William Mitchell Law Review

Volume 9 | Issue 2 Article 11

1983

Family Law—Parental Rights in Changing Child's Surname—In re Saxton, 309 N.W.2d 298 (Minn. 1981), cert. denied, 455 U.S. 1034 (1982)

CASE NOTES

Family Law—PARENTAL RIGHTS IN CHANGING CHILD'S SURNAME—*In re Saxton,* 309 N.W.2d 298 (Minn. 1981), *cert. denied,* 455 U.S. 1034 (1982).

The American custom of giving legitimate children their father's surname[1] at birth may be traced to its roots in medieval England.[2] The practice was criticized during the 1970s as American women became increasingly dissatisfied with the societal expectation that they take their husband's surname upon marriage[3] and that their children take their father's surname at birth.[4] The patrilineal method of naming legitimate children has been challenged most frequently when a divorced parent has sought to change his or her child's surname over the objection of the former spouse. Nonetheless, the Minnesota Supreme Court held in *In re*

1. Surnames perform at least three functions with relation to children. First, a surname provides a child with a sense of identity; second, a surname is a manifestation of the biological and psychological family unit; and third, a surname may operate as a vehicle for transferring to a child the goodwill associated with his name in the community. *See, e.g.,* Nellis v. Pressman, 282 A.2d 539 (D.C. 1971) (continuity of identity), *cert. denied,* 405 U.S. 975 (1972); *In re* Harris, 236 S.E.2d 426 (W. Va. 1977) (transmission of surname's goodwill). *See generally* C. EWEN, A HISTORY OF SURNAMES OF THE BRITISH ISLES 7-9 (1931) (by passing on his surname to his children the father helped to ensure that his property would be passed on to legitimate heirs).

2. For a short history of Anglo-American surnames, see, *In re* Shipley, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. 1960). The practice of giving legitimate children their father's surname became firmly established after an act of Henry VIII required that each parish record the names of all children born within its limits. *In re* Snook, 2 Hilt. 566, 571 (Ct. Com. Pleas 1859); *In re* Romm, 77 Pa. D. & C. 481, 486 (1951).

3. Presumably, taking the father's name resulted from custom and the view that the father's role is head of the family. *See generally* Carlsson, *Surnames of Married Women and Legitimate Children,* 17 N.Y.L.F. 552 (1971); Note, *The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests,* 1979 UTAH L. REV. 303. The father's role as absolute head of the family also was reinforced by the common law doctrine that a married woman had little legal identity separate from that of her husband. This fiction was affirmed in United States v. Yazell, 382 U.S. 341 (1966), where the United States Supreme Court stated that only one person existed in marriage, and that one person "worked out in reality to mean that . . . the one [person was] the husband." *Id.* at 361. Under the *Yazell* approach, a woman gave up her surname when she married and used that of her husband. Thus, she could no longer contract, manage property, earn money, or litigate in her own name. Giving children their father's surname was proper because the husband was the sole legal representative of the marriage. B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 561-63 (1975).

4. *See* Carlsson, *supra* note 3; Note, *supra* note 3.

Saxton[5] that only if a parent establishes by clear and compelling evidence that a name change is in the best interests of the child, will the court allow a change from the child's original surname.

At common law an individual could change the surname by which the community knew him or her merely by adopting a new name, as long as there was no intent to defraud creditors.[6] A child was not prevented by his or her minority from changing his or her name, provided the child was of sufficient age and maturity to make an intelligent choice.[7]

In contrast to the common law approach, some states provide a statutory method for effecting a name change.[8] In Minnesota the "Change of Name" statute[9] is in addition to, rather than to the exclusion of, the

5. 309 N.W.2d 298 (Minn. 1981).

6. *See, e.g.,* Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947 (1910).

7. *See* Laks v. Laks, 25 Ariz. App. 58, 59, 540 P.2d 1277, 1279 (1975); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758, 761-62 (1956); *In re* Shipley, 26 Misc. 2d 204, 209-10, 205 N.Y.S.2d 581, 587-88 (1960); Dunn v. Palermo, 522 S.W.2d 679, 682 (Tenn. 1975); *see also* Bruguier v. Bruguier, 12 N.J. Super. 350, 79 A.2d 497 (Ch. 1951) (where the court, in relying on common law, allowed a high school girl to adopt the name of her stepfather over her natural father's objection, apparently convinced that the change was the girl's true desire).

8. *See* Note, *supra* note 3, at 335-45.

