

THE HIDDEN BATTLE: DETERMINING WHOSE LAST NAME CHILDREN BORN OUT OF WEDLOCK SHOULD BEAR

BY: RUSSELL I. MARNELL, ESQ. and SCOTT R. SCHWARTZ, ESQ.

The parents of children born out of wedlock are faced with a multitude of important and life - altering issues. Establishing paternity, custody, visitation, child support, medical insurance and life insurance are just a few of the obvious examples. The children born out of such relationships are also fraught with numerous challenges such as confusion, alienation, embarrassment and the stigma that continues to attach to children whose parents are never married, and who no longer, or perhaps never resided together in the same household.

Beyond these obvious issues and the evident social stigmas lies the compelling, yet frequently overlooked issue of whether such children born out of wedlock should share the last name of their father or their mother. This issue is of little import when the parents are amicable and can agree on this vital issue. However, as demonstrated in this article, such is not always the case.

A potential client comes into your office. She has two children with the same father. She was never married to the father of the children, but she is aware of his identity. The client informs you that one of her children bears her last name while the other shares the last name of the father. She inquires as to whether there is anything your firm can do to rectify the situation so that both children can share in her last name. The woman also informs you that the father is adamantly opposed to her desires and that he wants both children to share his last name.

What advice can you give this potential client and what steps can your firm take to accomplish her goals? The answer depends on the case specific facts. Thus, will the child/children's best interests be promoted by sharing in the mother's or the father's last name? Who has custody of the children, either legally or defacto? Is the father adequately supporting the children financially? Does he play an active role in their lives? Has he abandoned them? How much financial and emotional support do the children receive from their mother? Is there a potential for confusion and embarrassment resulting from the children maintaining the last name of the father or of the mother? These are all questions which must be explored prior to your advising the potential client as these are the factors the Court will consider in rendering a determination on this issue.

The initial step which you must take in assisting your client subsequent to the discussion of these factors and your determination that she has a meritorious claim is to file a petition seeking to change the child or children's last name to that of the mother. The Civil Rights Law of The State of New York mandates that such an application be submitted in either the Supreme Court or the County Court. It further provides that an

application seeking to change the name of an infant may be brought by his next friend, by either of his parents, or by his general guardian, or by the guardian of his person.

The next process involves what factors must you establish in order to convince the Court that your client is entitled to the change of name sought on behalf of the child/children.

Courts from this state have established that neither parent has a superior right to determine the surname of a child, and that the determination of the child's sur name will be determined by what is in that child's best interests.

In addition, *New York's Civil Rights Law* provides that an infant's last name may be changed where the interests of the child will be substantially promoted by such a change. Thus, in exploring the child's best interests with your client, important factors include, but are not limited to her role in the raising of the child, whether or not the father challenged paternity, the level of the father's activity in the child's life, the level of support paid by each parent as well as the potential for any embarrassment to the child as a result of having a different sur name as compared with the mother. These are all factors which Courts have taken into consideration in determining whether or not a proposed name change is in the best interests of a child.

The policy that neither parent has a superior right to determine the surname of a child and that the determination of the child's sur name will be determined by what is in that child's best interests is additionally applicable in cases in which the child is a non- marital child.

One important factor in determining whether it is in the child's best interests to bear the last name of a parent is which parent has either legal or *defacto* custody. Each parents' respective role in the child's care, decision making and upbringing is additionally relevant. Thus, New York Courts have held that it was in a non - marital child's best interest to retain the last name of her mother based primarily on the fact that the mother had custody of the child. The Court stated that it was in the child's best interests to bear the mother's surname as the mother was the child's primary caretaker and would be making the major decisions for her. The Court additionally stated that as children get older, they generally prefer to use the name of the parent with whom they live. The court permitted the child to use the last name of her mother even though there was nothing in the record to indicate that the father's name would be a detriment to the child and despite the fact that the father and his family wished to share a warm relationship with the child.

Another vital factor in determining the child's best interests with respect to their last name is whether or not there is the potential for embarrassment, alienation or confusion for the child. Thus, the Appellate Division, Second Department has held that it was in a non - marital child's best interests to bear the mother's last name where the child lived with the mother and sharing her sur name would minimize the child's embarrassment, harassment and confusion in school and social contacts. A similar holding was reached by the Second Department with respect to the child of a divorced couple. In light of these holdings, it is imperative to determine if any potential issues of confusion, alienation or embarrassment exist with respect to the child. For example, if the children reside with your client, are they likely to suffer from confusion as a result of having a different surname from that parent, or are they likely to become alienated or embarrassed among their peers? In addition, Courts will consider whether there is the substantial possibility of confusion stemming from the divergent surnames. This might be the case if the child uses the mother's last name for all purposes other than in school. Thus, the child might be known by his or her mother's last name with respect to peers, friends, in religious institutions, on a social security card and on a medical insurance card, but might still be known by the father's sur name in school. The potential for embarrassment and confusion stems from the fact that the child might not initially understand why their other family members are known by the mother's last name while he or she has the last name of the father.

Name change applications submitted on behalf of infants have also been granted on the basis of one parent's misconduct, abandonment or lack of support. Thus, name change applications have been granted based upon one parent's failure to financially support a child or to visit with or maintain contact with the child. Thus, a Court will consider the level of contact and support, (both emotional and financial) provided by the non - custodial parent, the amount of time spent with the child by each parent, as well as the providing of ancillary items such as medical and life insurance in reaching a determination on a change of name petition submitted on behalf of an out of wedlock child. The more contact between the child and the opposing parent, and the greater the level of emotional and financial support by the non - petitioning parent renders it more likely that the Court will deny an application seeking to change the last name to that of the petitioning parent.

The bottom line is that a Court's determination in connection with an application seeking to change the name of an infant born out of wedlock will be based upon which parent can more effectively demonstrate that the child/children's best interests will be substantially promoted by their utilization of that parent's last name. In attempting to determine such best interests, Courts are seeking to ascertain the level of emotional and financial support contributed by each parent, whether or not either parent has abandoned the infant(s), whether either parent has legal or defacto custody, which parent is the primary caretaker, the amount of contact between each parent and the child/children, and whether or not the child is likely to suffer from any alienation, harassment, confusion or embarrassment if the name change petition is denied and the status quo is maintained.