State of New Hampshire
Supreme Court

NO. 2011-0833

2012 TERM

MAY SESSION

In re Name Change of Alexander Goudreau

RULE 7 APPEAL OF FINAL DECISION OF
BERLIN FAMILY COURT

BRIEF OF RESPONDENT/APPELLANT VERONICA GOUDREAU

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1. Did the court err in changing the child's surname to the father's surname, when the father had no involvement in the mother's pregnancy, has little involvement in the child's life and provides little support, the mother has been and is the primary parent and has custodial responsibility, and the court's ruling merely reflects sexist societal norms?

   Preservation: PETITION FOR CHANGE OF NAME RELATED TO FAMILY DIVISION JURISDICTION FOR MINOR (June 16, 2011), *Appx.* at 36.

2. Did the court err in dropping and substituting the child's middle name when no party requested such a change?

   Preservation: MOTION FOR CLARIFICATION (Oct. 7, 2011), *Appx.* at 40.

3. What is the burden of proof in infant name change cases?

   Preservation: The level of the burden to be proved was not preserved. New Hampshire law is either silent or ambiguous on the matter however, *Moskowitz v. Moskowitz*, 118 N.H. 199 (1978), making the issue unavoidable.

4. What is the standard of review in infant name change cases?

   Preservation: This is an appellate issue that is reached for the first time in this Court.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Andrew Gets Veronica Pregnant

Veronica Goudreau and Andrew Lemieux[1] grew up around the corner from each other in Gorham, New Hampshire, *EX PARTE* MOTION FOR PARENTING TIME (Apr. 15, 2010), *Appx*. at 3,[2] and

[1]For convenience first names are used throughout this brief. No disrespect is intended.

[2]The record in this case comprises two dockets in the Berlin Family Court. The first is the parenting plan case, captioned *In the Matter of Maurice & Gisele Lemieux, p/n/f Andrew Lemieux, and Raymond & Bridget Goudreau p/n/f Veronica Goudreau*, bearing docket number 2010-DM-072. The second is the name change case, captioned *Name Change of Alexander Goudreau*, bearing docket number 2011-NC-02.

Two issues arise from this.

First, because the facts of the parenting plan case gave rise to the name change case, and because the name change issue was first mentioned in the parenting plan case, they are factually treated here as one. Documents from both are cited interchangeably in this brief, although for clarity they are separated and designated in the appendix. It is nonetheless recognized that the issue before this Court, and the resulting mandate, is limited to the name change case.

Second, the parents in this matter, Andrew Lemieux and Veronica Goudreau, were both minors when the parenting plan case commenced. At all times during the proceedings in both cases Andrew was a minor and therefore his parents as next friends were parties. Veronica was a minor at the commencement of the parenting plan case, but reached the age of majority before it ended, and thus while her parents were initially parties as next friends, they no longer were as of July 13, 2011. By the time the name change case was underway she had reached majority, and thus during the proceedings in the name change case Veronica was an adult and her parents were not parties.

dated for over a year while students at Gorham High School. GUARDIAN AD LITEM PRELIMINARY REPORT at 3 (May 12, 2010), *Appx.* at 45.[3] When Veronica was 16 and a junior, GUARDIAN AD LITEM PRELIMINARY REPORT at 4 (May 12, 2010), *Appx.* at 45, and Andrew 15 and a sophomore, Veronica learned she was pregnant. Veronica never had any question who the father was. *Aug31* at 6-7.[4] Veronica and Andrew broke up in January 2010, *Aug31* at 8, when Veronica was 5 months pregnant, and their child was born on April 9, 2010. At the time of the hearing in this name change case, Veronica had just turned 18 and Andrew was 17; the child, Alexander, was 16 months old.

Although Andrew maintains Veronica did not tell him until five or six months after conception, *Aug31* at 14, Veronica testified that she told him "the day I was pregnant" because "I couldn't hide it from Andrew. … I had to tell him, because at the time he was everything." *Aug31* at 18. During the pregnancy Veronica did not get any help from Andrew or his family, *Aug31* at 9, and no contact except for one email through his parents.

Andrew did not want to have a baby. He testified "I had no idea what I was going to do," and did not understand "the baby game." *Aug31* at 16. Veronica knew from Andrew that he did not want to be a father, *Aug31* at 8, and that he thought she was crazy for wanting to keep the child. *Aug31* at 8. Andrew and his parents preferred to put the baby up for adoption, *Aug31* at 7, and Veronica's refusal precipitated the couple's breakup in January 2010. GUARDIAN AD LITEM PRELIMINARY REPORT (May 12, 2010), *Appx.* at 45. Consequently Veronica received no help – emotional, financial, or otherwise – from Andrew or his family during her prenatal term. *Aug31* at 7-8.

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[3]The GAL filed three reports, all of which are sealed. They are provided to this Court in a separate sealed appendix.

[4]The record relevant to the name change case comprises two hearings. The first, which occurred on June 16, 2011, was in the parenting plan case. Citations to it are "*June16* at #," where "#" indicates the page number. The second, which occurred on August 31, 2011, was in the name change case. Citations to it are "*Aug31* at #," where "#" indicates the page number.

The pregnancy significantly altered Veronica's life. She withdrew from school and continued most of her education on-line. GUARDIAN AD LITEM PRELIMINARY REPORT at 4 (May 12, 2010), *Appx.* at 45. Andrew, however, made no change in his curricular or extra-curricular activities. *Aug31* at 9. He was embarrassed by Veronica, and insisted the school alter her class schedule to avoid contact with him. *Aug31* at 8; GUARDIAN AD LITEM PRELIMINARY REPORT at 4 (May 12, 2010), *Appx.* at 45. Although it was a maturing experience for Veronica, the pregnancy appears to have made little immediate impact on Andrew. *Aug31* at 11-12.

II. Veronica Names the Baby

Alexander was baptized immediately after birth. *Aug31* at 13. Although it was done without his family's involvement, *Aug31* at 4-5, Andrew told Veronica he was content having the baby baptized, *Aug31* at 13, and the couple do not appear to have significant religious differences. GUARDIAN AD LITEM PRELIMINARY REPORT (May 12, 2010), *Appx.* at 45.

After the child was born, Andrew's parents sent an email saying they wanted to see him. *Aug31* at 10. A few days later Andrew got in touch with Veronica. *Aug31* at 17. Andrew would not visit at Veronica's house however, because he felt there was hostility between their families. *Aug31* at 10, 17.

Veronica testified that Andrew told her he did not want his name on the child's birth certificate, and that she complied out of respect for Andrew and his family. *Aug31* at 7-8, 18.

As to naming their child, Andrew and Veronica had no communication, *Aug31* at 13, and thus Veronica chose the name. *Aug31* at 4-5, 14. She named the baby *Alexander Bailey Goudreau*. There is no dispute about the baby's first name, "Alexander"; the significance of the middle name "Bailey" is not in the record; "Goudreau" is Veronica's family name.

III. Breast Feeding, Infant Visitation, and Child Support

Because Andrew was not willing to visit with Alexander in Veronica's presence, and because Veronica was a brand-new inexperienced mother, visitation caused immediate difficulties for Veronica and the baby's breast-feeding routine. Thus Andrew, through his parents as next friend and within a few days of birth, filed a parenting petition in the Berlin Family Court and an *ex parte* motion for parenting time. PARENTING PETITION (Apr. 13, 2010), *Appx.* at 1;EX PARTE MOTION FOR PARENTING TIME (Apr. 15, 2010), *Appx.* at 3; EX PARTE MOTION FOR CLARIFICATION AND ORDER (Apr. 22, 2010), *Appx.* at 7. The court held a hearing when Alexander was two weeks old.

