme Court is respectfully asked to articulate it for the benefit of trial court practice in Utah.

Ms. Hamby's actual testimony respecting any alleged agreement over the naming of the children conflicts with her counsel's "proffered" evidence. The "proffered evidence" should be disregarded.

C. All the Respondent's derogatory references to Ms. Hamby's character, actions and motives, which are not supported by the record in this case, should be disregarded by the Utah Supreme Court.

Throughout its brief the Respondent makes derogatory and misleading statements about Kathleen Hamby's character, motives, actions and testimony which are not part of the record and which should be disregarded by the Supreme Court.

Ms. Hamby is asking the Supreme Court to disregard the same rather than taking the Court's time to consider a Motion to Strike Matter Not Included in the Record.

One page 13 of his brief, the Respondent refers to counsel's "proffer" of evidence that "Kathleen's character and behavior was [sic] negative also" as if it were fact and evidence of record. This should be disregarded

One page 36 of his brief, the Respondent states:

"...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.'"

Ms. Hamby herself brought up that she would never stand in the way of her children changing their names when they are older. R. 140-141; Reply, A-21-22. Respondent's parenthetical comment is contrary to the actual testimony of Ms. Hamby and impugns her integrity without basis. Perhaps it is projection.

On page 39 of his brief, Respondent states that "the record reveals a punitive motive on the part of Appellant, Kathleen Hamby " because she testified that Mr. Jacobson [by his not working, his drunkenness, his violence, etc.] "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." This accusation of motive should not be accepted.

One page 40 of his brief the Respondent refers to Ms. Hamby as "blaming Mr. Jacobson for physical injury to her middle child." The evidence is uncontraverted that Mr. Jacobson caused physical injury to the

child. Mr. Jacobson's lawyer did not even try to "proffer" evidence that he did not.

On page 40 Respondent also states in parenthesis that Ms. Hamby compared Mr. Jacobson to her former husband ("against whom Mr. Jacobson compared during his marriage to the Appellant").

There is nothing remotely in the record of this case relating to whether Ms. Hamby compared Mr. Jacobson to her prior husband any more than there is evidence respecting Mr. Jacobson's comparing Ms. Hamby to his former wife. Such evidence would be irrelevant anyway.

These statements on page 40 of Respondent's brief should be disregarded.

The Respondent further states on page 40 that:

"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."

There is no evidence in the record as to the circumstances of Ms. Hamby's first marriage and her reasons for not changing her name after her divorce several years ago. As divorce and remarriage become common in the United States more and more women are not changing their surnames every time they undergo a change in marital status any more than men do not. In her Initial Brief Appellant cites caselaw involving the right of women to not change their names following divorce and remmariage. Many women retain names acquired during prior marriages even when they remarry. Pearl Buck and Ellen Goodman are but two examples. Respondent's statement has no relevance and should be disregarded.

And, on pages 40-41 Respondent states:

"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.'

Such a mischaracterization of Ms. Hamby's testimony is unconscionable and should be disregarded. Further, the insulting characterization here and elsewhere in his brief of Ms. Hamby's name as her former husband's and

not hers, particulatly in light of Ms. Hamby's affidavit to the Supreme Court respecting her name, is a low blow which should be seen for what it is and disregarded.

As if the foregoing assaults on Ms. Hamby's character were not enough, Respondent claims on page 41 that:

"the controversy arises because the custodial mother wants to terminate and cut-off all ties which the noncustodial father has with his children."

From the evidence of record it does not appear that Mr. Jacobson has any ties except a few dollars a month of child support. Respondent's mischaracterization of Ms. Hamby's intention should be disregarded. See, e.g., R. 140; Reply, A-21.

Adding insult to injury Respondent states on page 41:

"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."

This statement should be disregarded.

On page 34 Respondent claims:

"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."

This statement, in view of Ms. Hamby's Affidavit in Support of Motion For Change of Title of Action, referred to by Respondent in his brief, is simply unconscionable. Ms. Hamby has born her surname for at least twelve years (her oldest child was eleven at the time of the October, 1985 proceeding) minus the 10-11 months she lived with Mr. Jacobson. In her Affidavit (reproduced in the Addendum to this Reply) she states that "I consider it [Hamby] my name and I never intend to use any surname than Hamby for the duration of my natural life." Reply, A-53-54.

II. Respondent misunderstands, or misconstrues, the custodial parent presumption as set forth in the concurring opinion of Justice Stanley Mosk in In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980). The presumption provides a sex-neutral means by which courts can apply the standard of the "best interests of the child."

Respondent does not appear to understand the presumption as articulated by the nationally distinguished Justice Mosk. Respondent writes:

"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." at p. 22.

Respondent first claims that the presumption differs from the best interests standard. Second, he claims that the presumption is a "thinly disguised attempt at gender discrimination" because 90% of all (presumably both marital and nonmarital) children live with their mothers in single parent situations. (p. 38). Third, he claims that the presumption "is a legislative, not a judicial, policy-decision responsibility" (page 23). Fourth, with reference to three states which have legislation to prevent changes of children's names over the objections of the non-custodial parent (Indiana, Louisiana and Virginia), he favors such legislation over a custodial presumption "as an incentive to make non-custodial parents [i.e. fathers] to support and maintain contact with their children." (p.24). Fifth, he claims that the custodial parent presumption would create "a significant obstacle" to parents reaching voluntary custody agreements. (p. 24).

Respondent's concerns are misplaced. First, the presumption is not different from a best interests standard, but is a means to assure the same consistent with traditional black letter family law principles that the custodial parent, entrusted with the care, custody and control of children, acts in children's best interests in all areas of childrearing, including the naming of children.

In the landmark case of In re Schiffman, the California Supreme Court became the forerunner in this area of the law in expressly overruling all its precedent recognizing the primary right of men to name marital

children, caselaw which had developed in the familiar context of children who were originally given the paternal name, and adopted the "best interests" standards for resolving disputes over children's names. Justice Mosk concurred in this opinion and, in an opinion of high scholarship which has been received favorably by law review commentary and highly respected, if not expressly adopted by courts, set forth a means by to apply the best interests standard:

"Thus it would seem that a parent deemed fit to have custody ordinarily should be deemed fit to select a name that accords with the child's best interest...The abrogation of the father's 'primary right' to have the child bear his surname in California-as provided in the majority opinion-requires that a genuine 'best interest' standard be implemented. A rebuttable presumption in favor of the custodial parent's choice of name-when custody is in the mother-would accord due weight to the following factors which heretofore have often been subordinated to the father's interest at the possible expense of the child's welfare: 1) embarrassment to the child when he bears a surname different from that of the parent with whom he resides; 2) identification of the child as part of the current family unit, 3) support of the mother-child relationship in cases in which the custodial mother uses her birth or previous surname." (emphasis added).

Second, Respondent evidences little knowledge of the principles of gender discrimination in claiming that the custodial parent presumption would constitute such. The mere fact that a facially sex-neutral provision will affect more members of one sex than the other does not constitute gender discrimination. Personnel Administrator v. Feeney, 442 U.S. 256 (1979). Men can and do seek and win custody. The Utah Legislature abolished the "tender years doctrine" which favored women in obtaining custody in 1977. See Initial Brief at p. 33.

In Polikoff, "Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations," 7 Women's Rights Law Reporter 235, 236 (1982) the 90% statistic cited by Respondent is explained:

"The frequently cited statistic that 90% of all children of divorce are in the custody of their mothers is not evidence of unfairness within the legal system toward men. In the vast majority of cases, the fathers do not want custody and the children remain with the mother by parental choice. When fathers do want custody, their chances of winning are substantial. While little hard-core data exist, the statistics that have been gathered do not support the claims of the 'fathers' rights' movement. Lenore J. Weitzman and Ruth B. Dixon

found in a study limited to Los Angeles County that in 1977, 63 % of all fathers who requested custody in court papers were successful. A study of 196 Minneapolis cases showed fathers winning 45% of the time.. One New York family court judge awarded custody to men as often as to women during a five-year period in the 1970s. Two researchers who surveyed North Carolina judges in 1979 found that fathers prevailed in almost one-half of the cases. The Legal Aid Society of Alameda County, California, reports that of thirteen contested custody trials in 1979, fathers prevailed 38% of the time. Furthermore, reports from attorneys and analysis of written court opinions reveal that the fathers who are winning have not been exceptionally involved in childrearing prior to divorce." (footnotes omitted)

Years ago, before the demise of the tender years presumption, the argument that the custodial parent presumption would constitute gender discrimination might have had validity. It no longer does. Further, the presumption is being advocated herein for determining the names of infant or very young children, children who have not grown up with their fathers' names.

Third, Respondent misleadingly cites "The Right of Women To Name Their Children" among other things, to support its contention that the adoption of the presumption is a legislative function and not for the courts.

At the October 24, 1985 proceeding the trial judge stated on the record to the parties "as I indicated to counsel in chambers, it is a case in which I need your assistance." Respondent's Brief at A-10.

Trial courts across the nation need the same help. It is a physical impossibility for all children's names cases to be well litigated. As is the case with many legal reforms, improvements in the law in the naming of children can be effectuated by several means, including judicial, legislative and administrative action and/or a combination of the same. In Utah, for example, the Department of Health has proposed new regulations which will provide for the custodial parent to name newborns in cases of parental disagreement. The proposal is reproduced in the Addendum of this Reply at A-35-37.