The following is a list of the various state "Change of Name" statutes: ALA. CODE § 12-13-1 (1975); ALASKA STAT. § 09.55.010 (Supp. 1982); ARIZ. REV. STAT. ANN. §§ 12-601, -602 (1982); ARK. STAT. ANN. §§ 34-801 to -803 (1962); CAL. CIV. PROC. CODE §§ 1275-1279.5 (West 1982); COLO. REV. STAT. §§ 13-15-101, -102 (1973); CONN. GEN. STAT. § 52-11 (1983); DEL. CODE ANN. tit. 10, §§ 5901-04 (1974 & Supp. 1982); D.C. CODE ANN. §§ 16-2501 to -2503 (1981); FLA. STAT. ANN. § 382.16 (West Supp. 1983); GA. CODE § 19-12-1 (1981); HAWAII REV. STAT. §§ 574-2, -5 (Supp. 1983); IDAHO CODE §§ 7-802 to -804 (1979); ILL. ANN. STAT. ch. 96, §§ 1-3 (Smith-Hurd 1971 & Supp. 1982); IND. CODE ANN. §§ 34-4-6-1 to -5 (Burns 1973 & Supp. 1982); IOWA CODE ANN. §§ 674.1-.13 (West Supp. 1983); KAN. STAT. ANN. §§ 60-1401, -1402 (1976 & Supp. 1982); KY. REV. STAT. ANN. § 401.010 (Baldwin Supp. 1982); LA. REV. STAT. ANN. §§ 13:4751-:4755 (West 1968 & Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 781 (1981); MD. ANN. CODE art. 16, § 123 (1981); MASS. ANN. LAWS ch. 210, §§ 12-14 (Michie/Law. Co-op. 1981); MICH. COMP. LAWS ANN. § 711.1 (1982); MINN. STAT. §§ 259.10-.11 (1982); MISS. CODE ANN. § 93-17-1 (Supp. 1982); MO. ANN. STAT. §§ 527.270-.290 (Vernon 1953); MONT. CODE ANN. §§ 27-31-101 to -205 (1982); NEB. REV. STAT. §§ 61-102 & 71-640.01 (1981); NEV. REV. STAT. §§ 41.270 -.290 (1982); N.H. REV. STAT. ANN. § 126:6 (Supp. 1981); N.J. STAT. ANN. §§ 2A.52-1 to -4 (West 1952 & Supp. 1983); N.M. STAT. ANN. §§ 40-8-1 to -3 (1978); N.Y. CIV. RIGHTS LAW §§ 60-64 (McKinney 1976); N.C. GEN. STAT. §§ 101-2 to 7 (1979); N.D. CENT. CODE § 32-28-02 (1976); OHIO REV. CODE ANN. § 2717.01 (Baldwin 1977); OKLA. STAT. ANN. tit. 12, §§ 1631-40 (West 1980); OR. REV. STAT. §§ 33.410-.430 (1981); PA. STAT. ANN. tit. 54, §§ 701-05 (Purdon Supp. 1983); R.I. GEN. LAWS § 8-9-9 (1970); S.C. CODE ANN. §§ 15-49-10 to -50 (Law. Co-op. 1977); S.D. COMP. LAWS ANN. §§ 21-37-1 to -5 (1979); TENN. CODE ANN. §§ 53-455, 16-10-107, 16-16-107 (1980 & Supp. 1982); TEX. FAM. CODE ANN. tit. 2, §§ 32.01-.05 (Vernon 1975); UTAH CODE ANN. §§ 42-1-1 to -3 (1970); VT. STAT. ANN. tit. 15, §§ 811-716 (1974); VA. CODE §§ 8.01-.217 (Supp. 1983); WASH. REV. CODE ANN. § 4.24.130 (1962); W. VA. CODE §§ 48-5-1 to -6 (1980); WIS. STAT. ANN. §§ 86.36 & -.37 (West 1981); WYO. STAT. §§ 1-25-101 to -103 (1983).

9. MINN. STAT. § 259.10 (1982) states:

common law approach.[10] Under the Minnesota statutory approach, if a name change is sought for a minor, an application to the district court must be made by his or her guardian or next of kin.[11] Once the petition is filed on behalf of the minor, the statute directs the court to grant the name change unless it "finds that such a name change is not in the best interests of the child."[12]

In *In re Saxton,*[13] the natural mother appealed from the trial court's

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A person who shall have resided in any county for one year may apply to the district court thereof to have his name, the names of his minor children, if any, and the name of his spouse, if the spouse joins in the application, changed in the manner herein specified. He shall state in his application the name and age of his spouse and each of his children, if any, and shall describe all lands in the state in or upon which he, his children and his spouse if their names are also to be changed by the application, claim any interest or lien, and shall appear personally before the court and prove his identity by at least two witnesses. If he be a minor, the application shall be made by his guardian or next of kin. Every person who, with intent to defraud, shall make a false statement in any such application shall be guilty of a misdemeanor provided, however, that no minor child's name may be changed without both of his parents having notice of the pending of the application for change of name, whenever practicable, as determined by the court.