The court awarded joint decision-making on major issues, and daily decisions to each parent during the time each is caring for the child. Because of the nature of the breast-milk problem, the court got into the minutia of visitation scheduling, which provided that Andrew would have the child in two-hour increments four days a week. TEMPORARY ORDER AND PARENTING PLAN (Apr. 26, 2010), *Appx.* at 11. Although Veronica was sure Andrew was the father, *Aug31* at 6-7, the court also ordered paternity testing.

Within days problems arose concerning feeding the child formula rather than breast-milk, for which the parties sought judicial remedies. MOTION FOR *EX-PARTE* ORDERS (May 4, 2010), *Appx.* at 15; ANSWER TO RESPONDENT'S REQUEST FOR *EX PARTE* ORDERS (May 11, 2010), *Appx.* at 23. The court entered orders on supplementing Alexander's diet, ORDER ON *EX PARTE* MOTION (May 5, 2010), *Appx*. at 18, and appointed a Guardian *Ad Litem* to report on the needs of the infant, the parenting capacities of each young parent, the role of each set of grandparents, and issues regarding supplementation of Veronica's lactation. ORDER ON APPOINTMENT OF GUARDIAN AD LITEM (May 5, 2010), *Appx.* at 19.

The GAL filed the first of three reports a few days later, explaining the communication problems Veronica and Andrew faced regarding pregnancy and birth, their respective home and family situations, and their hopes and plans for the future. The GAL explained the natural difficulties Veronica encountered with breast-feeding and the additional problems associated with breast-milk pumping, and offered suggestions from the baby's doctor and the hospital's lactation consultant about how to alleviate them. The GAL made detailed recommendations about how to share parenting and parenting time, and suggested education and communication resources. GUARDIAN AD LITEM PRELIMINARY REPORT (May 12, 2010), *SealedAppx.* at 45.

Another hearing was held and the court entered further orders regarding visitation timing and breast-milk versus formula, and facilitating communication between the two parents. ORDER AFTER EX PARTE HEARING (June 9, 2010), *Appx.* at 29. Paternity testing was scheduled. LETTERS FROM DHHS TO PARTIES (June 9, 2010), *Appx.* at 27. In July 2010 the court slightly adjusted visitation, again addressed breast-feeding and supplementation with formula, and scheduled a final hearing on child support. ORDER ON REVIEW HEARING (Sept. 8, 2010), *Appx.* at 32.

Also in July 2010 results from the paternity testing confirmed, as Veronica already knew, that Andrew was Alexander's father, LABCORP REPORT (July 29, 2010), *Appx.* at 31, and the birth certificate was commensurately amended. *June16* at 17.

The parties entered mediation regarding visitation, which appears to have been unsuccessful. ORDER ON MOTION TO AFFIRM AND ENFORCE (Oct. 18, 2010), *Appx.* at 33. In preparation for the final hearing on those matters, in November 2010 the GAL filed her second report. It suggested progress in Veronica's and Andrew's efforts at communication, but pointed out remaining difficulties cooperating on scheduling. The GAL proposed a parenting plan attempting to

accommodate everyone. GUARDIAN *AD LITEM* PRE-TRIAL STATEMENT (Nov. 30, 2010), *SealedAppx.* at 61. The court held a hearing and made minor changes to visitation schedules. PRETRIAL CONFERENCE AND FURTHER ORDER (Dec. 20, 2010), *Appx.* at 34.

In May 2011 the GAL filed her third and final report in anticipation of the June final hearing on the original parenting petition. The GAL reported that Andrew had been suspended from school for possessing drug paraphernalia and a knife. GUARDIAN *AD LITEM* PRE-TRIAL STATEMENT (May 29, 2011), *SealedAppx.* at 57; *Aug31* at 12. The GAL reported that Veronica, on the other hand, after graduation would be attending college in Manchester "to pursue a nursing career," and thus might be in need of daycare. GUARDIAN *AD LITEM* PRE-TRIAL STATEMENT (May 29, 2011), *SealedAppx.* at 45; *Aug31* at 12-13.

The GAL also reported that co-parenting counseling was progressing, but described a recurring pattern:

> Within sessions … Andrew [is] very willing to negotiate, but when he goes home to talk to his family, often changes his position. This leaves Veronica being more rigid and distrustful.

GUARDIAN *AD LITEM* PRE-TRIAL STATEMENT 3-4 (May 29, 2011), *SealedAppx.* at 45. The GAL again proposed what she believed was a workable parenting schedule.

The final hearing was held on June 16, 2011, after which the court ratified the parties' parenting plan in which they agreed to: shared decision-making responsibility, Alexander residing primarily with Veronica, establishment of regular visitation schedules that appear to be largely what the GAL proposed, and plans for working out last-minute modifications.

The court ordered Andrew to pay child support, however, below the statutory minimum of $50 per month. Andrew was ordered to pay just $5 per week, despite making $250 per month from

his part-time job at Mr. Pizza and driving a "new conversion van." *Aug31* at 11; FINANCIAL AFFIDAVIT (June 16, 2011), *SealedAppx.* at 66.

IV. Andrew's Family Wants to Change Baby's Name

Shortly before the June 16 final hearing, and a year after paternity had been established, Andrew's family filed an amended pre-trial statement seeking to add an issue for the court to decide at the final hearing:

> As a result of the paternity test confirming Andrew Lemieux is the father of Alexander, Petitioners have proposed in their Parenting Plan that Alexander's name be changed from Alexander *Goudreau* to Alexander *Lemieux*.

AMENDED PRETRIAL STATEMENT (June 6, 2011), *Appx.* at 35 (emphasis added).

During the final hearing the parties discussed the name change. Andrew's amended pre-trial statement was Veronica's first notice of the issue, and it assumed both that the family court had jurisdiction and that it could be decided within the existing parenting plan docket. After discussion, the court directed Andrew's lawyer to file a separate name change petition, and also suggested avoiding jurisdictional difficulties by waiting to file it until after July 1 when the Circuit Court was created. *June16* at 4-11.

Thus Andrew's family opened a new case to address the issue, PETITION FOR CHANGE OF NAME RELATED TO FAMILY DIVISION JURISDICTION FOR MINOR (June 16, 2011), *Appx.* at 36, to which Veronica objected. Andrew's family requested Alexander's name be changed from "*Alexander Bailey Goudreau*" to "*Alexander Bailey Lemieux*." PETITION FOR CHANGE OF NAME (June 16, 2011), *Appx.* at 36 (emphasis added).

The court held a half-hour hearing on August 31, 2011. The lawyers for both parents made short offers of proof, and both Andrew and Veronica very briefly testified. The GAL was not

involved and there was no expert. Andrew's explanation for why he wanted the name change was that paternity had been established, *Aug31* at 6, that the child should feel proud and connected to his father, *Aug31* at 4-5, 14-17, that giving the child Andrew's surname would create "a greater probability that [Andrew] will be involved going forward," *Aug31* at 17, and that generally a child should bear his father's name. *Aug31* at 4-5. Veronica argued the child should retain his given name.