Fourth, Respondent's favorable reference to name change statutes, although not unexpected, contrary to the custodial parent

presumption as a 1980s means for resolving disputes over infant children, are a condonation of blatant, intentional gender discrimination. The Indiana statute, for example, was enacted to protect the changing of older children's names. See Senate Bill No. 81 and letter respecting the bill from Appellant's counsel to Lesley DuVall, Chair, Senate Judiciary Committee, State of Indiana, March 5, 1979. Several years down the line, after initial naming rights are sex-neutral, such statutes will be less objectionable. As they are today, they provide veto power to divorced husbands over the changing of children's names following divorce irrespective of the children's best interests. Noncustodial parents in all other aspects of childrearing are not presumed to act in their children's best interests over the custodial parents. Custodial parents are specifically entrusted with the responsibility of so acting as the parents better fit to make childrearing decisions.

Fifth, Respondent's claim that adoption of the presumption will serve as an obstacle to voluntary custody agreements is puzzling. The presumption will discourage litigation over children's names perhaps, and hopefully eliminate children's names as a negotiable item to be used in exchange for greater child support. If the presumption will cause men who should seek custody to do so, then it will serve an added function. Is Respondent suggesting that men who wish to brand their children but not to really assume day to day custodial care of them will file fraudulent custody actions to strong arm custodial mothers into giving up the names issue if the presumption is adopted?

It is submitted that Respondent avoids stating his real opposition to the custodial parent presumption: the fear that it will--as it should--wipe out the heretofore rarely challenged male right to control the naming of marital children. Under the guise of a "best interests" standard or with express deference to the male "right" to control the naming of marital children, men have assumed the right to name their marital

children as long as they maintain some minimal contact with them.

III. Respondent ignores the trend of the nation's courts, agencies and legislatures to approve the custodial parent's choice of name in cases involving the naming of children at birth or when they are very young, and erroneously uses caselaw developed to prevent the changing of names of older children (who were originally given their fathers' names and who lived with both parents for a substantial period of time), to support a requirement that the infant children in this case bear the paternal name.

Respondent ignores almost all the recent caselaw over the naming of infant marital and nonmarital children. Since 1979, except in a few cases,³ pursuant to a variety of theories, courts have found for the custodial mother in disputes over naming infant children. See, Aiken County Family Agency and Charlene DeVonne Evelyn Hoglund v. Frank Lee Girard, No. C7-86-283, Minnesota Court of Appeals (July 23, 1986) (reproduced in the Addendum to this Reply at A-44-A-52); Bell v. Bell, ___ A.D. 2d ___ (N.Y. 1986); Blasi v. Blasi, 648 S.W. 2d 80 (Ky. 1983); Hurta v. Hurta, 25 Wash. App. 95, 605 P. 2d 1278 (1979); Jacobs v. Jacobs, 309 N.W. 2d 303 (Minn. 1981); G.L.A. v. T.B.S., 430 N.E. 2d 433 (Ind. App. 1982); In re M.L.P., 621 P. 2d 430 (Tex. Civ. App. 1981); In re Nguyen, 684 P. 2d 258 (Colo. App. 1983), cert. denied, 105 S. Ct. 785 (1985); In re Goldstein, 104 A.D. 2d 616, 479 N.Y.S. 2d 385 (1984); Rosell by Yacono, 196 N.J. Super. 109 (1984); In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980); In re Schidlmeier, 496 A. 2d 1249 (Pa. Super. 1985) (Appeal denied, January 21, 1986). See also, State v. Teden, 101 Misc. 2d 485, 421 N.Y.S. 2d 297 (Sup. Ct. 1979).

And in Cohee v. Cohee, 210 Neb. 855, 317 N.W. 2d 381 (1982) the Nebraska Supreme Court attempted to provide a compromise in a dispute involving the interpretation of that state's name selection statute, by imposing a hyphenated name on a newborn.

³ Lassiter-Geers v. Reichenbach, 492 A. 303 (Md. Ct. Spec. App. (1985), cert. denied, ___ U.S. ___ (1985)

This body of law is, however, in striking contrast to the caselaw involving the changes of older children's names.

In a recent case, Aiken County v. Girard, supra, the Minnesota Court of Appeals interpreted the case of In re Saxton, 309 N.W. 2d 298 (Minn. 1981), cert. denied, 455 U.S. 1034(1982) in a case involving two (nonmarital) children, ages four and five whose father had, the parties agreed,"established a positive and loving relationship with the children." The Court adopted a degree of the custodial parent presumption in deciding for the custodial mother:

"absent evidence that the change will be detrimental to the preservation of the children's relationship with their father, we see no reason to put aside the preference expressed by their custodial parent, the children's mother. It is in the best interest of such young children to provide them with stability and continuity...The preservation of the family unit as they have always known it, including having the same name as their custodial parent, is an element of that continuity. Appellant has been and continues to be primarily responsible for the welfare of the children. Under these circumstances, the evidence does not show that the substantial welfare of the children necessitates a change of name." Reply at A-6-7.

In Cohee v. Cohee, supra, the Nebraska Supreme Court accepted custody as a factor to be considered.

And in Application of Rossell by Yacono, supra, the Superior Court of New Jersey wrote, in awarding the right of a divorced custodial mother to change the surname of her young son from the paternal to her birth given surname, in a case similar to the instant one:

"The emergence of women as equals of men in our society may be our most significant revolution. The acceptance of that emergence is grudgingly slow: it is an acceptance which the courts must not impede...The child is less than two years old. He has lived with his mother almost exclusively since birth. He is too young to have achieved any significant identification with his last name. His father's interest in his welfare has been so modest as to be nonexistent. His father's behavior while married to his mother exhibited little regard for the loving and considerate treatment which children have a right to expect from their father and he has provided no proof that his behavior has changed. Under the circumstances, Joseph Michael Thomas Rossell will be better served in this life if he carries his mother's name." at 115-116.

Under traditional caselaw--that developed to prevent older children's names from being changed over the objection of their fathers--the mother had to rebut the virtually irrebuttable presumption that the children's names should not be changed from the patronymic. If the mother claimed that the children would be embarrassed by continuing to bear the paternal name it was her responsibility--with an impossible burden of proof--to show exceptional circumstances. On page 34 of his brief Respondent states "In this case there was no evidence of any exceptional circumstances" following his citation of cases involving older children who had originally been given their fathers' names and lived with both parents under the same name as a family unit.

The application of these old standards, including the burden of proof they impose on the mother, are misplaced.

IV. Respondent's position that, if a mother's name is acquired from a previous marriage, her children who are not fathered by her ex-husband should not bear the same name as a matter of policy, is contrary to Utah law, the common law, the Constitution of the United States and the standard of the "best interests of the child."

On page 25 of his brief Respondent refers to the fact that "Mr. Jacobson did not object to his wife resuming the use of the surname 'Hamby,'" as if he had any right to. See, e.g., In re Banks, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37(1974); Egner v. Egner, 133 N.J. Super. 403, 337 A. 2d 46 (1975); Piotrowski v. Piotrowski, 71 Mich. App. 213, 247 N.W. 2d 354(1976); Welcker v. Welcker, 342 So. 2d 251 (La. App. 1977); Cowley v. Cowley, A.C. 450(1901). He continually refers to Ms. Hamby's ^{name}as "the surname of her prior husband" (e.g., p.29) instead of as her name(which she assumed during a prior marriage). He refers, on page 43, to Ms. Hamby's seeking to name her children with "the surname of one of her previous husbands" as if she has had numerous

marriages and, again, in derogation of her having her own name.

He argues that the name "Jacobson" will link the children with one of the two families from which they are descended and that "Hamby" will not.

The Respondent's contentions are puzzling. "Hamby" is the children's mother's name. She is linked to her mother and father ~~by~~ ^{the name} ~~respectively~~ of ~~she~~ uses. There is no evidence in the record that Ms. Hamby's mother took Ms. Hamby's father's surname or that the name Ms. Hamby bore before her first marriage was that of either her mother or father. Presumably it was.

Any lawyer who has done a title search realizes that family descendants bear numerous surnames. Respondent's argument that children should not use a surname not originally borne by either of its parents is a policy argument. Even if the Utah Legislature were to enact a children's names law, however, under the common law and the Constitution of the United States⁴, parents have the right to name their children as they please. Limiting the names parents could give their children would be patently unlawful. See cases cited, supra, page ^{9a} and Sydney v. Pingree, 564 F. Supp. 412 (S.D. Fla. 1982).

The standard of the "best interests of the child" does not by definition allow for a limitation on the name which may be in a child's best interests. Ms. Hamby wants her children to bear the same name as the rest of her household, including herself.

⁴
Amendment XIV, section 1

Conclusion

For the reasons stated herein and in her Initial Brief, the Appellant Kathleen Hamby asks that the Order and Ruling of the Fourth Judicial District Court be reversed and her two children fathered by her ex-husband be given her surname, Hamby. The Appellant also requests that in its Order to such effect, the Supreme Court of Utah give clear direction to trial courts of the state for a method for resolving disputes between custodial and noncustodial parents of newborn, infant or very young children consistent with the custodial parent's authority to direct the upbringing of children in accordance with their best interests.

Ms. Hamby asks that such an Order be made following oral argument on the issues raised herein.

Dated this 22 day of August, 1986.

Respectfully submitted,


Priscilla Ruth MacDougall

ADDENDUM

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1 Jacobson.

