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Misnomers: The Law and Practice of Child Naming

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Verdict

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What standard should be applied when unwed parents disagree about whether to change a child's surname? In a recent ruling, ***Connor H. v. Blake G.*** **(http://law.justia.com/cases/nebraska/supreme-court/2014/s-13-1995-s-13-1000.html)** , the Nebraska Supreme Court held that a five-year-old boy should keep his original surname, his mother's name at the time of his birth, rather than assuming the surname she later took upon marrying another man or switching to his biological father's surname. A surname can be changed, this court held, only if doing so is in the child's best interests, with no special deference to the wishes of the custodial parent. A child is an individual, and the decision whether he should keep or change his surname must be individualized as well. This case is one of many revealing tensions over naming that are aggravated by unwed parenting, divorce, and remarriage.

Connor's Story

Connor H. was born in 2008 to unmarried parents, Amanda H. and Blake G., who had already ended their relationship with each other. With the consent and signature of both parents, Connor's birth certificate indicated that he would use his mother's surname. She has been his custodial parent since birth, and when she remarried, and changed her own surname, she sought to change Connor's as well—to that of his stepfather and, now, his mother. His biological father objected and, in a separate proceeding requesting a modification of the custody and visitation order, requested that Connor's surname be changed to his surname. (Because this is a proceeding involving a minor, the court uses only initials for surnames, further confused by the fact that the biological father and the stepfather have surnames beginning with the same letter, G.)

His mother argued that it would be in the child's interest to take her new surname, since not only would the two of them share the name, but it was also the name of the stepfather and half-sister with whom the child lived. She testified that he "would feel more part of the family and feel like he belongs if he could have the same last name as everybody that he lives with." Amanda also testified that Connor had a loving relationship with his stepfather and with his step-grandparents, who live nearby.

Connor's father, on the other hand, thought it preferable for the child to have the surname of his biological father rather than his stepfather (even though his mother had been using that name for three years now as well). Although Connor has always lived with his mother, he has maintained a good relationship with his father, who took advantage of his visitation rights. (The father had been in arrears on child support, but had caught up by the time of the trial over Connor's surname.) Blake was involved with Connor's school activities, and sports facilitated a relationship between Connor and his paternal relatives. Both parents were involved with his medical care as he was treated at age four for leukemia.

The Court Rulings: Traditionalism and Its Antidote

After the parties presented evidence for their competing name change requests, the trial judge ruled in favor of the father. He rejected Amanda's request because, in his words, giving the child his stepfather's name was "like a de facto adoption," which "would just simply be wrong." Given that the biological father had kept contact with the child and developed a good relationship, there was no justification in the court's view "to be changing the name to a stepfather's name." That the name is now shared by Connor's mother was deemed irrelevant. Her name was her husband's name, and her husband had no claim to the child.

The trial judge was more sympathetic to the biological father's claim. Admitting that he might be making an "old fashioned statement," the judge concluded that it was in the child's best interest to take his father's surname.

Amanda appealed. The state's highest court did not side with her – but neither did it side with Blake. It ruled, instead, that neither party had presented sufficient evidence to justify changing the child's surname.

First, the court noted that there is no automatic preference for the surname of a child born in wedlock and concluded that there should be none for a child born out of wedlock. Neither mothers nor fathers have a superior right to choose a child's surname. To the extent the trial judge was overtly or covertly giving superior preference to the father's naming rights, it was wrong to do so.

Second, the custodial parent does not have an absolute right to choose the child's name. In addition to having physical custody of Connor since birth, Amanda also has sole legal custody—the right to make decisions in his life about health, education, religion, and so on. She contended that naming a child is one of those fundamental decisions over which she had been giving exclusive control. Several states have adopted at least a strong presumption that the surname chosen by a custodial parent is in the child's best interests. But courts in other states have refused, concluding only that decision-making power of a custodial parent is one factor to be taken into account. The Nebraska court in Connor's case refused to adopt such a presumption on the theory that the child's best interests in any individual case may be served by deviating from the surname chosen by the custodial parent.

Third, having rejected the two presumptions sometimes relied on in other jurisdictions, the court concluded that the decision whether to change a child's surname must be evaluated based solely on the best interests of the child. The court articulated a non-exhaustive list of ten factors.

These factors are (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.

For Connor, application of these factors, in the court's opinion, did not support either parent's name-change request. Neither parent had forfeited the right to have a preference into the child's name, and neither parent's relationship, in the court's view, would be threatened by having a different name from the child. Connor had formed a good relationship with his stepfather and half sister despite having a different surname from everyone

else in the household. That he had a different surname from his custodial parent, Amanda, was the only factor in favor of changing his surname. (She could, of course, have avoided this problem in the first instance by keeping her birth name and given it to her daughter as well, rather than conforming to two sexist traditions—women's name changing upon marriage and the practice of giving children their father's name.) But, the court concluded, that one factor was insufficient to justify changing it at all.

The court was "not unmindful that declining to change Connor's surname leaves him with a surname different from the surnames of both of his parents." This might, as a dissenting judge had noted in a previous case, cause the child to be "questioned in the future as to why he does not carry the last name of either his mother or his father." Having the same surname as others within a family unit, that same judge observed, "provides security, stability, and a feeling of identity and limits the potential difficulties, confusion, and embarrassment that may arise relating to the paternity of the child." However, the court in *Connor H.*, concluded, the significance of surnames will vary by child, and thus the question should be resolved through a fact-intensive inquiry about the needs and interests of a specific child. For Connor, his interests are best served by keeping the surname he was given at birth.