The court then issued an order. It found that although Andrew had since developed a relationship with the child, his reaction to Veronica's pregnancy was "not positive," he did not want his name on the birth certificate, he refused to support her during pregnancy, and he lobbied her to give the baby up for adoption. The court recognized that the child "has two parents who both care for him and love him." It ruled that "Andrew's Lemieux's commitment to [the child] should be demonstrated in [the child's] name, as should Veronica Goudreau's." The court then, "based on the best interests of Alexander," changed the his name to "*Alexander Goudreau Lemieux*." ORDER ON PETITION FOR NAME CHANGE (Sept. 23, 2011), *Appx.* at 39 (emphasis added).

Noting the difference between the name Andrew's family requested, and the name the court ordered, including the omission of the middle name "Bailey," Veronica asked for clarification, MOTION FOR CLARIFICATION (Oct. 7, 2011), *Appx.* at 40, to which Andrew's family objected. PETITIONERS' OBJECTION TO RESPONDENT'S MOTION FOR CLARIFICATION (Oct. 20, 2011), *Appx.* at 42. The court made clear it intended the child's name to be "Alexander Goudreau Lemieux" with no hyphen and no "Bailey." MOTION FOR CLARIFICATION (handwritten order) (Oct. 24, 2011), *Appx.* at 40; CERTIFICATE OF CHANGE OF NAME (Nov. 10, 2011), *Appx.* at 44. Veronica appealed.

SUMMARY OF ARGUMENT

After tendering the symbolism of names generally, Veronica Goudreau briefly discusses the common law of naming. She notes the naked best-interest standard is vague, and often creates sexist outcomes. Ms. Goudreau then offers three solutions, including a list of factors to fill out the best-interest standard, and urges adoption of a presumption in favor of allowing the custodial parent to name infants. She points out that Mr. Lemieux's arguments for his surname do not meet any accepted measure, and that therefore her choice of surname should prevail.

In addition, Ms. Goudreau sets out the possible burdens of proof to be used in infant name cases, and urges a relatively high-scrutiny burden. Finally, she sets out the possible standards of review, and urges this Court use a *de novo* standard.

ARGUMENT

I. Symbolism of Names

"For most of us, a name is much more than just a tag or a label. It is a symbol which stands for the unique combination of characters and attributes that define us as an individual. It is the closest thing that we have to a shorthand for self-concept. Our identities and our perceptions of ourselves and of others are greatly affected by the names we are called and the words with which we are labeled." Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 329 (1998).

"Every society has developed a special folklore around a person's name. One's name becomes a symbol for one's self." *Jech v. Burch*, 466 F. Supp. 714, 718 (D. Haw. 1979). "Surnames give an individual a personal identity and selfawareness." *Roe v. Conn*, 417 F. Supp. 769, 782 (M.D. Ala. 1976). "Property and contract law and the best interests of the child do not adequately account

for parents' interests in their children's surnames. Rather than seeing the child's name as the result of a commercial transaction or as a vested incident of paternal status, or trying to create a right for the father out of the best interests of his child, courts should recognize that the name's value for both parents is its symbolism." Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1341 (1984).

II. Common Law of Names and Naming

The law of naming is long in history and tradition. *See e.g.*, Kelly, *Divining the Deep and Inscrutable: Toward A Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. Va. L. Rev. 1 (1996). The common law exists side-by-side with state statutory law, the latter governing mainly procedural aspects. *See* 57 AM. JUR. 2d *Name* §§ 16-17.

> A review of the authorities makes clear that at common law a person could adopt another name at will. In the absence of statutory restrictions, one may lawfully change his name at will without resort to any legal proceedings if the change is not made for a fraudulent, criminal or wrongful purpose. Statutes setting forth procedures to be followed merely provide an additional method of making the change. They do not abrogate or supersede the common law, but merely affirm and aid it, and they have been held to be more advantageous both for individuals and for the State. For that reason, application under a statute should be encouraged and generally granted unless made for a wrongful or fraudulent purpose.

Moskowitz v. Moskowitz, 118 N.H. 199, 202 (1978). New Hampshire's various name change statutes and rules are exclusively procedural. RSA 170-B:26 (name may be changed upon adoption); RSA 490-D:2, X (family courts have jurisdiction to change names in conjunction with other areas of family court jurisdiction); RSA 458:24 (former name may be restored upon divorce); RSA 547:3, I(g) (probate court has general jurisdiction to change names); N.H.FAM.DIV.R. 9 (procedure for filing petition for name change in the family court).

Outside of some allowable regulation against bizarre or obscene naming, *Moskowitz v.*

Moskowitz, 118 N.H. 199, 202 (1978) (court may prevent "the choice of a name that is bizarre, unduly lengthy, ridiculous, or offensive to common decency and good taste"); *see also e.g.*, *Application of Ferner*, 685 A.2d 78 (N.J. Super. 1996) (allowing change of full name to single name "Koriander"); *In re Ravitch*, 754 A.2d 1287 (Pa.Super. 2000) (preventing change of surname to a single letter "R"), generally a child can have any surname, and statutes providing otherwise have been held unconstitutional. *See* Note, *The Controversy Over Children's Surnames: Family Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303, 304; Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 189-90 (2002) ("In fact, in Nazi Germany, this was one of the first dehumanizing efforts of the Nazi regime: to force Jewish males to take the name 'Israel' and Jewish women to take the name 'Sarah' if their own name was not 'Jewish enough' so that Nazis could readily identify them as Jews."); *but c.f.*, *Henne v. Wright*, 904 F.2d 1208 (8th Cir. 1990) (state has authority to require child's surname to be related to natural parents' surnames); Katz, *Constitutional Law-Parental Right to Choose A Child's Surname Other Than One Legally Connected to A Parent*, 64 TEMP. L. REV. 1095 (1991). There is no constitutional issue in this case however, because this is a dispute between parents, and not parents' rights versus the state. *In re Kurowski*, 161 N.H. 578, 581 (2011) ("As two fit parents, they … have equal constitutional parenting rights.").

> Names and naming practices originate in the languages and cultures of the varied heritages of America's citizenry. Although some people have changed their surnames in an effort to assimilate into mainstream society, surnames reflecting ethnic and religious heritage contribute to America's tradition of cultural diversity. Statutes and regulations that dictate childrens' surnames interfere with parents' expressions of their cultural backgrounds and undermine their authority to raise children to appreciate their ethnic and religious ancestry. Like ethnic and religious heritage, family heritage may also be expressed in a surname: the name may provide a means of tracing one's ancestors. Moreover, surnames may serve as a link to the nuclear family by identifying children as the offspring of their biological parents and by

> indicating children's membership in a particular family unit. The function of surnames as a link to the family is so widely recognized that the term "family name" is a synonym for the term "surname." Surnames may also reflect other societal and personal values. For example, many American blacks have adopted new surnames to replace the slaveowners' names borne by their ancestors, thereby reclaiming the right to determine their own names. An increasing number of women retain their original surnames after marriage as a means of expressing their individual identities. Similarly, many people have rejected the custom of giving children the father's surname because they feel it reflects the historical subservience of women. Many couples instead give their children surnames produced by combining all or part of the mother's and father's surnames.

Foggar, *Parents' Selection of Children's Surnames*, 51 GEO. WASH. L. REV. 583, 587-88 (1983).

The law recognizes at most two names – middle names have no legal significance. *See e.g.*, *State v. McMillan*, 593 S.W.2d 629 (Mo.App. 1980); *Imperial-Yuma Production v. Hunter*, 609 P.2d 1329, 1330 (Utah 1980); *Northern Trust Co. v. Perry*, 168 A. 710, 712 (Vt. 1933).

