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FAMILY COURT OF AUSTRALIA at SYDNEY

In the Marriage of GEORGE and RADFORD

Watson J

28 May 1976

(1976) 25 FLR 461; 11 ALR 428; 1 Fam LR 11,510; [1976] FLC 75,293 (¶90-060)

FAMILY LAW – INJUNCTION – CHANGE OF SURNAME OF CHILD OF MARRIAGE BY WIFE WITHOUT CONSENT OF FATHER – WHETHER CHILD'S NAME SHOULD BE CHANGED: *FAMILY LAW ACT* 1975.

H. and W. separated, and W. went to live with Radford with the two sons of the marriage. By Deed Poll she changed her surname and that of the two boys to Radford. Husband sought a declaration that the Deed Poll was invalid, and further, an injunction restraining wife from continuing to have the children known by the surname of Radford, and directing that in future they be known by the father's surname of George. Upon application for a declaration and injunction by the husband—

HELD: Application granted.
1. Factors which should guide the Court in this case are as follows:
(a) the final decision must be governed not by supposed parental right but must be in the best interests of the children;
(b) short-term embarrassment must be weighed against long-term effects;
(c) where the father has a meaningful relationship with his children they should, unless there is a clear indication bearing on their welfare, bear his name;
(d) children should not be subjected unnecessarily to a confusion of identity;
(e) a parent does not have the right unilaterally to change the surname of children in his or her custody or care and control: such a change requires the consent of both parents, or an order of the relevant court.

2. Accordingly the declaration was made and the injunction granted as sought in the father's application. The mother was ordered to take steps forthwith to have the children enrolled, registered and generally known by their correct surname. Generally no parent should attempt to change a child's surname unless there is clear consent by the other parent or guardian, or there is an order of the appropriate court.

WATSON J: Four reported decisions were referred to me by counsel. In *Re T (an infant)* (1962) 3 All ER 970, a wife, who had obtained a divorce and the custody of her daughter, remarried and then executed a deed poll purporting to change the daughter's surname to that of her new husband. Buckley J held the deed poll to be ineffective. In the course of his judgment he said (at pp972-973):

> 'An order for custody is what its name implies. It is an order which gives the person to whom custody is given the right to the custody of the child and to bring the child up, subject of course to any direction which the court may think right to make from time to time under its jurisdiction in relation to the matter. It does not deprive a father, who is not given the custody of the child, of all his rights and obligations in respect of his child. He remains, subject to the rights conferred on the person to whom custody is given by the court, the natural guardian of the person of child, and among the residual rights which remain to him are any rights which he may have at law with regard to the control of the child. In my judgment the deed which the mother has executed with regard to the child is one which she had no power to execute so as to have any effect on the infant. In any case, as I have already pointed out, the deed-poll is no more than evidence of anything of that kind. The most effective way in which this child's name has in fact been changed is that she is now called and known by her mother's present surname in the school register and, I suppose, in school. That was done in September last year. In my judgement the infant's mother had no status which entitled her to take any step on behalf of the infant which would result in her being known by some surname other than the surname of her father, and I can find nothing in the facts of this case which would make it desirable that the infant should be known by any name other than the name of her father.

> One can imagine cases in which it might be in the interests of a child to cease to be known by a particular name, perhaps because of some particular unhappy association which that name might have acquired or possibly in order to comply with some condition contained in a trust document. But in the present case there seems to have been no reason at all for this change of name, except that the mother thought that it was embarrassing to the child to be called by one surname, while she herself was called by a different one as a result of her having re-married. The mother in her evidence suggested that the child herself asked that she might be called by the same name as her mother.
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> In the case of a divided family of this sort it is always one of the aims of the court to maintain the child's contact, respect and affection for both of its parents so far as the circumstances will permit. But to deprive the child of her father's surname, in my judgment, is not in the best interest of the child, because it is injurious to the link between the father and the child to suggest to the child that there is some reason why it is desirable that she should be called by some name other than her father's. The facts that there has been a divorce and that the father was the person against whom the decree was granted are insufficient grounds for such a view. For these reasons not only, I think, was the infant's mother incompetent to take this step on behalf of the infant which was of a kind calculated to have far-reaching effects on the child, but also it was a step which was not in the interests of the infant and one which the court ought not to assist in any way. In these circumstances I shall declare that the deed poll of August 24, 1961, was ineffective to change the name of the infant and I shall direct the infant's mother, who is the appropriate person, to take such steps as are necessary to ensure that the infant is called by her proper surname as before this deed.'