2 MR. ELKINS: I'm Don Elkins, on behalf
3 of the plaintiff.

4 THE COURT: Ready to proceed?

5 MR. ELKINS: Yes, sir.

6 THE COURT: Are you ready to proceed,
7 Mr. Taylor?

8 MR. TAYLOR: Yes, your Honor.

9 THE COURT: Do you want to briefly tell
10 me what it's all about?

11 MR. ELKINS: Your Honor, this is a
12 divorce matter and has turned into essentially a default
13 divorce, but there is one area of contention between the
14 two parties. There is a stipulation now on file that dis-
15 poses of the property settlement, child custody, that type
16 of thing. It's a little unusual in that the matter they are
17 disputing, I'm not sure there a definite statement anywhere
18 in Utah law of how the things to be decided. That's the
19 reason we'd like the Court to listen to it.

20 What the dispute centers around is whether or not
21 one child that is the natural child of the plaintiff and the
22 defendant, although born before this marriage, and one other
23 child that's due to be born in about four weeks shall bear
24 the surname of the plaintiff or the defendant. The child
25 that was born before the marriage now bears the surname of

1 the plaintiff and she wants that situation to continue with
2 the new child also. The defendant, the father, wants both
3 children to bear his last name.

4 The plaintiff would like the opportunity in
5 addition to stating her grounds for the divorce to explain
6 to the Court why she wants that name to be as it is now,
7 and why she wants the new child also to bear her name.
8 That's where we stand.

9 MR. TAYLOR: May it please the Court:

10 The defendant is an unemployed miner who called
11 me about a week ago and indicated that he had a chance to
12 go out of state for a few days work and, therefore, it would
13 be inconvenient for him and difficult for him to be here at
14 this hearing. I called Mr. Elkins and advised him of this,
15 told him that rather than delay the matter I would not file
16 an application for vacation of trial setting if the only
17 issue to be reserved would be the question of this name
18 change. And Mr. Elkins indicated that was agreeable and
19 that if the Court, after hearing the plaintiff's represen-
20 tations, would not deny the motion, then Mr. Elkins agrees
21 that we may stipulate and join in the motion to the Court
22 that the case may be continued just to hear his response at
23 a time when he's available. He's been unemployed all winter,
24 and told me that if he passed this opportunity up he'd go
25 to the bottom of the board, something to do with the union,

1 and he was very upset about the difficult that this appearing
2 today and testifying would create for him.

3 So, that's our posture, your Honor.

4 THE COURT: Well, he says that the law
5 provides for changing of a name. Isn't there some law,
6 however, that provides what will and what will not be a
7 legal name of a person?

8 MR. TAYLOR: The common law is that the
9 father who is, ordinarily, would object has a right to have
10 the name remain with him, his own name, have the children
11 bear his own name, unless there's an overriding benefit.

12 THE COURT: Is that what the law is,
13 unless there's an overriding consideration?

14 MR. TAYLOR: If there's a consideration
15 which would be --

16 THE COURT: Does it have to be public,
17 or is it --

18 MR. TAYLOR: Yes, it would have to be
19 for the benefit of the children.

20 THE COURT: Oh. Well, I meant overriding
21 public considerations?

22 MR. TAYLOR: No. I didn't finish my
23 sentence. If there's an overriding reason why it's for the
24 children's benefit, the name change can be made. I can
25 conceive in a situation if someone had a notorious name, for

1 example --

2 THE COURT: Well, you can do that by
3 simply following the procedure for a change of name.

4 MR. TAYLOR: Yes.

5 MR. ELKINS: Your Honor, I might point
6 out here: There is no change of name, your Honor. The one
7 child in existence has the name Hamby on the birth certifi-
8 cate, which she wants, which has been born. The new child
9 has no name. We are arguing about whether the new child
10 here has to be named Jacobson and whether that new child
11 should have that name based on the birth certificate. We
12 have a letter from the State of Utah, in fact, it says the
13 name on the birth certificate should be the name both parents
14 agree upon, which would tend to show that there isn't a
15 definite way one way or another of what the name would be,
16 it's just that the two parties should agree on what name
17 they place on that certificate.

18 THE COURT: Okay. Well, why don't we
19 get the evidence in and then if you want to move for a
20 continuance or something, we'll take that up at the time.

21 MR. TAYLOR: My point, my procedure
22 would be, your Honor: If at the conclusion of her evidence
23 the Court is unwilling to rule at that time that she is not
24 entitled to what she would ask for, then we would ask for a
25 continuance to allow him to present his view.

1 THE COURT: All right. You may proceed.

2 MR. ELKINS: All right. Thank you.

3 Mrs. Jacobson, would you stand here and be sworn?

4 KATHLEEN JACOBSON, having been called as
5 a witness, being first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. ELKINS:

8 Q Mrs. Jacobson, could you please state your full
9 name and address, for the record?

10 A Yes. My name's Kathy Jacobson. I live at 45 East
11 100 -- 200 South, in Goshen.

12 Q And are you the plaintiff in this matter that's
13 before the Court this morning?

14 A Yes.

15 Q And when were you married to Mr. Jacobson, the
16 defendant?

17 A November 29th of '83.

18 Q And Mrs. Jacobson, were you a resident of Utah
19 County for more than three months prior to the time that this
20 Complaint was filed?

21 A Thirteen years.

22 Q Your Complaint states that your husband treated
23 you cruelly, causing you great mental distress. Could you
24 tell the Court what you mean by that? What did your husband
25 do that made you want the divorce?

1 A Well, he's verbally abusive, he's physically
2 abusive, and he's abusive to all of the children in our home.
3 He's a drunk. He's drunk more often than he's sober. And
4 he wouldn't work.

5 Q Were these continuing problems throughout the time
6 that you were married to Mr. Jacobson?

7 A Yes, they were.

8 Q All right. And when did you and Mr. Jacobson
9 separate?

10 A October 20th.

11 Q Of 1984?

12 A Um-hum. (Yes)

13 Q You told me that you want to resume use of your
14 prior married name, Hamby; is that correct?

15 A Yes, it is.

16 Q Do you have any children that now have that name?

17 A Yes, I do. I have a ten-year-old son from my first
18 marriage whose name is Hamby, and I have a 21-month-old son
19 whose name is Hamby.

20 THE COURT: How did he get the name of
21 Hamby?

22 THE WITNESS: He was born out of wedlock,
23 and I gave him the name that I carried then.

24 Q (By Mr. Elkins) At the time that that child was
25 born, did you have plans to marry Mr. Jacobson?

1 A No, I didn't.

2 Q After you were married did you ever discuss with
3 Mr. Jacobson the matter of changing the name of that child
4 from Hamby to Jacobson?

5 A When we were talking about getting married, that
6 was one of the ideas to marry was to give this baby a home
7 and stable family conditions. After we were married it was
8 never even brought up till about June he said I should send
9 for the papers. When I got them I filled them out and told
10 him that all that needed to be done was have them notarized
11 and that I'd leave that up to him when he wanted to do it,
12 and he never did until, I think it was the 2nd of October
13 when he demanded that we sign it, which at the time I already
14 had told him I was leaving him. And I think he did that to
15 have some kind of a foothold. But I still felt that for my
16 child's sake it was the thing to do and I went ahead and
17 signed them, but I didn't send them into the State because
18 I was too confused as to whether I should give him that kind
19 of a right to a child that he had been abusive towards, and
20 he's hurt that baby. He's hit him in the head with a board.
21 The baby's lost the upward motion in his left eye.

22 Q Has the baby received medical treatment because of
23 that?

24 A Yes, he has. There's no treatment, though. He's
25 had two specialists look at him.

1 Q Mrs. Hamby, on file in this matter is a document
2 called a Stipulation -- excuse me -- Mrs. Jacobson, that
3 you and the defendant Gail Jacobson both executed along with
4 your attorneys. Did you enter into that of your own free
5 will?

6 A Yes.

7 Q It seems that Stipulation takes care of most of
8 the matters that the divorce hearing ordinarily would take
9 care of, but paragraph 10 bring up the question of the name
10 of the children. Can you explain to me why you don't want
11 the child that you currently have with Mr. Jacobson and the
12 child that's to be born to have Mr. Jacobson's name?

13 A Yes, I could.

14 THE COURT: There's no -- Before she
15 answers that question: I don't know that I can do anything
16 about the child of the parties born, can I, in this proceed-
17 ing?

18 MR. ELKINS: I don't think you can, your
19 Honor. I think that if Mr. Jacobson wanted to change the
20 name from Hamby, he would have to --

21 MR. TAYLOR: Your Honor, I would like
22 to be heard on that. I didn't respond when your Honor --

23 THE COURT: Well, you can be heard on
24 the question of what can I do with regard to the child that's
25 already been born.

1 MR. TAYLOR: Do you want me to speak
2 to that now?

3 THE COURT: Yes, in this proceeding. I
4 know what I can do in an appropriate application for a name
5 change.

6 MR. TAYLOR: The child which has already
7 been born, your Honor, is the child of the defendant.

8 THE COURT: Well, but this is an action
9 for divorce.

10 MR. TAYLOR: Yes, sir.

11 THE COURT: Okay. Now, it's not an
12 action to change names; and a child already in existence is,
13 the law provides, common law or otherwise, and the parties
14 have done whatever they have done --

15 MR. TAYLOR: That's correct.

16 THE COURT: -- with respect to names.

17 MR. TAYLOR: They have married and in
18 effect legitimized the child.

19 THE COURT: Yes. But do I have that
20 question before me? It's foreign to this divorce decree,
21 isn't it?

22 MR. TAYLOR: The child before the Court,
23 because the support for the child before the Court and the
24 legitimacy of the child, I think the child has been legiti-
25 mized by the parents and by acknowledgment of both parties,

1 that the child is, at the child's age, in that event it's
2 just as if the child was born and conceived after wedlock.
3 So if she chooses to call the child Hamby, I don't think
4 that that would preclude the Court from ordering at this
5 time that this is common law right to have the child to bear
6 his name if he's going to be ordered to support and be
7 determined to be the father of the child, thereby compromi-
8 zed --

9 MR. ELKINS: Your Honor, we do have an
10 exhibit that may be placed here in the record here that may
11 help the Court decide, at least what the policy of the
12 State of Utah would be towards that.