III. Emerging Consensus on Process and Outcome

The situation in which Veronica and Andrew find themselves occurs frequently: Young girl and boy get pregnant; during pregnancy boy is disinterested, encouraging either adoption or abortion, and providing little or no help; at birth boy-father's name is either written on or left off the birth certificate; sometime after birth, boy-father develops parental feelings, but little financial assistance and even less custodial interest; meanwhile baby has taken girl-mother's name, and boy-father objects. Consequently, there are many cases and lots of commentary, but few rules and little consistency. *See e.g.*, Russell, *Huffman v. Fisher: Defining the Best Interest of the Child for Disputes Involving A Minor Child's Surname*, 53 ARK. L. REV. 717 (2000); Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 40 A.L.R.5th 697.

Over the last two decades however, there has been a recognition that a best-interest standard alone allows patronymic customs to create sexist presumptions, and a consensus appears to be

emerging: That a list of specific factors gives substance to the best interest standard and aids lower courts in rational decision-making, that a child sharing the name of the custodial parent is an important or even determining factor, that the burden of proof in child name change cases may be higher than mere preponderance, and that the appellate standard of review requires more scrutiny than mere deference.

IV. Best Interest Standard Alone is Vague and Leads to Sexist Results

A. Best Interest Standard is Vague and Undefined

The common law standard for name change in New Hampshire, is the "overall welfare" of the child. *Moskowitz v. Moskowitz*, 118 N.H. 199, 203 (1978). Other jurisdictions use the term "best interest," 57 AM. JUR. 2d *Name* § 46, and it is assumed the phrases are interchangeable.

But the standard is problematic because it is so vague. "[I]n determining the appropriateness of a child's name, the [best interest] standard is ill-defined." Foggar, *Parents' Selection of Children's Surnames*, 51 GEO. WASH. L. REV. 583, 595 (1983). The cases employing the best interest standard appear to consider a variety of factors, which appear to reflect the facts of the case but have no consistency or rigor.

A review of Arkansas's name-change jurisprudence from 1952 through 2005 provides a compelling example. *Compare*, *e.g.*, *Clinton v. Morrow*, 247 S.W.2d 1015 (Ark. 1952) (establishing best interest standard); *Reaves v. Herman*, 830 S.W.2d 860 (Ark. 1992) (upholding trial court's discretion); *Mathews v. Oglesby*, 952 S.W.2d 684 (Ark. App.1997) ("Here, the chancellor followed a 'policy' that took but one factor into consideration, i.e., the age of the child. The mechanical application of such a policy precludes consideration of the full panoply of factors inherent in determining the best interests of a child."); *Moon v. Marquez*, 999 S.W.2d 678 (Ark. 1999) (res

judicata not apply because it does not take into account child's best interest); *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999) (creating explicit list of factors for consideration of best interest).

In its most recent installment, the Arkansas Supreme Court quoted the trial court's frustration at the arbitrary nature of its decision-making:

> You want the baby named after your grandpa. I can understand. You want the baby named after your brother. The two of you should be able to sit down and work that out, but you didn't and you couldn't. You left it to me, a complete stranger, to make that decision for your child. You left it to the people of the State of Arkansas. Is there a good reason? No, there's not. Malcolm, Joseph, David, you know. Yeah, what tipped the balance, to be honest with you, it's probably because of the deceased brother. I can't think of any other good particular reason to name a kid Joseph, other than that's my son's name, your son's name. And why I didn't do the hyphen, 'cause I thought of that. I thought that's the easy way out for me, you know, give him both names. I'll tell you what would happen. You want to know what would happen? I guarantee you, and you lawyers know this is true. You've done enough of this. One of 'em would call him Malcolm, and the other one would call him Joe.

Poindexter v. Poindexter, 203 S.W.3d 84, 87 (Ark. 2005) (concerning relatively rare first-name dispute; remanded for failure to consider factors set forth in *Huffman*). The Arkansas cases and the vagueness of the best-interest standard are well reviewed in *Huffman v. Fisher: Defining the Best Interest of the Child for Disputes Involving A Minor Child's Surname*, 53 ARK. L. REV. 717 (2000).

> The best-interest-of-the-child standard as an arbiter of custody disputes has been the subject of much criticism. Its vagueness carries with it many dangers, not the least of which is that gendered concerns will creep into the decision-making process. It has been criticized as being unpredictable and, therefore, costly as both parties laying claim to the child employ experts to determine the child's best interests. The best-interest standard also may result in powerplays in which claims to custody are made insincerely in order to gain leverage in the overall divorce or support negotiation.

Kelly, *Divining the Deep and Inscrutable: Toward A Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 56 (1996); *see also* Singer & Singer, SUTHERLAND STATUTORY CONSTRUCTION § 21.16 (2009) (vagueness of best interest standard in custody and termination statutes).

The "best interest" standard is so arbitrary as to be possibly unconstitutional. *Belotti v. Baird*, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring) (in context of judicial bypass of parental notification for minor's abortion) ("Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor – particularly when contrary to her own informed and reasonable decision – is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision.").

B. Patronymic Customs Create Sexist Presumptions

An unalloyed best-interest standard has been roundly criticized because it usually reflects the custom of giving a child its father's surname, and therefore reflects sexist social conventions.

Normative law says it does not give precedence to the name of either parent. *See e.g.*, *Braunschweig v. Fahrenkrog*, 773 N.W.2d 888 (Iowa 2009); *In re Custody of J.C.O.*, 993 P.2d 667, 669-70 (Mont. 1999); *Brown v. Shannahan*, 141 S.W.3d 77, 82 (Mo. App. 2004) ("Neither parent has the absolute right to confer his or her name upon the child."); *Gubernat v. Deremer*, 657 A.2d 856, 867 (N.J. 1995) ("We do not accept the preference that some courts accord to paternal surnames in the context of determining the best interests of the child."); *In re C.R.C.*, 819 A.2d 558, 560 (Pa. Super. 2003) ("neither parent is to be accorded a presumption"); *In re Name Change of L.M.G.*, 738 N.W.2d 71, 74 (S.D. 2007) ("A mother gets no advantage from the unilateral act of naming a child at birth, nor does the father obtain an advantage from the custom of giving a child the father's surname."). This is in accord with constitutional anti-discrimination principles, civil and human rights statutes, and gender-neutral family law statutes.

The custom of giving a child its father's surname stems from feudal inheritance rules, *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1324-26 nn. 101-116 (1984), but "[n]ames and naming practices originate in the languages and cultures of the varied heritages of America's citizenry." Foggar, *Parents' Selection of Children's Surnames*, 51 GEO. WASH. L. REV. 583, 599 (1983).

Thus not all American naming customs are patronymic. *See e.g.* MacClintock, *Sexism, Surnames, and Social Progress: The Conflict of Individual Autonomy and Government Preferences in Laws Regarding Name Changes at Marriage*, 24 TEMP. INT'L & COMP. L.J. 277, 285 (2010) (review of various countries' naming laws, conventions, and customs, some of which are matronymic); Cherena-Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 4 (1992) (subjugation of Latino maternal hyphenated names); Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1321-23 nn. 85-93 (1984) (reviewing various, including matronymic, naming customs); Hook, FAMILY NAMES: HOW OUR SURNAMES CAME TO AMERICA (1982); *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1008 (Ariz. App. 1993) (finding "custom of giving legitimate children their father's surname [but] [w]ith respect to children born out of wedlock … the custom has been for the child to assume the mother's surname.").

