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FAMILY COURT OF AUSTRALIA at BRISBANE

In the Marriage of ARTHUR

Demack J

7 April 1977

(1977) 29 FLR 262; 3 Fam LR 11,199; [1977] FLC 76,319 (¶90-245)

FAMILY LAW – CUSTODY OF CHILDREN GRANTED TO THE MOTHER – MOTHER REMARRIED – APPLICATION BY MOTHER TO CHANGE THE SURNAME OF CHILDREN – WHETHER APPLICATION SHOULD BE GRANTED: *FAMILY LAW ACT* 1975, S61(1).

HELD: Application refused.
1. Under the *Family Law Act* an order giving one parent custody does not entitle that parent to change child's name without agreement or in the absence of agreement without a court order.

2. In the present case, it is clear that unless the parties find some way of reducing the level of bitterness that exists between them the children will face a very uneasy future. Having seen the parties and the two grandmothers each give evidence allowing the proposed change would only add another major cause for friction.

3. While the embarrassment that the children felt at school was significant, it did not outweigh the other factors in this case. The children would have continuous contact with their father, all possible sources of friction must be kept to a minimum, and the children needed to know and understand their identity within the Arthur family, as well as cope with the embarrassment at school of having a surname different from their mother.

4. Accordingly, the injunction to restrain Mrs Comben from using the name of Comben for the children was granted.

DEMACK J: In my opinion s61(1) removes any question of some residual rights remaining in a father after a custody order has been made in favour of a mother. I do not intend to repeat what I have previously said in *In the Marriage of Newberg* (1977) 27 FLR 254, about my opinion between guardianship and custody in s61.

However when the question of the child's surname is considered there are issues which go beyond the wishes or desires of the parent having custody. First of all, there is the general question of the welfare of the child. Secondly, there is the right of the child in respect of its name, a matter which may not always be identical with the question of its welfare. Thirdly, there is the question of the public interest in names. In this respect the first names may be as significant as the surname, and although the cases coming before the courts seem to be concerned with surnames, it does not require much experience in the Family Court to envisage a change of first name being used to hurt or annoy the other parent. Fourthly, there is the need to protect the family unit (s43), which must be read, because of the limitations of the legislative power of the Commonwealth, as consisting of the parties to a marriage and their natural and adopted children.

Because these factors are involved it is in my opinion clear that under the *Family Law Act* an order giving one parent custody does not entitle that parent to change child's name without agreement or in the absence of agreement without a court order.

Turning to the facts of this case, it is clear that unless the parties find some way of reducing the level of bitterness that exists between them the children will face a very uneasy future. Having seen the parties and the two grandmothers each give evidence I am satisfied that to allow the proposed change would only add another major cause for friction.

While the embarrassment that the children feel at school is significant, it does not in my opinion outweigh the other factors in this case. The children will have continuous contact with their father,

all possible sources of friction must be kept to a minimum, and the children need to know and understand their identity within the Arthur family, as well as cope with the embarrassment at school of having a surname different from their mother. I shall therefore grant the injunction to restrain Mrs Comben from using the name of Comben for the children.