13 THE COURT: She may -- As the question
14 that you asked her.

15 Q (By Mr. Elkins) Mrs. Hamby, can you tell me why
16 you don't want Mr. Jacobson's name attached to the child
17 that's already been born to the two of you and the child
18 that's going to be born to you?

19 A Yes. I have a lot of reasons. The main one is
20 for, are for the benefit of the children. If the children
21 don't have the same last name in the family I feel that it
22 makes more insecurity, less family closeness. Mr. Jacobson
23 has put me in a position now to raise three children by
24 myself, because it's his choice not to be a husband that
25 I can stay with. And when I have to raise three children

1 I need the best circumstances to raise those kids under that's
2 possible; and I feel that having my whole family have the
3 same last name brings the family closer together, there will
4 be a lot less questions brought up at an earlier date for
5 those little babies. They won't be wondering why their
6 name is different until they are old enough to discuss it.

7 I'd also like to tell you that where I hadn't sent
8 the paper in and even put Mr. Jacobson on Kelly's birth
9 certificate, I've agreed to do that, I've agreed to put his
10 name on the birth certificate of the born child and have the
11 unborn child when it's born.

12 THE COURT: When are you expecting this
13 child to be born that you are carrying?

14 THE WITNESS: Within four weeks.

15 THE COURT: Okay.

16 THE WITNESS: And I feel that they should
17 have their father's name on the birth certificate. That's
18 for the children's sake.

19 Q (By Mr. Elkins) You are speaking of, as the father
20 of the child?

21 A As the father stated in the place where it says
22 "father," to say that Gail Jacobson is the father, so that
23 the children see a father there on their birth certificate.
24 And I feel that that's a moral decision that I've already
25 made, but the last name is what --

1 Q Mrs. Jacobson, let me interrupt. Have you sought
2 any professional advise on any affect of the children having
3 different names?

4 A Yes, I have. I have Mr. Downey here today, who is
5 a school psychologist. I've talked to a lot of people about
6 it. I was, also, raised in a broken home with a different
7 last name and saw the affects of it. Even when you are
8 happy in a broken home, when you come home with a child as
9 a friend and you introduce your mother with a different name,
10 your friend asks you: why does your mother have a different
11 name, is she really your mother, or things like that. And,
12 so that kids begin to wonder who their mother and father is.
13 And I feel that it's just the security on the children. It's
14 not an issue here I'm here to argue about to hurt Gail
15 Jacobson or anything else. His name does carry around a
16 stigma.

17 MR. TAYLOR: We object to that, your Honor.

18 THE COURT: Her testimony may remain.

19 A It's just that he, we live in a small town, a very
20 small town, his home and my home are two blocks apart, and
21 he has always been known as a drinker and a fighter in town.
22 His mother told me that when I tried to tell her and --

23 Q (By Mr. Elkins) Well, you can't testify as to
24 what someone told you.

25 Q Oh, okay.

1 Q Do you have personal knowledge of this reputation
2 you are speaking of Mr. Jacobson?

3 A Yes, I do.

4 Q How do you have that personal knowledge?

5 A I've lived in that town for six years.

6 Q Have you ever heard of anyone, without naming
7 names or specific conversations, say the types of things
8 about Mr. Jacobson that you have just portrayed to the Court?

9 MR. TAYLOR: We'd object to this, your
10 Honor, as calling for hearsay.

11 THE COURT: Well, I guess she can testify
12 about reputation from her own knowledge, and it would have
13 to be based on what she's heard.

14 A Yes. I have heard a lot of people say things. And
15 mostly they said them after I left him.

16 Q (By Mr. Elkins) All right.

17 A I knew that he had been married just prior to
18 being married to me, and another woman had to divorce him
19 within a year of marriage. And she was pregnant, too.

20 THE COURT: That may go out.

21 MR. ELKINS: That may be stricken.

22 Q (By Mr. Elkins) Now, Mrs. Jacobson, as to the
23 remaining portions of the stipulation that you have entered
24 into are you willing to abide by the amounts that are con-
25 tained in there as to property settlement and child support

1 and that type of thing?

2 A Yes, I am.

3 Q The stipulation calls for eighty dollars per month
4 per child child support. Can you tell us what that was
5 based upon?

6 A That was based on the fact that I need to get this
7 settled and over with.

8 Q But to your knowledge was Mr. Jacobson employed at
9 the time that you entered into this?

10 A Yes. Mr. Jacobson will be employed as long as he
11 chooses to be.

12 Q Mrs. Jacobson, you told me that one item in the
13 stipulation that calls for you to return to Mr. Jacobson
14 certain bedroom drapes and two old knives which were his
15 property. Have you been able to locate those items as yet?

16 A There's some old drapes and curtain rods, but I
17 don't know of anything about the knives.

18 Q If you can locate the knives are you willing to
19 return those at the earliest possible time?

20 A Oh, sure.

21 Q Have you moved -- You've moved recently from the
22 house that you occupied with Mr. Jacobson?

23 A October 20th.

24 Q So was any -- Have you unpacked everything in your
25 new location?

1 A Well, I hadn't--It was in my basement, but my
2 basement flooded Thursday, so I'm in the process of dragging
3 things around and trying to find them. If they are there,
4 I'll find them and return them. But I don't believe that I
5 do even have them.

6 Q Mrs. Jacobson, do you have any request to make
7 to the Court with regard to the three-month interlocutory
8 period that's called for by Utah law after this divorce is
9 granted?

10 A Yes, I certainly do. I'm going to have this child,
11 and I'm begging the Court to make the divorce final today
12 so that I can have this baby. I've suffered this pregnancy
13 the whole time facing this divorce, and his family has given
14 me a bad time in town. And I feel that the sooner that the
15 divorce is made final, the sooner they'll leave me alone.
16 I'd like to be able to nurse my baby and settle down and
17 have a few weeks peace of mind before the baby gets here
18 without this hanging over us.

19 MR. ELKINS: And, your Honor, on file
20 in this matter is the letter from Mrs. Jacobson's doctor
21 that's indicated that because of some difficulty that she
22 has had with the pregnancy, that he recommends that it be
23 gotten over as quickly as possible.

24 MR. TAYLOR: We have no objection.

25 MR. ELKINS: I would like the Court to

1 take note of that.

2 THE COURT: Okay.

3 MR. ELKINS: Could I have this marked
4 as Plaintiff's Exhibit 1?

5 THE COURT: With respect to the child
6 that is already born, do you say that child is 21 months
7 old?

8 THE WITNESS: Yes, sir.

9 THE COURT: And what's the child's name
10 on the birth certificate?

11 THE WITNESS: On his birth certificate,
12 Kelly Lynn Hamby.

13 THE COURT: Okay.

14 MR. ELKINS: Your Honor, we have that
15 birth certificate, if the Court would like to see it.

16 THE WITNESS: Your Honor, I also feel --

17 THE COURT: Just a minute.

18 THE WITNESS: Oh, okay.

19 MR. ELKINS: Your Honor, if I might,
20 the birth certificate of Kelly. (handing to the Court)

21 THE COURT: Okay.

22 Q (By Mr. Elkins) Mrs. Hamby, I have a letter here
23 that I have had marked as Plaintiff's Exhibit No. 1. It's
24 a letterhead from the State of Utah Department of Health and
25 addressed to Kathy Jacobson, Goshen, Utah. Would you please

1 tell me that and tell me if you recognize it?

2 A Yes. It's a letter, when I first separated, when
3 I was trying to find out what I was to do, to find out if
4 I didn't put Mr. Jacobson's name on the birth certificate
5 at all, if Kelly could still have social security benefits
6 if anything happened to Mr. Jacobson. And they sent this
7 plus a booklet of the laws in the different states. And it
8 states that as long as we were married --

9 Q That's right, Mrs. Jacobson, the letter will
10 explain.

11 A Okay.

12 Q But does the letter at least explain to you what
13 the policy for the State of Utah is with regard to having
14 the name for Kelly changed?

15 A Yes, it does. There's no need.

16 Q Okay.

17 MR. ELKINS: Your Honor, we'd like to
18 introduce Plaintiff's Exhibit 1 into evidence.

19 MR. TAYLOR: Well, we want to --

20 THE COURT: I think I'm going to read it,
21 anyway.

22 MR. TAYLOR: I think it's immaterial,
23 your Honor.

24 THE COURT: Okay.

25 MR. ELKINS: Your Honor, that's all I

1 have for Mrs. Jacobson at this time.

2 THE COURT: All right. You may step
3 down.

4 MR. TAYLOR: May I cross examine, your
5 Honor?

6 THE COURT: Oh, excuse me. Certainly,
7 you may.

8 CROSS EXAMINATION

9 BY MR. TAYLOR:

10 Q Mrs. Jacobson, Gail Jacobson is the father of
11 the child which is now born, is he not?

12 A Yes.

13 Q No question about that in your mind?

14 A No.

15 Q And you are anxious that the child receive all the
16 benefits of that fatherhood, are you not, that is, social
17 security in the event Mr. Jacobson should die, all of the
18 benefits which may be available by reason of any federal
19 entitlement through Social Security? Is that not correct?