Nonetheless, patronymic naming is a custom to which courts often default. *See e.g.*, Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 HOW. L.J. 227 (1992) (noting continuing bias toward father in naming cases); *Huffman v. Fisher*, 987 S.W.2d 269, 275 (Ark. 1999) ("[T]he 'norm in the locale' is not one of the factors to be

considered in determining the child's best interest, although such evidence may be relevant in determining whether the child may experience difficulties, harassment, or embarrassment from bearing a particular surname."); *Welcker v. Welcker*, 342 So. 2d 251, 253 (La. App. 1977) ("[W]e judicially recognize the generally existent custom under which divorced women are known by a combination of their Christian name, their family surname and their former husband's surname, and, in view of the fact that no express or positive law exists in this jurisdiction, we justifiably look to established custom and equity for assistance in deciding this case. Indeed, the courts of Louisiana have long taken cognizance of custom as a source of law."); *Bennett v. Northcutt*, 544 S.W.2d 703, 707 (Tex. App. 1976) ("Courts may take judicial notice of well-known facts concerning the habits and activities of human beings. Among these well-known facts is the practically universal custom of giving a child the father's surname."); *In re Petition of Carter*, 640 S.E.2d 96, 100 (W.Va. 2006) ("Children bear the surnames of their fathers by custom and usage in this society.").

The default to the father's name has been widely criticized as producing unjustifiably sexist results. "Grandiose and vague standards such as 'the child's best interest' serve[] as a guise for maintaining discriminatory traditions." Omi, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 270 (1997). *See also* Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 HOW. L.J. 227 (1992) (bias toward father's name); MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. 91 (1985); Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893 (2010); Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321 (1998) (describing persistence of patronymic naming and problems caused for women); Urbonya, *No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes the Paternal from the Parental Right to Name a Child*, 58 N.D.L.REV.

793, 799 (1982); Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 218 (2002) (pointing out sexism of naming customs and statutes); Miller & Swift, WORDS AND WOMEN (1976); *Moskowitz*, 118 N.H. at 199 (trial court prevented divorced women from resuming maiden names).

Whether explicit or implicit in the vague best-interest standard, the patronymic preference is an anachronism:

> Until the latter part of this century, the assumption that children would bear their father's surnames was a matter of common understanding and the preference for paternal surnames was rarely challenged. But the historical justifications that once supported a tradition in the law for children to bear paternal surnames have been overtaken by society's recognition of full legal equality for women, an equality that is incompatible with continued recognition of a presumption that children must bear their father's surname.

Gubernat v. Deremer, 657 A.2d 856, 857 (N.J. 1995).

In *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999), for instance, the Montana Supreme Court reviewed its own name-change jurisprudence. It found "in each case the father prevailed regardless of whether he was the challenger or defender of the given surname." In one of them a Judge Barz dissented, arguing that deference to the trial court based on the vague guideline-less "best interest" standard means that "the traditional preference for the father's name will continue and a subtle form of discrimination against women will prevail." *Matter of Iverson*, 786 P.2d 1, 3 (Mont. 1990) (*Barz*, J. dissenting). Thus in *J.C.O*, the court indicated that "Justice Barz's concern about the subtle 'preference' for the father's surname appears justified." *Custody of J.C.O.*, 993 P.2d at 669-70.

V. Three Solutions to the Vague Best-Interest Standard

Beyond the naked best-interest standard now used in New Hampshire, *Moskowitz*, 118 N.H. at 199, states have employed three additional approaches, each of which is addressed below.

The first simply hyphenates the parents' names and creates a compound name.

The second is a "best-interest approach with factors." Under it, courts are "directed toward an examination of those factors which the courts or legislators have decided are relevant to the child's best interest in the name change context." Kelly, *Divining the Deep and Inscrutable*, 99 W. VA. L. REV. 1, 6-7 (1996).

The third is New Jersey's "which holds that decisions regarding the child's name should reside primarily with the child's custodian." *Id.* at 56.

A. Compound Name

One solution to child naming when parents cannot agree is to simply hyphenate the parents surnames and give the child a compound name.

This preserves the integrity of family names, and gives the child a basis from which to chose when the child comes of age. *In re Andrews By and Through Andrews*, 454 N.W.2d 488 (Neb. 1990) (compound names may "facilitate the attachment of the child to both parents").

> A dual naming system would protect for each parent the symbolic value of the child's surname. The noncustodial parent can communicate to the world that he is a responsible parent even though he is not the child's primary caretaker. The custodial parent can signify that she is more to the child than a babysitter.

Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1354 (1984). Compound names may be an acceptable compromise. *Cohee v. Cohee*, 317 N.W.2d 381, 384 (Neb. 1982); Lussier, *Delaney v. Appeal from Probate: When is a Dual Surname in the Best Interest of the Child?*, 9 CONN. PROB. L.J. 161 (1994) (arguing that dual surname is in best interest of child unless severe conflict between parents).

Compound names, however, may just beg the question. As pointed out in the quotation, *supra*, of the Arkansas trial judge in *Poindexter v. Poindexter*, 203 S.W.3d 84, 87 (Ark. 2005), "One

of 'em would call him Malcolm, and the other one would call him Joe." In a case where the parents had considered and rejected a compound name, the Iowa Supreme Court wrote: "We believe that selecting a hyphenated name in this case would pour salt in the wounds of one or both of the parties and eventually would affect [the child]. We reject this solution." *In re Marriage of Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993). There are other practical problems as well:

> If young adults with hyphenated names marry and have children, do these children now take on a maximum of four surnames? With hyphenated surnames, does one party's surname always appear before the other's? Will recording and other institutions where records are kept drop a second name within its internal practices for ease in administration? The potential problems that could arise in this area … could be numerous and comical.

Rio v. Rio, 504 N.Y.S.2d 959, 965 (N.Y. Sup.Ct. 1986).

B. Specific Factors That May be Considered

Several courts, legislatures, and commentators have assembled lists of factors that should be considered when making surname choices for minors in an effort to give substance to the otherwise vague best-interest standard. *See generally*, Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 40 A.L.R.5th 697.

Factors that have been mentioned elsewhere are collected below into what is hoped represents a comprehensive list. In addition, several factors that courts have warned against considering have been appended at the end of the list.

1. Sharing the Name of the Custodial Parent

Courts may consider whether it may be convenient and reassuring for the child to share the name of the custodial parent. *Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Change of Name of Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Cohee v. Cohee*, 317 N.W.2d 3813 (Neb. 1982); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio

1988); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994).

2. Effect on Child-Parent Relationships

Courts may consider the effect of a name change on the father-child and mother-child relationships. *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999) (concurrence); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994).

This factor is weak however, because there is no support for the claim that a child having his mother's name harms the child-father relationship. *Moskowitz*, 118 N.H. at 203 ("Mere speculation as to possible embarrassment to, confusion or harassment of, or harmful effect on, the child … due to … having a different name has been held not to be sufficient reason" for a name change.).

> The preservation of the paternal bond is not and should not be dependent on the retention of the paternal surname; nor is the paternal surname an indispensable element of the relationship between father and child. As one author found: [The] impairment of the father-child relationship had been an assumption by the courts, and fathers had not introduced circumstantial or scientific evidence of harm. More significantly, children and fathers frequently testify that they would not love each other less if the child bore a different surname. [This] rationale for the paternal surname presumption confuses the child's best interests with the father's need for a symbol.

Gubernat v. Deremer, 657 A.2d 856, 867 (N.J. 1995) (quotations and citations omitted) (citing and quoting Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 HOW. L.J. 227 (1992) and Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303 (1984)).

