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Whose Surname Should a Child Have? A New York Court's Ruling Reinforces Sexist Traditions

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Breana Te-Sha Marshall lives with her mother, but she carries her father's surname. Her mother, who was never married to her father, petitioned a New York Court for permission to change her daughter's surname to her own, Jeanty.

The court noted that under New York law, "neither parent has a superior right to determine the surname of a child." But it still denied Breana's mother's request - on the ground that Breana's father had done nothing sufficiently wrong to forfeit his right to pass on his surname.

The ruling wrongly honored a longstanding, unjustifiable, sexist American tradition of paternal naming.

The Historical Origins of Patronymy

Patronymy is the practice of giving children the surname of their fathers. In the U.S., the tradition of patronymy 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. One such rule was coverture, which meant a woman ceased to have her own legal identity after marriage and could not, among other things, own property in her own name. Another was primogeniture, the rule of descent that dictated the first son to be the sole inheritor of his father's real property.

By the middle of the Twentieth Century, coverture was abolished everywhere. Primogeniture had never been followed in the American states in the first place. Yet patronymy was, and 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.

How The Supreme Court's Sex Equality Cases Led to Changes in Naming Laws

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.

In the 1970s, however, the Supreme Court began to recognize a constitutional right to sex equality, rooted in the Equal Protection Clause of the Fourteenth Amendment. For instance, in 1971, in *Reed v. Reed*, the Court struck down a state law that preferred male relatives over female ones when it came to deciding who would be the administrator of a decedent's estate.

Decisions like *Reed*--and subsequent ones that denounced state-sponsored sex discrimination even more resoundingly--marked the end of an era in which states could allocate burdens and benefits on the basis of sex, at least without having a very good reason for doing so. They also had obvious relevance to

traditional naming laws - which gave the father a naming benefit, while denying it to the mother, solely because of gender.

Almost a century before, the Lucy Stone League had advocated - for the most part, unsuccessfully - for the right to sex-neutral naming laws, which would guarantee that wives could keep their own names, and that children's names would not necessarily follow that of the father. Later, organizations like the Center for a Woman's Own Name, founded in 1974, took up the cause.

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.

How Birth Certificate Naming Disputes Are Resolved

Disputes about naming typically arise at one of two stages: choosing the child's name that will appear on the birth certificate, and attempting to change that name later.

When the child is born, the parents may disagree about what surname should appear on the birth certificate. Many states have statutes with explicit instructions for resolving such disagreements.

In Florida, for example, a child whose mother and father both have custody but cannot agree on a surname will be given both, hyphenated, with the names appearing in alphabetical order. Other states provide that a court must decide, based on the best interests of the child, what surname should be entered on the birth certificate in the case of parental disagreement.

By virtue of regulations adopted in 2000, the District of Columbia required all marital children to bear the surnames of their fathers. Even if both parents wanted the child to bear the mother's surname, they could not enter that name on the birth certificate. They, instead, were forced to institute a formal name change proceeding for the child subsequent to birth. (These regulations have since been suspended.)

The rules for nonmarital children may be different, however - favoring or requiring that the child bear the mother's surname (or at least not the father's surname). In some cases, the law prohibits an unmarried mother from giving her child the putative father's surname without his consent or an adjudication of paternity.

How Name Changes Disputes Are Resolved: The Three Main Modern Approaches

After the birth certificate is completed, another naming issue may arise if the parents divorce or split up. Often, a custodial mother will seek to change the child's surname to the new stepfather's. Sometimes, she will seek to change the child's surname to her own "maiden" or birth name.

As with birth certificates, states have statutes to address name changes. But these statutes, unlike birth certificate statutes, often simply set out a general standard. As a result, courts have played a bigger role in developing name change rules than birth certificate rules.

Today, there are three main approaches - developed through both statutes and the cases interpreting them - to resolving disputes about a child's name.

The first approach favors the status quo - that is, the original name. A parent petitioning to change a child's surname will only prevail if they can show that it would be detrimental to the child to keep his or her original name.

The second approach is exactly the opposite: 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 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 Arkansas Supreme Court recently adopted six such factors. The first is the child's own preference. The second is the potential effect of the name change on the child's relationship to either parent. The third is the length of time the child has used a particular name. The fourth is the reputation or meaning associated with a particular name. The fifth is the difficulty the child may face as a result of either keeping the existing name or adopting the proposed one. The sixth, and last, is whether there has been parental misconduct or neglect.

New York's Approach to Name Changes: *Jeanty v. Marshall*

That brings us back to the case of Breana Te-Sha Marshall, and her mother's unsuccessful name change petition. In that case, New York law was applied.

New York is now a "best interests" jurisdiction. Its name change statute permits a civil court (New York family courts lack jurisdiction) to order a child's name changed upon a petition to which there is "no reasonable objection," as long as the child's interests "will be substantially promoted by the change."

Since the adoption of the "best interests" approach, New York courts have purported to develop and apply a sex-neutral standard - one that gives both parents an equal say in choosing their children's

surnames. In the case of a dispute, the touchstone is supposed to be the child's best interests. But as applied, the standard plainly favors fathers, not children.

For instance, in *Jeanty v. Marshall*, the court paid lip service to a sex-neutral standard, as noted above. But in practice, it favored the father. It recognized a "father's interest in having the child bear his surname," but it did not recognize a mother's similar interest as having equal weight. Accordingly, it rejected the mother's name change petition because she failed to show "any evidence of misconduct, abandonment, or lack of support" by the father.

The bottom line is this: Under the New York decision, mothers will not be able to change children's surnames unless the father fails to meet some minimum standard of fatherhood. In effect, this means that mothers only have naming rights when their children's fathers have done something to lose their own naming rights. That is hardly an equal right.

Put another way, when both parents are adequate, the father's name will trump. The father's name will also trump if the mother is terrific, and the father is barely adequate. This is not sex equality; it's court-enforced sexism.

Is There a Better Approach?

Indeed, commentators such as University of Oregon Law Professor Merle Weiner have argued, persuasively, that none of the three modern approaches to child name changes is, in practice, truly sex-neutral.

Initially, a child is almost always given his father's surname. That means the first approach - the presumption that the status quo should continue - obviously favors fathers.

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. Put another way, the "detrimental to the child" loophole means that patronymy can continue if the judge thinks it's a good idea.

What about the third approach, the "best interests of the child" standard? It, too, is vulnerable to sex bias. As happened in the New York case, courts may articulate a sex-neutral standard, while in effect applying a sex-biased one. Sexism can easily creep into the application of the multi-factor test that courts use to evaluate the child's best interests.

For example, consider the factor relating to the difficulties a child may face because of the adoption of a particular name. "Experts" may testify that children who do not have their fathers' surnames face social ostracism or teasing. If the court accepts the evidence, then private bias can become a factor infecting a court name change order.

In the end, the social practice of patronymy probably will continue to dominate, simply because it has been the status quo for so long. But the law need not perpetuate it. Rather, the law should be true to its constitutionally required sex-neutrality.

Accordingly, it should treat mothers fairly when they seek to have their own surnames on their children's birth certificates, or to change their children's names in the event of divorce or break-up. That means, among other things, counting a mother's interest in passing on her name as heavily as a father's interest in passing on his - which the court in *Jeanty v Marshall* failed to do.

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