20 A I don't know anything about the federal.

21 Q Well, I'm talking about just social security. If
22 Gail should die you'd want your son to receive that benefit,
23 wouldn't you?

24 A Yes, I would.

25 Q And also there are other benefits that the child

1 may receive by having some attention of it's father, is
2 that not true, such as whatever association or comfort the
3 child may have?

4 A No, sir. I don't feel there's anything like that.

5 Q So you don't want Gail to have any association
6 with the child at all?

7 A He hasn't had any these months I have been gone.

8 Q All right. Now, but you don't want him to have
9 any in the future; is that what you are saying to the Court?

10 A I'm hoping he doesn't.

11 Q You don't want Gail to visit with the child or
12 have any association with him?

13 A I'm hoping he doesn't.

14 Q And yet you want him to support the child and be
15 a father to him for all of the benefits that may give to
16 the child, but you don't want any of the benefits to come to
17 the child by any association with Gail. Is that right?

18 A I would love him to have benefits by association,
19 if there are any present. There aren't any.

20 Q You've made this decision forever and ever?

21 A No, I haven't. And as far as the name goes, I
22 still like, as the children are babies, they should have
23 the same family name. And where he is on the birth certifi-
24 cate and will be put on Kelly's birth certificate, which
25 I've agreed to as the children get older, if they make the

1 decision that they want their father's name, if he has been
2 coming around and seeing them and being a father to them, I
3 would never object to my children having their way when they
4 are old enough to make a decision like that.

5 Q But you want to make that decision for them now?

6 A Yes, I do. I have custody of them, and I'm their
7 mother.

8 MR. TAYLOR: That's all, your Honor.

9 THE COURT: All right, now, you may step
10 down. Thank you.

11 THE WITNESS: Thank you.

12 MR. ELKINS: Your Honor, we have one
13 other witness that we would like to call, the Nebo School
14 psychologist that Mrs. Jacobson has consulted about the
15 affect of the children having different names; that he has
16 some interesting things that he might say that relate to
17 this case. If we could ask him a few questions, we'd
18 appreciate it.

19 THE COURT: I don't know whether I'm
20 going to let that become an issue or not.

21 MR. TAYLOR: I have some law on the matter,
22 your Honor, I'd like to be heard and at the appropriate time.

23 THE COURT: Do you have an objection to
24 this witness testifying?

25 MR. TAYLOR: I suppose not.

1 THE COURT: Okay, call him.
2 MR. ELKINS: Mr. Downey, will you come
3 forward.
4 GAYLON L. DOWNEY, having been called as
5 a witness, being first duly sworn, testified as follows:
6 DIRECT EXAMINATION
7 BY MR. ELKINS:
8 Q Would you please state your full name and address,
9 for the record?
10 A My name is Gaylon Lester Downing. I live at
11 1627 South 400 West, in Orem.
12 Q And, Mr. Downing, where are you employed, currently?
13 A I'm employed in Payson, Utah for Nebo School
14 District.
15 Q What is your job there?
16 A I'm a school psychologist.
17 Q How long have you had that job?
18 A This is my eighth year.
19 Q And, Mr. Downing, could you please tell the Court
20 about your educational background, where you went to school?
21 A I went to BYU, got my bachelors and masters at
22 BYU, bachelors in psychology and masters in psychology.
23 Q And when did you graduate with your masters?
24 A 1977.
25 Q Mr. Downing, could you please tell the Court just

1 what your job with Nebo School District entails?

2 A I do testing and evaluations for children in
3 special education programs, resource class as well as con-
4 sulting with parents, teachers, principals, counseling with
5 students or in group therapy sessions, group counseling,
6 that type of thing.

7 Q Mr. Downing, you have been present throughout the
8 course of this proceeding this morning so far. Has you had
9 occasion prior to this day to talk with Mrs. Jacobson about
10 this case?

11 A Yes, I have.

12 Q Are you familiar with the details of this parti-
13 cular matter?

14 A Yes.

15 THE COURT: Have you talked with Mr.
16 Jacobson?

17 THE WITNESS: Not recently, no.

18 THE COURT: Have you ever?

19 THE WITNESS: Yes, I have.

20 THE COURT: How long ago?

21 THE WITNESS: This has probably been
22 three years since I've met with him.

23 THE COURT: Okay. It wouldn't have had
24 anything to do with either of these children?

25 THE WITNESS: No. It was his older

1 children.

2 THE COURT: I see. Okay.

3 Q (By Mr. Elkins) You've heard, I hope, what we
4 have been talking about with regard to names and children.
5 Do you have any background at all in the problem of whether
6 or not children from a divorce should have the parents,
7 either father or the mother's, name?

8 A Professional experience in working with kids
9 that I've counseled with who are going through divorces or
10 whose parents have gone through divorces, and they have been
11 in that kind of situation where they have been placed in
12 choosing a name or deciding which name they'd like to have for
13 themselves; and sometimes you can change in that type of
14 personal involvement, yes.

15 Q Perhaps that question wasn't as direct as I -- If
16 I can rephrase it and see what I'm getting at here: Do you
17 have any experience with cases where children within a
18 family have had different last names?

19 A Yes, I have.

20 Q Do you have any opinions about the affects of that
21 situation?

22 A Yes. Where they come from a family that has two
23 different names, it disrupts somewhat the identity they
24 have with themselves and also with the family. A big part
25 of what a child feels himself to be is linked to the immediate

1 family they are involved with. And when a child can say
2 well, we are the foundation or we are this family, it helps
3 provide, essentially, unity in the family and something they
4 belong to. Where if there's two names, it provides some
5 kind of division in that unity that they are faced with
6 whenever they fill out an application and whenever they
7 state their name in class. That kind of thing raises a
8 lot of questions continuing in their minds. And in a refer-
9 ence with the unity that's involved in a family, that
10 provides a lot of security for a child that is growing up.

11 Q In your opinion as one who works in the area of
12 child psychology, from what you know about this particular
13 case, if after this divorce Mrs. Jacobson were to have one
14 name and one or two of her children were to have a different
15 name, could you foresee any possible problems that might
16 result fro the children?

17 MR. TAYLOR: We object to that, your
18 Honor. I don't think they have a proper foundation for him
19 to give a conclusion on this particular case. I think he
20 can speak generally, but he's never talked with the father
21 or --

22 THE COURT: I think that might be true.
23 I think he may talk in general terms.

24 Q (By Mr. Elkins) Generally, in a case it would be
25 similar, if there was a divorce and the mother were to have

1 one name and one or more of the children could have another
2 name, do you see any problems that might develop?

3 A Possibly, yes. It's never a sure thing because
4 there are so many factors involved. But that could be a
5 factor, it could hinder a child in their development.

6 Q Can you give me an example of what type of problem
7 might develop?

8 A For example, I've worked with one boy whose parents
9 are divorced, and he will go through periods when he's more
10 happy with his dad so he'll take on his dad's name, and
11 there will be some problems there, and so he'll go move in
12 with his mom and he'll take his mom's name. And it will
13 create uncertainty in his own mind as to who he is and where
14 he is and what he ought to be doing. Because attached to
15 that name is also the values that go along with the parent
16 who also has that name.

17 MR. ELKINS: Thank you, Mr. Downey.

18 That's all I have.

19 CROSS EXAMINATION

20 BY MR. TAYLOR:

21 Q You are certainly not advocating in all circum-
22 stances that the name of the father be changed to that of
23 the mother in case of a divorce, are you?

24 A I think it should always be considered on an
25 individual basis.

1 Q And in this particular case you really can't say
2 what Mr. Jacobson's behavior would be later or whether even
3 it's bad now, you don't know that, do you?

4 A I can't say for sure what his behavior has been.

5 Q In fact you deal with a great many children in
6 families where there are divorces and where the children
7 bear two different names?

8 A Yes.

9 Q And in many of those cases the children are getting
10 along well, is that not true?

11 A That's true.

12 MR. TAYLOR: That's all.

13 THE COURT: All right, you may step down.

14 MR. ELKINS: That's all the plaintiff
15 has, your Honor.

16 THE COURT: You say you have some law.
17 Tell me what it is.

18 MR. TAYLOR: Yes. I don't have anything
19 in Utah, but American Juris Prudence 57 Am Jur 2d at Section
20 4 page 284 is to the effect that it's generally recognized
21 that the father who is ordinarily the objecting party has a
22 protectable interest in having his child bear the paternal
23 surname in accordance with the usual custom, even though the
24 mother may have been awarded the custody of the child; and
25 for that reason the name, merely to save the mother or the

1 child from inconvenience or embarrassment, won't be authoriz-
2 ed against the father's objection.

3 Now, as I've stated earlier, where there's a sub-
4 stantial interest and in changing the name and where there's
5 a good reason for the benefit of the children, then I think
6 the Court does have the power to order it under the common
7 law. Now, there are a number of cases cited in the anno-
8 tations, and all of them seem to support, I couldn't find
9 any of the cases where they authorized a change of name,
10 they all have denied it. That doesn't mean to say that
11 in a proper circumstance or a proper showing a name change
12 would be granted.