Moreover, conclusory assertions by the father that he wants the child to have his name are not demonstrations of the child's best interest. *See Chamberlin v. Miller*, 47 So. 3d 381 (Fla. App.

2010); *Jenkins v. Austin*, 255 S.W.3d 24 (Mo. App. 2008).

3. Identification by the Child as Part of a Family Unit

Courts may consider the identification of the child as a part of a family unit, or conversely the possibility that a different name may cause insecurity or lack of family identity. *Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Name Change of L.M.G.*, 738 N.W.2d 71 (S.D. 2007). This includes a child's step-family and siblings. *Petition of Two Minors for Change of Name*, 844 N.E.2d 710 (Mass. App. 2006); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999).

4. Maintaining Child's and Mother's Names if she Later Marries

Courts may consider whether the custodial parent will keep her and the child's surname if she later marries. *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Marriage of Gulsvig*, 498 N.W.2d 725 (Iowa 1993); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999); *State ex rel. Spence-Chapin Servs. to Families & Children v. Tedeno*, 421 N.Y.S.2d 297 (N.Y. Sup.Ct.1979); *In re Guthrie*, 45 S.W.3d 719 (Tex. App. 2001).

5. Conduct or Misconduct of a Parent

Courts may consider the conduct or misconduct of a parent, including crime, conduct toward the child, conduct toward the other parent, or conduct in litigation. Courts may consider any misconduct by either parent that would make that parent's surname possibly deleterious. *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. 2004); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999) (concurrence); *Change of Name of Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Cohee v. Cohee*, 317

N.W.2d 381 (Neb. 1982); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994).

6. Extent of Financial Support

Courts may consider the extent to which a parent has provided financial support for the child. *Montgomery v. Wells*, 708 N.W.2d 704 (IowaApp. 2005); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. 2004); *Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Cohee v. Cohee*, 317 N.W.2d 381 (Neb. 1982); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994); *Petition of Carter*, 640 S.E.2d 96 (W.Va. 2006).

Although older cases employ this factor, *see e.g.*, *Mark v. Kahn*, 131 N.E.2d 758 (Mass. 1956); *In re Harris*, 236 S.E.2d 426, 429 (W.Va. 1977), there appears to be a general recognition that a parent's surname should not be used as a *quid pro quo* for support, for two reasons: it ignores the fact that support is an obligatory duty and not an election, and it also ignores the other parent's mutual duty of support. Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1330 nn. 131-145 (1984); *In re Andrews By & Through Andrews*, 454 N.W.2d 488 (Neb. 1990); *In re Guthrie*, 45 S.W.3d 719 (Tex. App. 2001).

7. Extent of Contact

Courts may consider the extent of the child's contact with the non-custodial parent. *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. 2004); *Change of Name of Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Cohee v. Cohee*, 317 N.W.2d 381 (Neb. 1982); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994).

8. Motivation of the Parents

Courts may consider the motivation of the parents. *Moskowitz v. Moskowitz*, 118 N.H. 199, 202 (1978) ("unworthy motive"); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Mark v. Kahn*, 131 N.E.2d 758 (Mass. 1956); *Minnig*

v. Nelson, 613 N.W.2d 24 (Neb.App. 2000).

9. Age of Child and Length of Time

Courts may consider the age of the child and the length of time the child has had the existing name. *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Schiffman*, 620 P.2d 579 (Cal. 1980); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Petition of Two Minors for Change of Name*, 844 N.E.2d 710 (Mass. App. 2006); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. 2004); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999) (concurrence); *Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Cohee v. Cohee*, 317 N.W.2d 381 (Neb. 1982); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994).

10. Use of Name Without Objection

Courts may consider the child's use of a name for a period of time without objection. *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000).

11. Community Respect or Derision of Name

Courts may consider the degree of community respect or derision for a current or proposed name. *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000); *Name Change of L.M.G.*, 738 N.W.2d 71 (S.D. 2007).

12. Inconvenience, Harassment, or Embarrassment Having a Name Different from Custodial Parent

Courts may consider the inconvenience, harassment, or embarrassment the child may experience from bearing a name different from the custodial parent's. *Moskowitz v. Moskowitz*, 118 N.H. 199, 202 (1978); *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Marriage of Schiffman*, 620

P.2d 579 (Cal. 1980); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999) (concurrence); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Name Change of L.M.G.*, 738 N.W.2d 71 (S.D. 2007).

13. Child's Preference

Courts may consider the child's own preference, if the child is of sufficient age and maturity to meaningfully express one. *Huffman v. Fisher*, 987 S.W.2d 269 (Ark. 1999); *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Hazel v. Wells*, 918 S.W.2d 742 (Ky. App. 1996); *Dorsey v. Tarpley*, 847 A.2d 445 (Md. 2004); *Petition of Two Minors for Change of Name*, 844 N.E.2d 710 (Mass. App. 2006); *Custody of J.C.O.*, 993 P.2d 667 (Mont. 1999) (concurrence); *Change of Name of Slingsby*, 752 N.W.2d 564 (Neb. 2008); *Minnig v. Nelson*, 613 N.W.2d 24 (Neb.App. 2000); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988); *Name Change of L.M.G.*, 738 N.W.2d 71 (S.D. 2007).

14. Any Other Factor in Child's Best Interest

Courts may consider any other factor relevant to the child's best interest. *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa App. 2005); *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988).

15. Factors that Should Not be Considered

Courts have warned that some matters should not be considered, including anything reflecting the parents' interests rather than the child's interest. Thus a parent's desires, inconvenience or embarrassment, are not reasons for a name change. *Wearn v. Wray*, 228 S.E.2d 385 (Ga. App. 1976); *Jenkins v. Austin*, 255 S.W.3d 24 (Mo. App. 2008); *Spero ex rel. Spero v. Heath*, 593 S.E.2d 239 (Va. 2004); *In re Harris*, 236 S.E.2d 426 (W.Va. 1977).

Similarly, whether paternity is established is not a relevant consideration, because it does not

focus on the best interests of the child. *Hutcheson v. Taylor*, 43 So. 3d 921 (Fla. App. 2010).

Likewise, whether the parents were married also does not focus on the child's best interest. *Gubernat v. Deremer*, 657 A.2d 856 (N.J. 1995). As has been discussed, gender also is not material.

C. New Jersey Rule – Name of Custodial Parent

A third solution to the arbitrary outcomes caused by the vagueness of the best-interest standard was adopted by New Jersey in 1995. The facts in *Gubernat v. Deremer*, 657 A.2d 856, 869 (N.J. 1995), except for the age of the parents, are virtually identical to Veronica's and Andrew's.

A child was born to Ms. Deremer and Mr. Gubernat, who were not married. Mr. Gubernat "initially doubted his paternity, and was not present at the birth of [the child], nor was he named on [the child's] birth certificate." *Id.*, 657 A.2d at 858. Ms. Deremer gave the child her surname. When a paternity test confirmed Mr. Gubernat was the father, visitation commenced although with on-going timing disputes that resemble the problems faced by Veronica and Andrew. Mr. Gubernat then petitioned to change the infant's surname to his.

Mr. Gubernat's reason for the name change was because he wanted his "son to recognize who his father is," and so that the child will "know that he was always there for him or made every attempt to" be. *Id.*, 657 A.2d at 858. Ms. Deremer pointed out that "since the child's birth I have been the primary caretaker," and that "it's easier if the child's last name matches my last name. We live in a small local area [in which] [t]he Deremer name is know[n]." *Id.*, 657 A.2d at 858-59. As with Veronica and Andrew, the court approved a visitation schedule and also changed the child's last name to that of the father.