There are 2 Australian cases reported – *Pizzinato v Pizzinato* (1967) 10 FLR 374 (where the children were called by their mother's maiden name and the mother was ordered to adopt their correct surname) and *K v D* (1968) 13 FLR 430. In the course of his judgment in the latter case Menhennitt J said at pp432-433:

> 'In my view, it is very much in the interests of the boys that they should bear their father's name. They are in regular contact with him and there is no suggestion that this contact should cease. On the contrary, the mother said in evidence, in answer to the question of her own counsel, "Have you done anything at all to try and sever the links between Mr K. and his sons?" "No, I don't intend to either". There is no suggestion or evidence that the boys conceal their father's existence from their friends and in this situation it is proper and desirable that they should be known by their father's name. They should continue to have the benefit of their fathers name. They should continue to have the benefit of their father's influence and guidance, particularly at the impressionable years they are approaching in their teens. Any step which tends to lessen the link with their father or to replace him by the mother's present husband is, I consider, contrary to their best interests. I am satisfied from the evidence of the father that he is devoted to them and has their best interests at heart. He will, I am satisfied, continue to guide and assist their development to the best of his ability as he has done in the past.
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> In the case of a mother who has remarried there is nothing unusual in the children of the first marriage continuing to bear their father's name. This occurs when the mother remarried not merely because of divorce, but also when the first husband dies. If the boys were known by a name other than their father's name, embarrassment to them could well arise when they reach the age of contemplating marriage if they have then to explain to a prospective wife or her family that their father's name is not the name they bear. The fact that the mother has changed their surname this year, and that a change back to their father's name will be involved if I make the order sought, is a matter which in this case, I consider, has little, if any weight, and does not outweigh in any manner the considerations to the contrary.
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> I conclude from the whole of the evidence that the elder boy's name was not changed at school until after he left hospital in about May this year and, accordingly, that he has been known by both names at his present school, and I conclude from the mother's evidence that the younger boy is known by both names at school, so that any embarrassment involved in using one name only will be minimal. Any embarrassment to the boys which may result will be the result entirely of the unauthorized act of the mother in changing the boys' surnames.
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> I am satisfied that if any embarrassment does result from their names being changed back to their father's name, it will be temporary merely and it will occur at a convenient time, namely at the end of a year, so that at school they can start next year with their father's name on a proper basis. Any temporary embarrassment is far less significant than the importance of them bearing their father's name and the embarrassment which, I consider, would be caused to them later if they did not do so. The present case is, in my view, stronger in favour of the conclusion that the boys should bear their father's name than either *Re T. (Orse. H.) (An Infant)* (1963) Ch 238 or *Pizzinato v Pizzinato* (1967) 10 FLR 374 to which I have referred, because in both of those cases the child was a girl whereas in

> the present case the two children are boys and in the present case it was the husband who obtained the divorce on the ground of the wife's desertion, the converse of the position in the case of *Re T.*
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> The fact that the mother has custody of the children is irrelevant to the basic issue of the mother's powers as was decided by Buckley J in the case of *Re T.'*

The latest reported decision is *Y v Y* (1973) 3 WLR 80. In that case Latey J held (a) that a custody order in favour of a mother did not entitle her to change a child's surname unilaterally and in the absence of agreement a court's decision should be sought, and (b) that, although the mother was in grave error when she caused the children to be known at school under her married name, on the evidence it would not be in the best interests of the children to order them to resume their father's name. I have read and re-read that decision. It concerned girls of 13 and 10. It was deeply concerned with inter-relationships personalities and delay. It is a decision on its own facts. It sheds no new light on principle, if there is to be any clear principle which emerges in this case.

I consider that the factors which should guide me in this case are as follows:

> (a) the final decision must be governed not by supposed parental right but must be in the best interests of the children;
> (b) short-term embarrassment must be weighed against long-term effects;
> (c) where the father has a meaningful relationship with his children they should, unless there is a clear indication bearing on their welfare, bear his name;
> (d) children should not be subjected unnecessarily to a confusion of identity;
> (e) a parent does not have the right unilaterally to change the surname of children in his or her custody or care and control: such a change requires the consent of both parents, or an order of the relevant court.

There can be no doubt as to (a), the statement is supported by authority and the provisions of the *Family Law Act*. As to (b) the analysis made by Menhennitt J in comparing alleged temporary embarrassment with long range effects is apposite. With respect I adopt his approach.

The factor in (c) above could be crucial. Do the children have a continuing relationship with their father, and if so does the relationship have meaning and reality for them? Every child has a right to know both his parents and to share a relationship with both – where his emotional security is threatened by parental separation and division, it is important that whatever relationship survives not be weakened by unilateral decisions based on expediency or some personal motive in the custodial parent.

As to (d) it appears that eminent psychologists accept the theory that the formation of identity and self-concept is important to children and young people. A sense of personal identity is important. The imposition on a child of a name not his own can contribute to a feeling of confusion in that child. It could be seen as a punitive action against the child's father by the mother. It could lead to difficulty in the child's natural identification with his father. In my opinion this is too high a price for a child to be called upon to pay in circumstances such as exist in the present case.

As to (e), I respectfully agree with the judgments set out above. Accordingly I make the declaration and grant the injunction sought in the father's application. The mother is to take steps forthwith to have the children enrolled, registered and generally known by their correct surname. Generally no parent should attempt to change a child's surname unless there is clear consent by the other parent or guardian, or there is an order of the appropriate court.