13 THE COURT: Okay.

14 MR. TAYLOR: But that's all I have to
15 say on it.

16 THE COURT: Now, where do you sit in
17 this matter -- Oh, excuse me. Did you have something more?

18 MR. TAYLOR: Yes, I do, your Honor.

19 THE COURT: Go ahead, then.

20 MR. TAYLOR: I'd like to point out that
21 I think that the Court's power and responsibility is the same
22 with respect to the child which was born out of wedlock but
23 which has been acknowledged and accepted into the family as
24 though that child were born in wedlock, and that there's no
25 real difference. And the mere fact that this lady chose to

1 put the name Hamby on the birth certificate should not pre-
2 clude the Court from requiring that if this man is going to
3 be ordered to support the child, acknowledge paternity,
4 accept the responsibility for the child, be given the right
5 to visitation and all of the normal things that the father
6 has, that merely because the child was born prior to wedlock
7 should not preclude the Court from ordering that that child
8 bear this man's surname, because he's going to have all of
9 the burden of responsibility.

10 THE COURT: All right. Where do you sit
11 in the matter?

12 MR. GAMMON: The mother has received
13 some assistance from the State of Utah in the past. The
14 defendant or father has paid that money to the State that was
15 owing to the State. And so the State then is simply to
16 state that we have been paid for all assistance that has been
17 provided heretofore.

18 THE COURT: Okay. All right. This is
19 what I'm going to do:

20 First of all, we'll grant the plaintiff a decree
21 of divorce from and against the defendant on the grounds of
22 cruelty; and the divorce will become absolute upon its sign-
23 ing and entry in the register of actions of the Clerk. And
24 it will be based upon the stipulation, that is the relief
25 that the agreement, stipulation of the parties, have entered

1 into is approved, and that may be incorporated in the decree.

2 MR. ELKINS: Your Honor?

3 THE COURT: Yes.

4 MR. ELKINS: Mr. Taylor has agreed with
5 me that we might add a mutual restraining order to that
6 stipulation, also.

7 MR. TAYLOR: We have no objection, your
8 Honor.

9 THE COURT: All right, and that may go
10 in, too.

11 Now, with respect to the name of the child that's
12 here previously born, the, is it Kelly?

13 MR. ELKINS: Yes, your Honor.

14 THE COURT: His name on the official
15 records of the State of Utah is, and the record will show
16 that the birth certificate has been exhibited to me, is
17 Kelly Lynn Hamby. And I will permit a filing in this action,
18 if you care to file it, an application for name change; and
19 the issue can be raised, joined, at that time. If nothing
20 is done with respect to it, there's no further court order;
21 the child's name will be as it is upon the records of the State
22 of Utah at this time, on the birth certificate.

23 Now, with respect to the child who is to be born,
24 that, the name of that child will also be Jacobson, Jacobson,
25 unless there is a petition or application for name change

1 filed in this case. And I'm doing that solely to keep filing
2 costs down. I would normally require it in a separate suit.
3 But I'll consider it as though it were filed as an appli-
4 cation for name change under the statute. In other words,
5 I believe that there's something, first of all, I think Kelly
6 has the legal name and it would have to be changed and should
7 be changed upon the records, under the law, if that's what
8 should be done. And the child to be born would have the,
9 under the common law, would normally be known as Jacobson.
10 But after birth of that child you can file a petition or an
11 application in this case, then I'll consider it as an appli-
12 cation for --

13 MR. TAYLOR: The Court didn't indicate
14 any time limit on this. We would prefer to wait until the
15 birth of the new child and have it all handled at once, if
16 that's a --

17 THE COURT: You can do that, and we'll
18 give you 30 days after the child is born.

19 MR. TAYLOR: Thirty days after the birth.

20 THE COURT: In which to file any appli-
21 cation for name change.

22 Now, you'd have the same right, Mr. Elkins, because,
23 and then I can give consideration to the testimony of this
24 witness and also her testimony with regard to reasons and so
25 on, and then we'll decide that name change at that time.

1 MR. TAYLOR: And I presume we would
2 have opportunity then to present testimony.

3 THE COURT: Exactly. But the legal
4 names of the child will be, against the advise of a profes-
5 sional, would be Hamby and Jacobson at this juncture. How-
6 ever, the second child has not been born yet, the one we are
7 talking about. And so we'll preserve the issues with respect
8 to both until that time.

9 MR. ELKINS: Thank you, your Honor.

10 THE COURT: Okay. But the decree of
11 divorce, as I indicated, will be final upon entry. The
12 names will be the only thing that would be reserved for
13 further consideration.

14 (WHEREUPON, the hearing was concluded at 10:02
15 o'clock a.m.)

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Norman H. Bangerter
Governor

Suzanne Dandoy, M.D., M.P.H.
Executive Director

June 16, 1986

Pricilla MacDougall
346 Kent Lane
Madison, Wisconsin 53713

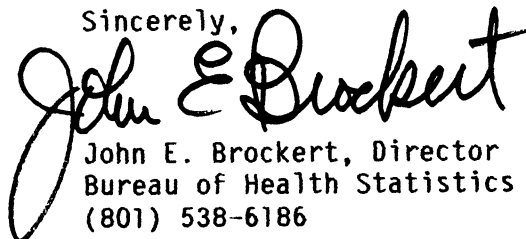
Dear Ms. MacDougall:

This is in response to your telephone request for a copy of our guidelines for naming father and surname of child.

A copy of the guidelines are enclosed, along with a copy of Rule 1.5 and Rule 3.4 of our proposed revised Rules (formerly Regulations) for Vital Statistics in Utah. I believe that with these revised Rules we will be able to discard our guidelines.

If you have any suggestions, please let me know.

Sincerely,


John E. Brockert, Director
Bureau of Health Statistics
(801) 538-6186

Enclosure

Rule 1.4 Designation of Additional Offices

Full-time local health officers may be designated by the Department to serve as the local registrar of vital statistics for the area they serve as health officer. They shall carry out their required duties without payment of any additional fee. For areas of the state not served by a full-time local health officer, the Department, acting through the State Registrar, shall designate an individual to serve as local registrar.

The State Registrar shall delegate such duties and responsibilities for the local registrars as he deems necessary to insure the efficient operation of the system of vital statistics. These may include, but are not limited to, the following:

- (a) The receipt and processing of birth, death, and spontaneous fetal death records. This includes the receipt of these records from the person responsible for filing the record, checking it for accuracy and completeness, making a local copy, and forwarding the original to the State Registrar at least once a week.
- (b) Issuance of certified copies of birth, death, and fetal death certificates after receiving written authorization from the State Registrar. The records from which the certified copies are issued shall be the local copy of the original certificate. All forms and procedures used to issue the copies shall be provided or approved by the State Registrar.
- (c) Issuance of burial-transit and disinterment permits and other designated forms as prescribed by regulation or direction of the State Registrar.
- (d) Acting as the agent of the State Registrar in their designated area and providing assistance to physicians, hospitals, funeral directors, and others in matters related to the system of vital statistics.

The State Registrar, with the approval of the Department, shall determine the responsibilities and duties of each office independently.

Rule 1.5 Name of Child

The child's name should be determined by its' parents. If the parents disagree on the child's name and they have never married each other or are separated or divorced, the custodial parent shall determine the child's name. If the parents are married to each other and cannot agree on the child's name, it may be left blank and added later by an Affidavit to Amend a Record or by court order.

RULE 2. Infants of Unknown Parentage; Foundling Registration (Section 26-2-6)

The report for an infant of unknown parentage shall be registered on a foundling certificate of live birth and shall, unless more definitive information is available:

Amendments shall be filed with and become part of the record to which it pertains. The original certificate shall be marked "Amended, 1 of 2," or however many parts the amendment may require. Subsequent parts will be marked accordingly.

When an amendment is accepted, the State Registrar shall transmit copies of the amendment to the local registrar in whose office a copy of the original record is on file.

Rule 3.3 Amendment of Medical and Health Data

Whenever the originally furnished medical and health data of any record of death, fetal death, or live birth is modified by supplemental information, the certifying physician or medical examiner having knowledge of this information, may certify, under penalty of perjury, the changes necessary to make the information correct and file it with the state or local registrar. The cause of death information may also be amended by the physician who performs an autopsy on the deceased.

This amendment shall be processed in the manner prescribed in Section 3.2 of these rules.

Rule 3.4 Acknowledgement of Paternity by Natural Parents

A child born to an unmarried mother may not have the father's name entered on the birth certificate unless the mother and father sign an acknowledgement of paternity. If the acknowledgement of paternity is signed and received before the certificate is registered, the father's name and other related information may be entered in the appropriate items on the original certificate. The acknowledgement of paternity is transmitted with the original certificate to the State Registrar, where it is retained as documentary evidence.

An acknowledgement of paternity received after the certificate is registered is not acceptable for registration. Alternatively, the father's information may be added by amendment as specified in Rule 3.2. However, if another man is shown as the father of the child on the original certificate, the correction can only be made following a judicial determination of paternity or following adoption.

RULE 4 Delayed Registration of Birth (Section 26-2-8)

Rule 4.1 Registration - Ten Days to One Year

Certificates of birth filed after ten days, but within one year from the date of birth, shall be registered on the standard birth certificate in the manner prescribed in Section 26-2-5, Utah Code Ann. 1953, as amended. Such certificate shall not be marked "Delayed."

The State Registrar may require additional evidence in support of the facts of birth and/or an explanation of why the birth certificate was not filed within the required ten days.

PRISCILLA RUTH MACDOUGALL

ATTORNEY AT LAW

346 KENT LANE

MADISON, WISCONSIN 53713

608-255-2971

608-274-6729

March 5, 1979

Lesley DuVall
Chair, Senate Judiciary Committee
State of Indiana
State House
Indianapolis, Indiana

Re: Senate Bill No. 81-
Statutory change of minors'
names

Dear Senator DuVall:

Thank you for inviting my comments on Senate Bill No. 81 respecting the statutory changing of minors' names. As I understand from our conversation, that portion of the bill relating to the statutory changing of adults' names was deleted and I am therefore addressing my comments to that portion of the bill relating to children's names only.