The New Jersey court then provided a thoroughly-researched history of surnaming in American law and its medieval patronymic roots. Like other states (including New Hampshire in

Moskowitz, 118 N.H. at 199), it adopted the best-interest standard for name-change cases. It also recognized that the best-interest standard unwittingly produces sexist results, which the court disdained. *Gubernat v. Deremer*, 657 A.2d at 867 ("We do not accept the preference that some courts accord to paternal surnames in the context of determining the best interests of the child.").

The New Jersey court then reviewed a list of factors similar to that presented *supra*, and concluded that "[c]ourts have experienced difficulty, however, in applying the factors underlying the best-interests-of-the-child standard." *Id.*, 657 A.2d at 868. It posited two explanations for the difficulty: 1) "[T]he speculative quality of the inquiry into the effect that the chosen surname would have on the future welfare and happiness of the child," and 2) "as a result of the vagueness of the standard, judges have proposed different and frequently conflicting subjective factors for deciding whether a particular name is in a child's best interests – factors that lead to inconsistent resolutions of child-naming controversies." *Id.*, 657 A.2d at 868 (quotation and citation omitted).

The court thus rejected the best-interest-with-factors solution. Rather, it reported that "[t]o enhance the predictability of the best-interest standard, some commentators have suggested, and a few courts have adopted, a presumption in favor of the surname chosen by the custodial parent." *Id.*, 657 A.2d at 868. The court explained that the custodial parent naming presumption "is firmly grounded in the judicial and legislative recognition that the custodial parent will act in the best interest of the child." *Id.*, 657 A.2d at 869.

The court explicitly left open the opportunity for the non-custodial parent to overcome the presumption if the custodial parent's "chosen surname is not in the best interests of the child." *Id.*, 657 A.2d at 869. The court cautioned however, that "[c]ourts should examine scrupulously all factors relevant to the best interests of the child and should avoid giving weight to any interests unsupported

by evidence or rooted in impermissible gender preferences." *Id.*, 657 A.2d at 869. It explained:

> The rebuttable character of the custodial-parent presumption serves two ends: it protects the right of the custodial parent to make decisions in the best interests of the child; and it permits judicial intervention, on a sufficient showing by the non-custodial parent, when that decision does not reflect the best interests of the child.

Gubernat v. Deremer, 657 A.2d at 869.

Although the New Jersey rule as been rejected by some states, *see*, *Schiffman*, 620 P.2d 579 (Cal. 1980); *Cohee v. Cohee*, 317 N.W.2d 381 (Neb. 1982)*; Doherty v. Wizner*, 150 P.3d 456 (Or. App. 2006); *Hamby v. Jacobson*, 769 P.2d 273 (Utah App. 1989)*; In re Wilson*, 648 A.2d 648, 650 (Vt. 1994), most of these rejections are dated. The New Jersey rule has nonetheless been advocated in a California concurring opinion, *Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980) (*Mosk*, J. concurring), and may be on the verge of adoption in Massachusetts. *Richards v. Mason*, 767 N.E.2d 84, 88 (Mass. App. 2002) ("Either party is free to present evidence on remand whether additional considerations should now be entertained, and others abandoned."). At least two states have adopted it by statute. KY. REV. STAT. ANN. § 213.046 (Kentucky); 28 PA. CODE § 1.7 (Pennsylvania).

The New Jersey formulation solves the problems inherent in child-naming cases. It appropriately assumes the custodial parent will normally act in the best interest of the child; while simultaneously giving the non-custodial parent the opportunity to show the contrary, in accord with widely-accepted best-interest factors.

VI. Alexander's Surname Should Remain Goudreau, the Same as Veronica's

It is recognized here that a compound name would not work well. Both Veronica and Andrew have multi-syllable surnames, which if hyphenated would produce a mouthful. The families may ultimately call the child different names, which would not be in his best interest.

A. Andrew Failed to Prove a Name Change is in the Best Interest of the Child

The family court reported that it decided in the child's best interest, but the only reasons advanced by Andrew for the child getting his surname were: 1) Andrew is the father, 2) the child should feel proud and connected to Andrew, 3) giving the child Andrew's surname would create "a greater probability that [Andrew] will be involved going forward," and 4) generally a child should bear his father's name.

None of these however, are focused on the child's best interest; they reflect Andrew's desires.

That Andrew is the father merely states the obvious. He has duties of support, with which he minimally complies. As noted above, courts have warned that establishment of paternity should not be a relevant consideration as it does not focus on the best interests of the child. *Hutcheson v. Taylor*, 43 So. 3d 921 (Fla. App. 2010).

The claim that sharing a surname will create pride and connection, or enhance the likelihood that there will be greater child-father bond, as noted above, has no basis in any known evidence or science. Beyond his conclusory assertion, moreover, Andrew provided no basis. He did not, for example, offer expert testimony, or clinical, psychological, or child development literature that might support such a claim. Further, to the extent this claim of an enhancement of a parent-child bond is accepted as a valid basis for naming a child, Andrew provided no rationale for applying it in his own favor, rather than Veronica's.

That a child should share his father's surname on general principle is merely a restatement of the sexist presumption which virtually all courts have recognized should be abandoned.

Consequently, the court's report that it considered the child's best interest is in error.

B. Best Interest as Measured by the Factors

Some of the 14 factors enumerated, *supra*, do not apply given the age and circumstances of Andrew, Veronica, and their child. The evidence in the record is reviewed here, and measured against the remaining relevant factors. *Bobo v. Jewell*, 528 N.E.2d 180 (Ohio 1988) (courts should consider only those factors present in the circumstances of each case); *Cohee v. Cohee*, 317 N.W.2d 381 (Neb. 1982) (balance each factor giving relative weight as demanded by circumstances).

Sharing the Name of the Custodial Parent. Veronica is the custodial parent, and it does not appear that is likely to change. Thus Veronica will be the one regularly registering the child in schools and programs, getting his mail, signing him up services such as for bank accounts and cell phone service, and generally enrolling him in life's numerous activities. It will be most convenient for the child to share Veronica's surname Goudreau.

Effect on Child-Parent Relationships. As noted, there is no basis to believe that choice of name affects child-parent relationships.

Identification by the Child as Part of a Family Unit. As Veronica is the custodial parent, the child will be living with her and in her family unit. However Veronica structures her life after nursing school, it will facilitate the child's incorporation into her family unit to share her last name.

Maintaining Child's and Mother's Names if she Later Marries. There was no evidence of this matter in the record. The trial court therefore could not have taken it into account in arriving at its decision.

Conduct or Misconduct of a Parent. Veronica is guilty of no known misconduct. Andrew, however, was suspended from school for possession of drug paraphernalia and a deadly weapon. He also drives what appears to be a expensive car, yet is content to provide below-statutory-minimum support for his child.

Extent of Financial Support. Andrew's child support is less than one-half the statutory minimum, even though it appears he can afford more. He has not changed his lifestyle, apparently applying his earnings to his own purposes or entertainment, and not to his child.

Extent of Contact. Andrew's contact is commensurate for the parties' situation. Veronica, of course, is a full-time single mother.

Motivation of the Parents. Although he alters his position after pressure from his parents, Andrew is agreeable to little visitation time, and then often misses the sessions. *Aug31* at 10-11. This shows indifference at best.