The Traditions and Complications of Child Naming

Disputes over child surnames have increased along with divorce, unwed parenting (from a small percentage of children a few decades ago to over forty percent today), and more commitment to egalitarian ideals. Like many aspects of family law, the law was simpler when families and cultural values were more monolithic.

In the U.S., the tradition of patronymy—the practice of giving children the surname of their fathers—was and is entrenched. But the tradition is neither universal, nor ancient in origin. (A few countries, such as Spain, follow a matronymic tradition.) Prior to the sixteenth century in England, for example, surnames did not descend by inheritance at all. Instead, an individual adopted his surname voluntarily, or his neighbors conferred it upon him. Surnames were often descriptive. (A skilled laborer might be known as "Goldsmith"; John's son might be known as "Johnson.") In small towns, where everyone knew everyone else, surnames were not particularly important anyway. But as population increased, and the need to distinguish between individuals with the same first name increased, surnames became more important.

Eventually, patronymics emerged. They were a natural outgrowth of other rules dictating men as the head of families. But even as those rules subsided—or were invalidated by courts in the name of constitutional sex equality—the rule of patronymy remains dominant in the United States—at least for children born in wedlock. The tradition for nonmarital children is the opposite—they are usually given their mother's surname. (Connor was thus named consistently with this latter tradition—he was given the surname of his unmarried mother.)

Prior to 1970, many states, by statute or common law, dictated that fathers had a right to have their children bear their surnames. As a result, fathers could insist that the child's birth certificate reflect that surname. Moreover, if the mother tried to change the surname—post-divorce, for example—she was usually unsuccessful, unless there was evidence that the father had forfeited the right. But after the Supreme Court began to recognize a constitutional right to sex equality, rooted in the Equal Protection Clause, these rules were mostly invalid. Courts slowly struck down laws giving fathers the absolute right to name their children. These laws were replaced, by statute or judicial decision, with ostensibly gender-neutral standards. The social traditions that underlay them, however, remained strong.

In the modern era, states follow different approaches to child name change petitions. The first of three common approaches favors the status quo—that is, the original name. A parent petitioning to change a child's surname will prevail only if he or she can show that it would be detrimental to the child to keep his or her original name.

A second common approach: It gives little weight to the status quo. Instead, it gives the custodial parent the right to choose the child's surname, including the right to adopt a new one. Only a showing that the change to a particular name will be detrimental to the child can limit the exercise of this right. The *Connor H.* court, as discussed above, expressly rejected this approach.

Finally, a third approach adopts the generic standard applicable to most disputes involving children—the "best interests of the child." Under this approach, a court does not start with any presumption favoring, or disfavoring, the status quo. Instead, it evaluates the name change petition against a list of factors the prior decisions have deemed relevant. The *Connor H.* court opted for this approach. By placing the burden of proof squarely on the party seeking a change of name (in this case, both parents), the court invited an open-ended inquiry into the interests of this particular child.

While this last approach appears sex neutral, there is hidden gender bias in each standard. Initially, a child of married parents is almost always given his father's surname. That means the first approach—the presumption that the status quo should continue—obviously favors fathers. A child of unmarried parents is often given his mother's surname, and a rule favoring the status quo reinforces the social norm that unwed fathers are not full fathers—either in terms of rights or obligations.

The second approach—the presumption toward the custodial parent's naming—might seem to actually favor mothers. After all, mothers are still more likely to be custodial parents. Unfortunately, however, despite the custodial parent presumption, a sexist court can still deny a mother's name change if the judge feels it is detrimental to the child not to carry the father's surname. (The trial court in this case showed evidence of such thinking.)

Even the best interests of the child standard can be vulnerable to sexist ideals. Multi-factored tests rely heavily on judicial discretion, which family law lawyers know all too well can be infused with gender or other types of biases. The *Connor H.* court was careful, however, to avoid indulging such biases. Its ruling demonstrates the best use of the best interests standard in this context—to invite a full and fair inquiry into what the child needs rather than what the parents want.

Conclusion

The Nebraska ruling, which I think is correct, suggests that we may be moving beyond some of the traditional assumptions and traps of child naming. But all of the common approaches—including the one used in the *Connor H.* case—infuse the choice of a child's name with too much meaning.

The *Connor H.* court observed that "Blake was able to build a strong relationship with Connor despite their different surnames." The silent premise of this statement is an assumption that different names might interfere with the development of an appropriate father-son relationship. But there's simply no reason to think that is the case. Mothers who retain their birth names upon marriage often have children with different surnames, but there's no suggestion that those relationships are threatened because of naming disparities. As a society, we should break out of the patronymic tradition and give equal regard to the names of men and women. The more variation in marital and child naming, the fewer questions that naming disparities would raise.

Perhaps more importantly, we should stop assuming that names will dictate the substance or strength of a parent–child bond. Children are not property that comes with a certificate of title, and there are myriad ways to make clear that one is a parent without sharing a surname. And while anecdote is no substitute for scientific data, I can say as the mother of three children with alternating last names (the first and third have mine; the second has my husband's), the most serious challenge we have encountered as a family is in claiming sibling discounts for sports and camps. The different last names raise at least an eyebrow by the person reading those applications. The playground gossip about the dead husband I must have had at some point, which might explain our naming oddities, is just an entertaining bonus.

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