As I mentioned to you on the telephone, there are several problems with the bill as drafted in light of the mandate for equal protection for women and the recognition of children's legal rights and privileges. There are several issues I could discuss, some of which I mentioned to you briefly, but the most obvious problem I see with the bill is that it appears to be patently designed to prevent women with children in their custody from statutorily changing their children's names if the father objects and contributes any support for the child and is in obedience with a decree issued pursuant to IC 31-1-11.5.

While this discrimination is phrased as a presumption, it appears, though "neutrally" worded, to clearly be written to give men the predominant naming rights of children.

Do you mean the bill to apply to the statutory changing of only the names of children born to married parents?

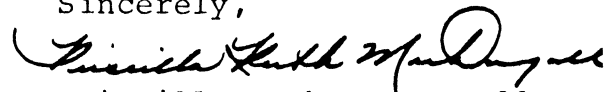
The presumption is not only discriminatory, but runs contrary to the general presumption in favor of a custodial parent who is ordinarily entrusted with the "care and control" of a minor. A sex neutral statute could give any presumption to the custodial parent while still leaving the noncustodial parent the right to petition for a statutory name change of his/her minor child. Unless the custodial parent could be deprived of the control of his/her child in another area (for example, in changing the school or religion of the child), s/he should not be deprived of the control of the child's name, subject, of course, to the overriding standard of the child's best interests and the child's own rights.

The bill does mention the child's best interests as controlling the statutory name change of a minor, but does not provide for independent representation for the child to protect those interests or the child's independent rights. In practice the male judiciary has recited the "best interests of the child" as the appropriate standard for reviewing name changes where the parents disagree, but then has decided cases in such a way as to almost always favor the father over the mother. To avoid this, perhaps the bill could provide for the appointment of a guardian ad litem for the child in cases where the parents disagree. I have seen guardians ad litem used well in cases of disagreement between parents in naming their children both after divorces and at births.

To provide that the child's rights are preserved, the bill could:
1) specifically recognize the child's preferences as a presumption equal to that of the custodial parent's at least after the age of 10 or 12, and 2) require the consent of the child at a specific age, perhaps 14, the age recognized in some states as that at which a minor can change his/her name statutorily in his/her own right.

I shall be happy to comment further and to work with you or any staff working on the bill in drafting a provision which is not sex discriminatory and which protects minors' rights and privileges.

Sincerely,


Priscilla Ruth MacDougall

Judith Palmer, Executive Assistant to the Governor
Richard C. Bodine, Representative
Patrick Carroll, Senator
John Donaldson, Chair, House Committee on the Judiciary
Lynn Brundage, Indiana Civil Liberties Union Women's Rights Project
ACLU, Women's Rights Project
National Organization For Women

January 22, 1979

PRINTING CODE—The parts in **this style type** are additions to the text of the existing section of the law. The parts in ~~this style type~~ are deletions from the text of the existing section of the law. The absence of either of the above type styles in an amendatory SECTION indicates that an entirely new section or chapter is to be added to the existing law.

DIGEST

Adds IC 34-4-6-1.1 to require parental consent to change the name of a minor child; to change the procedure for a name change by requiring the reason for the change to be stated in the petition to the court, notice to be given seven days after the filing of the petition, specified information to be contained in the petition, and a hearing to determine whether the petition should be granted. Adds IC 34-4-6-2.1 to require a hearing on any objections to the petition. Repeals IC 34-4-6-1, IC 34-4-6-2, IC 34-4-6-3, and IC 34-4-6-4, which are the current change of name provisions.

SENATE BILL No. 81

A BILL FOR AN ACT to amend IC 34-4-6 concerning the procedure for changing an individual's name.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 34-4-6 is amended by adding a NEW sec-
2 tion 1.1 to read as follows: Sec. 1.1. (a) An individual who
3 wishes to change his name, or the name of his minor child,
4 must present a verified petition stating in detail the reason
5 the change is requested to the circuit court located in his
6 county of residence.
7 (b) Not more than seven (7) days from the date the peti-
8 tion is filed, the petitioner must publish notice of the peti-
9 tion in a newspaper of general circulation in the county of

the petitioner's residence. Notice must be given once a week for three (3) consecutive weeks. If a newspaper of general publication is not published in the petitioner's county of residence, then the notice must be published in a newspaper of general publication in an adjoining county.

(c) The notice required by subsection (b) must include:

- (1) The name of the petitioner.
- (2) The name of the person whose name is to be changed (if different from that of the petitioner).
- (3) The new name desired.
- (4) The name of the court in which the action is pending.
- (5) The date on which the petition was filed.
- (6) A statement of the rights of any person to appear at the hearing and to file objections.

(d) Proof of publication must be made by filing a copy of the published notice, verified by a disinterested party, with the court.

e Except as provided by IC 31-3-1-6, if the petition is to change the name of a minor child, the written consent of the parents, or the written consent of the child's guardian if both parents are dead, must be filed with the petition.

(f) Before a minor child's name may be changed, the parents or guardian of the child must be served with a copy of the petition as required by the Indiana trial rules.

SECTION 2. IC 34-4-6 is amended by adding a NEW section 2.1 to read as follows: Sec. 2.1. (a) Except as provided under subsection (b), the court may hear the petition and issue a final decree after thirty (30) days from the later of:

- (1) the filing of proof of publication of the notice required under section 1.1 of this chapter; or
- (2) the service of the petition upon the parents or guardian, or both, of a minor child.

(b) The court shall set a date for a hearing on the petition if:

- (1) written objections have been filed; or
- (2) a parent or guardian of a minor child has refused or failed to give written consent under section 1.1(e) of this chapter.

The court shall require that appropriate notice of the hearing be given to the parent or guardian of the minor child or to any person who has filed written objections. In deciding on the petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under IC 31-1-11.5-21. However, there is a presumption in favor of a parent of a minor child who:

- 1 (i) has been making support payments and fulfilling
- 2 other duties in accordance with a decree issued under IC 31-
- 3 1-11.5; and
- 4 (ii) objects to the proposed name change of the child.
- 5 SECTION 3. IC 34-4-5-1, IC 34-4-6-2, IC 34-4-6-3, and IC
- 6 34-4-6-4 are repealed.

COMMITTEE REPORT

Mr. President: Your Committee on Judiciary which was referred Senate Bill No. 81, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be amended as follows:

Page 2, line 12, delete "interested party" and insert in roman "person".

Page 2, delete line 25 and insert in roman the following:

"SECTION 2. IC 34-4-6 is amended by adding a NEW section 2.1 to read as follows: Sec. 2.1. (a) Except as provided under subsection (b), the court may hear the petition and issue a final decree after thirty (30) days from the later of:

- (1) the filing of proof of publication of the notice required under section 1.1 of this chapter; or
- (2) the service of the petition upon the parents or guardian, or both, of a minor child.

(b) The court shall set a date for a hearing on the petition if:

- (1) written objections have been filed; or
- (2) a parent or guardian of a minor child has refused or failed to give written consent under section 1.1(e) of this chapter.

The court shall require that appropriate notice of the hearing be given to the parent or guardian of the minor child or to any person who has filed written objections. In deciding on the petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under IC 31-1-11.5-21. However, there is a presumption in favor of a parent of a minor child who:

- (i) has been making support payments and fulfilling other duties in accordance with a decree issued under IC 31-1-11.5; and

(ii) objects to the proposed name change of the child.”.

Page 2, delete lines 26, 27 and 28.

Page 3, delete lines 1-11, inclusive.

(Reference is made to bill as introduced)

and when so amended that said bill do pass.

DUVALL, Chairman

SENATE BILL No. 81

A BILL FOR AN ACT to amend IC 34-4-6 concerning the procedure for changing an individual's name

DUVALL

January 8, 1979, read first time and referred to Committee on JUDICIARY
January 19, 1979, reported AMENDED DO PASS favorably

LC-877/DI-37

STATE OF MINNESOTA
IN COURT OF APPEALS

C7-86-283

Aitkin County

Crippen, Judge

Aitkin County Family Service
Agency and Charlene DeVonne
Evelyn Hoglund,

Appellants,

John R. Leitner
Aitkin County Attorney
Anne L. Mohaupt
Assistant County Attorney
Courthouse Annex
Aitkin, MN 56431

vs.

Frank Lee Girard,
Respondent.

Richard A. Zimmerman
P. O. Box 388
Aitkin, MN 56431

Filed July 29, 1986
Wayne Tschimperle, Clerk
Minnesota Appellate Courts

S Y L L A B U S

1. A minor child's name may be changed only when the change promotes the child's best interests.

2. Trial courts must make particularized findings supporting their reasons for granting or denying an application to change a child's surname.

3. When the custodial parent objects to changing the child's surname and the evidence does not show that the failure to change the name will be detrimental to the preservation of the child's relationship with the noncustodial parent, it is in the best interests of the child to follow the custodial parent's preference.

Reversed.

Considered and decided by Crippen, Presiding Judge, Leslie, Judge, and Nierengarten, Judge, with oral argument waived.

O P I N I O N

CRIPPEN, Judge

Charlene Hoglund appeals from the trial court's judgment changing the surname of her two minor children from Hoglund to Girard, the surname of the children's biological father. We reverse.