Age of Child and Length of Time. The child has enjoyed Veronica's surname since birth, and was a year-and-a-half old at the time of the hearing. Presumably the child is old enough to know and answer to his surname. Moreover, the father's family waited until a year after paternity had been established, and close to two years after paternity was obvious, to express an opinion about the child's name.

Use of Name Without Objection. Although Andrew technically objected in a timely manner, he was aware of – although did not acknowledge – his paternity long before birth. Thus, some lengthy time passed before he petitioned for a name change.

Community Respect or Derision of Name. Both family names appear to command equal respect in the community.

Inconvenience, Harassment, or Embarrassment Having a Name Different from Custodial Parent. For the practical reasons detailed above, it would increase convenience for the child to share his name with Veronica, the custodial parent.

Andrew suggests that convenience would be increased by the child sharing his surname and

points to the fact, which the court repeated in its order, that he was not notified of the baby's Baptism. But it would not have made any difference. When a church pastor is approached by a single-mother seeking a Baptism, the baby's surname will not make it any more or less likely that the pastor will inquire about the presence of the father.

Child's Preference. The child is too young to have a preference.

Based on a review of these factors, sharing Veronica's last name will help the child fit into her family on a day-to-day basis. The other deciding elements are practical – sharing Veronica's name will convenience the child's every-day needs for schools, medical care, and arrangements for various service-providers. There is no basis to suggest that having Andrew's name will impact the child's relationship with his father. Andrew claimed that establishment of paternity prompted the name change, but his family had been advocating for visitation long before that. On these grounds, the court was in error in changing the child's name.

Accordingly, this Court should reverse and restore the child's name to *Alexander Bailey Goudreau* as named by his mother.

C. Name Should be Chosen by the Custodial Parent

For the reasons enumerated by many courts, the naked best interest standard in *Moskowitz*, 118 N.H. at 202, is insufficient. As noted by the New Jersey Supreme Court in *Gubernat v. Deremer*, 657 A.2d 856, 869 (N.J. 1995), the custodial parent is presumed to treat children in their best interest, including the choice of their names.

This Court should follow New Jersey and determine that in disputed child-name cases, the name should be that chosen by the custodial parent, with the opportunity for the non-custodial parent to prove the best interest of the child demands some other name.

Because Andrew did not prove that here, this Court should reverse and restore the child's name to *Alexander Bailey Goudreau* as named by his custodial parent.

VII. Andrew's Evidence Did Not Meet the Standard of Proof for Name Change Cases

Some states apply a preponderance of the evidence standard to name-change cases, but many states, recognizing the symbolic importance of names and the warning that courts should be reluctant to change them, apply a variety of higher burdens. *Application of Saxton*, 309 N.W.2d 298, 301 (Minn. 1981) ("a change of a minor's surname against the objection of one parent should be exercised with great caution").

In *Moskowitz*, 118 N.H. at 199, this Court noted "[t]here is authority to deny the change of name if the interests of a child would be *adversely affected* thereby." *Moskowitz*, 118 N.H. at 203-04 (emphasis added). That case involved women desiring to restore their pre-marital names, and in that context this Court suggested that "[t]he general rule is that some *substantial reason* or peculiar circumstance must exist before the court is justified in denying such a request." *Moskowitz*, 118 N.H. at 203 (emphasis added). Thus, the law today appears to require that to change a name the petitioner must show a substantial reason that the child would be adversely affected by its current name.

Some states explicitly impose higher burdens of proof.

Illinois imposes a "clear and convincing evidence" standard. In *Stockton v. Oldenburg*, 713 N.E.2d 259, 261 (Ill. App. 1999), the court wrote, "[a]s to a minor, an order to change a child's name shall not be entered unless the trial court finds by *clear and convincing evidence* that a change is *necessary* to serve the *child's best interest*") (emphasis in original); *see also Petition of Carter*, 640 S.E.2d 96, 100 (W.Va. 2006) (proof "by clear, cogent, and convincing evidence [to show] that such change will significantly advance the best interests of the child") (case significantly different).

Minnesota uses a "clear and compelling" standard. *Application of Saxton*, 309 N.W.2d 298, 301 (Minn. 1981) ("a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change").

Courts in Nebraska, Minnesota and New York require a showing that a child's name be changed only if it is in the "substantial welfare" of the child or if the "interests of the infant will be substantially promoted." *Matter of Spatz*, 258 N.W.2d 814, 815 (Neb. 1977) (name change if "substantial welfare" of the child); *Application of Saxton*, 309 N.W.2d 298, 301 (Minn. 1981); *Swank v. Petkovsek*, 629 N.Y.S.2d 129, 130 (App.Div. 1995) ("interests of the infant will be substantially promoted").

In Veronica and Andrew's case, Andrew did not show any substantial reasons that the child would be adversely affected by bearing the surname *Goudreau*. Thus his meager evidence fell short of even the *Moskowitz* standard for adults. Given the caution courts should exercise in changing a child's name, a higher burden is justified, and Andrew's evidence did not come close to the "clear and convincing," "clear and compelling," or "substantial welfare" tests.

Accordingly, this Court should reverse and restore the mother's name *Goudreau*.

VIII. De Novo Standard of Review for Changing the Name of Minor

Most appellate courts employ discretionary review of name change cases. *See e.g.*, *Custody of J.C.O.*, 993 P.2d 667, 669 (Mont. 1999); Russell, *Huffman v. Fisher: Defining the Best Interest of the Child for Disputes Involving A Minor Child's Surname*, 53 ARK. L. REV. 717, 744-45 (2000). And for adult name changes, New Hampshire appears to use a modified discretion standard. *Moskowitz*, 118 N.H. at 202 ("The court is allowed to determine, in its discretion, the sufficiency of

the reasons, but not to arbitrarily deny the change.").

While discretionary review appropriately applies to the facts found by the family court, the changed name itself is a conclusion of law, and thus should not be reviewed for mere discretion.

Here, for an easy example, the court found that "Andrew was fifteen and Veronica was sixteen." ORDER ON PETITION FOR NAME CHANGE (Sept. 23, 2011), *Appx.* at 39. Such facts are clearly subject to discretionary review. But the child's new name is not a *fact* – it is a conclusion of the court based on the found facts. The court's order changes the child's *legal* name. It is therefore a conclusion of law that is not a matter of discretion, but rather is subject to *de novo* review by this Court based on the facts found by the family court. Thus the Nebraska Supreme Court wrote:

> An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. Provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Change of Name of Slingsby, 752 N.W.2d 564, 567 (Neb. 2008).

This Court should use the same wise standard of review as in *Slingsby*. Accordingly, this Court is free to revisit without remand the family court's conclusion, and determine that the thin facts upon which it was based do not support the changed name here.

IX. Middle Name

The court entirely eliminated the middle name, "Bailey," which the child enjoyed for the first 16 months of his life. No party requested this relief, and the court thus had no authority to order it.

CONCLUSION

In accord with the forgoing, this court should reverse the conclusion of the family court and restore the child's name to Alexander Bailey Goudreau, as named by Veronica the custodial parent.

Respectfully submitted,

Veronica Goudreau
By his Attorney,

Law Office of Joshua L. Gordon

Dated: May 8, 2012

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Veronica Goudreau requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction, the court applied wrong standards, and the name of the child is important.

I hereby certify that on May 8, 2012, two copies of the foregoing will be forwarded to Jack Crisp, Esq.

Dated: May 8, 2012

Joshua L. Gordon, Esq.