FACTS

Appellant Charlene Hoglund and respondent Frank Girard lived together for about six years and had two children, Orville Lee, born February 18, 1981, and Bobby Jean, born October 11, 1982. Sometime after Bobby Jean was born, respondent moved out of the home where he had been living with appellant and the children. In November 1985, appellant brought a paternity action against respondent. Respondent acknowledged his paternity and was accordingly adjudicated the father of the children.

In the same proceeding, respondent petitioned the court to change the children's surname from Hoglund to Girard. The trial court record shows that when the children were born, both were given appellant's surname of Hoglund. In their daily life, they have always used the surname Hoglund. Respondent, however, also testified that "all his friends and everybody" called the children "Girard" when he was living with appellant. The children have lived continuously with appellant; respondent has visited with them about once a month since he and appellant stopped living together.

Respondent testified that he does not care if the children continue to use Hoglund as their surname in their daily lives, but that he nevertheless wants their name to be changed legally to Girard. He explained that he was the only son in his family that named a son after his father, that his father had expressed a dying wish that the Girard name be carried forward, and that he wanted to fulfill his father's wish. He also expressed his ongoing desire to marry appellant and raise the children together with her, and stated that even if he and appellant do not marry, he still wants the children to have his name in recognition that he is their father.

Appellant testified that she objected to a change in the children's surname and that the change would confuse them. She testified that the children, now ages 5 and 3, are not old enough to meaningfully tell her which name they would like to keep. In regard to respondent's desire to marry her, appellant testified that she would "like to give it a try" but that she would first want to live with respondent "for awhile and see how things work out."

In addition to the parties' testimony, the court also considered a letter from an Aitkin County Family Service Agency social worker, which recommended that the children's surname remain Hoglund. The social worker wrote that the benefit of changing the name is outweighed by the possible confusion and disruption that could ensue, and that because appellant has been and continues to be the primary parent of the children, her wish to maintain the Hoglund name should be granted.

The trial court issued findings that appellant and respondent are the parents of the two children and that respondent "is desirous of changing the surnames of the children to Girard." The court then ordered that the children's name be changed to Girard. Charlene Hoglund appeals from the judgment entered upon the court's order.

ISSUE

Did the trial court abuse its discretion in ordering that the children's surname be changed?

ANALYSIS

A trial court shall grant an application for a change in a minor child's name unless the court finds that the change is not in the best interests of the child. See Minn. Stat. § 259.11 (1984). Applying the statute, the Minnesota Supreme Court has held that the "welfare of the children must ultimately be the controlling consideration in any change of status." Robinson v. Hansel, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974).

In Robinson, the court focused on the "significant societal implications" of changing a child's name from the natural father's name following the divorce of the child's parents and the grant of custody to the child's mother. The court noted that the "link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever," the bond between a noncustodial father and the child. Id. at 35-36, 223 N.W.2d at 140.

This concern is notably absent from the present case, where the children's parents were never married and the children have

never regularly used their father's name. Here the father does not oppose change but seeks it. In addition, independent of the surname of the children, both parties agree that respondent has established a positive and loving relationship with the children, that both children know respondent is their father, and that he sees the children on a regular basis. Respondent's testimony that his primary interest is to fulfill his father's wishes and not to ensure that the children identify with the name Girard in their daily lives also indicates that the name change would not affect his ongoing parental relationship with the children.

In 1981, the supreme court took the "opportunity to elucidate [its] decision in Robinson." In re Saxton, 309 N.W.2d 298, 301 (Minn. 1981), cert. denied, 455 U.S. 1034 (1982). In Saxton, the court reaffirmed that a name change should be granted "only when the change promotes the child's best interests." Id. In Robinson, the court said that change of a child's surname over the objection of a parent should be considered with "great caution" and only where "the evidence is clear and compelling that the substantial welfare of the child necessitates such change." Robinson, 302 Minn. at 36, 233 N.W.2d at 140. Saxton specified several factors that trial courts may consider in determining the child's best interests. Further, the court stated that trial courts need not limit their consideration to those factors, but that they should set out their reasons for granting or denying an application to change the child's surname. Id.

Other than stating that respondent desired the name change, the trial court here did not state reasons for granting respondent's petition. Most notably, the trial court made no findings on the best interests of the children.

Two of the factors articulated in Saxton are particularly important here, namely, the length of time the child has borne a given name, and the difficulties, harassment or embarrassment that the child may experience from bearing the present or the proposed name.¹ The record shows that the children have borne the Hoglund name throughout their lives and that appellant testified that a change of name would cause adjustment difficulties for them. The record also includes the recommendation from the Aitkin County social worker, a recommendation that the trial court specifically waited to receive before holding the hearing on the proposed name change, which states her belief that any benefit of a name change would be outweighed by the possible confusion and disruption that could result from the change.

In addition, absent evidence that the change will be detrimental to the preservation of the children's relationship with their father, we see no reason to put aside the preference expressed by their custodial parent, the children's mother. It

1. The other factors noted in Saxton do not bear on the present case. They are: (1) the child's preference (the children here are too young to express a preference); (2) the effect of the change on the child's relationship with each parent (the relative unimportance of this factor has already been noted in the discussion on Robinson); and (3) the degree of community respect associated with the present and the proposed names (neither parent testified that one name evokes a greater degree of community respect than the other).

is in the best interest of such young children to provide them with stability and continuity. See Pikula v. Pikula, 374 N.W.2d 705, 711 (Minn. 1985). The preservation of the family unit as they have always known it, including having the same name as their custodial parent, is an element of that continuity. Appellant has been and continues to be primarily responsible for the welfare of the children. Under these circumstances, the evidence does not show that the substantial welfare of the children necessitates a change of name.

The absence of particularized findings as well as the trial court's focus on respondent's desire to change the children's name indicates that the trial court relied on the Robinson doctrine without considering its development in Saxton.²

Robinson refers to

the natural and appropriate desire of the father to have his children bear and perpetuate his name, as well as * * * the desirability of the child knowing his own parentage.

Robinson, 302 Minn. at 36, 223 N.W.2d at 140. Saxton, however, in discussing that concern, refers to the effect of a name change on the child's relationship with each parent. Saxton, 309 N.W.2d at 301. Moreover, although this factor was of primary concern in Robinson, both that case and Saxton included

2. At the hearing on the petition, counsel for appellant cited Robinson but not Saxton to the court as controlling authority. The judge declined to make a decision immediately following the hearing, stating that he first wanted to review Robinson.

it as only one among several factors to be considered. Id. at 302. Here, however, the court's findings do not reflect consideration of any other relevant factors.

The trial judge's questioning of the parties also reveals his reliance on a mistaken presumption of law that may have influenced the court's final decision. The judge expressed his belief that if the parties were to marry, the children's names would automatically convert to Girard. This is error; because the surname on the children's birth certificates is Hoglund, an application for a name change is necessary regardless of the parties' marital choices. See Minn. Stat. § 259.10 (1984). The merit for a change of name may increase upon the marriage of the parties; however, until application is made and granted, their names will continue to be Hoglund.


We recognize the validity of respondent's desire to perpetuate his family's name. This desire, however, is primarily aimed towards Orville, who was named after respondent's father, and not towards Bobby Jean, making it even less clear that the change of name would be in the best interests of both children. As noted in Robinson, the children may some day voluntarily decide to change their name to Girard. See Robinson, 302 Minn. at 38, 223 N.W.2d at 141. At the present time, however, the evidence is insufficient to show that a change of name would promote their best interests.

D E C I S I O N

The trial court erred in granting respondent's petition to change the surname of the parties' children over appellant's

objection. Respondent's reasons for desiring a change of cde
children's names are not clear and compelling evidence that the
substantial welfare of the children necessitates a change.

Reversed.


23 July 1986

Supreme Court of Utah

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

Appellants,

-vs.-

Gail Jacobson,

Respondent.

Fourth Judicial District Court
Utah County,
Civil Case No. 67, 957

Supreme Court Case No. _____

Affidavit in Support of Motion for Change of Title of Action

I, Kathleen Hamby, execute this affidavit in support of my Motion for Change of Title of Action, and state:

1. I am the Appellant in the action.
2. I assumed the surname Hamby following my marriage to Richard L. Hamby on July 16, 1973.
3. I gave the surname Hamby to my son born of that marriage, Clint, and he has borne it since his birth on July 9, 1974.
4. Following my divorce from Richard Hamby on July 13, 1979, I continued to use the surname Hamby.
5. On June 14, 1983 I gave birth to another son, Kelly Lynn, and named him with the surname Hamby. Kelly's biological father is Gail Jacobson.
6. On November 29, 1983 I married Gail Jacobson and assumed the surname Jacobson for the period of November 29, 1983 to October 20, 1984 at which time I resumed the use of my name Hamby.
7. Since October 20, 1984 I have used the name Hamby, I consider it my name and I never intend to use any other surname than Hamby for the

remainder of my natural life.

8. I have all of my identification in the surname Hamby, including my Utah driver's license, my Utah chauffeur's licence, my employment and social security records, my bank records and all other identification.

9. All my friends, family and business associates know me as Kathleen Hamby.

10. I signed papers connected with this lawsuit in the name Jacobson only because my attorney Donald Elkins, who prepared the papers, told me that I had to sign my name as Jacobson.

11. When I was divorced from Gail Jacobson on April 11, 1985 my name change was included in the divorce decree.

12. On April 13, 1985 following my divorce I gave birth to another son, Kevin, whose biological father is Gail Jacobson.

Dated this 7 day of May, 1986.

Kathleen Hamby

Kathleen Hamby
P.O. Box 188
Goshen, Utah 84663

Signed before me this 7 day of May 1986.

Patricia Ness
(Notary)