10. *See In re* Dengler, 287 N.W.2d 637, 639 n.1 (Minn. 1979), *appeal dismissed,* 446 U.S. 949 (1980). The *Dengler* court cites with approval the Massachusetts case of *In re* Merolevitz, 320 Mass. 448, 450, 70 N.E.2d 249, 250 (1946), which stated:

> It is well settled that at common law a person may change his name at will, without resort to legal proceedings, by merely adopting another name, provided that this is done for an honest purpose. . . . In jurisdictions where this subject has been regulated by statute it has generally been held that such legislation is merely in aid of the common law and does not abrogate it.

In *Dengler*, the plaintiff wanted to change his name to a numeral. The Minnesota Supreme Court held that when the Minnesota Legislature enacted the change of name statutes, it did not intend to authorize a court order which changes an alphabetical name to a numeral. *In re* Dengler, 287 N.W.2d at 639.

11. *See* MINN. STAT. § 259.10 (1982).

12. MINN. STAT. § 259.11 (1982) states:

> Upon meeting the requirements of section 259.10, the court shall grant the application unless it finds that there is an intent to defraud or mislead or in the case of the change of a minor child's name, the court finds that such name change is not in the best interests of the child. The court shall set forth in the order the name and age of his spouse and each child of the applicant, if any, and shall state a description of the lands, if any, in which the applicant and his spouse and children, if any, claim to have an interest. The clerk shall file such order, and record the same in the judgment book. If lands be described therein, a certified copy of the order shall be filed for record, by the clerk, with the county recorder of each county wherein any of the same are situated. Before doing so he shall present the same to the county auditor who shall enter the change of name in his official records and note upon the instrument, over his official signature, the words "change of name recorded." Any such order shall not be filed, nor any certified copy thereof be issued, until the applicant shall have paid to the clerk the cost of such record. The fee of the clerk shall be as provided by law. No application shall be denied on the basis of the marital status of the applicant.

13. 309 N.W.2d 298 (Minn. 1981).

order which refused her petition to change her children's surnames.[14] After her divorce from the children's natural father, the petitioner, Ms. Saxton, changed her name from Dennis, that of her former husband's surname, to Saxton, her maiden name.[15] Three years later, Ms. Saxton petitioned to change her two children's surnames from solely the father's surname to a hyphenated combination of both the father's surname and the mother's maiden name.[16] Ms. Saxton and two expert witnesses testified in favor of the name change,[17] but the children were not allowed to testify.[18] The trial court held that once a surname has been selected for a child, a name change will not be permitted unless the change is in the best interests of the child.[19]

The *Saxton* court affirmed the trial court's reliance on the guidelines established for determining the child's best interest in *Robinson v. Hansel.*[20] In *Robinson* the Minnesota Supreme Court noted that "the welfare of the children must ultimately be the controlling consideration in any change of status."[21] The *Robinson* court established the principle that "judicial discretion in ordering 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."[22] The *Saxton* court declined to alter the guidelines set in *Robinson*[23] but did elucidate on factors that a trial court

14. *Id.* at 300. The district court held that the petitioner had failed to meet her burden of proof that the children's best interests would be served by the name change.

15. *Id.*

16. *Id.* At the initial hearing before the trial court, Ms. Saxton testified that she was requesting the name change so that the children's surnames would reflect their dual parentage and the Saxton family unit that they had established in Minnesota.

Although the children's natural father was not present at the hearing, he was represented by counsel who submitted an affidavit by the father opposing the surname change. 309 N.W.2d at 300. For the full text of the father's affidavit, see Appellant's Brief and Appendix at A-5 to A-7.

17. 309 N.W.2d at 300. Mr. John Baudhuin, an assistant to the Rector at St. James Episcopal Church, Minneapolis, who was familiar with the Saxton children from their participation in church activities, and Dr. Seymour Gross, director and chief psychologist for Pilot City Mental Health Center, Minneapolis, testified on behalf of Ms. Saxton. Dr. Gross testified that "the name change would enhance their self-image, their feelings about themselves and it need not be that they have bad problems associated by not having a change, but that this is an affirmative or positive step of enhancing themselves." Appellant's Brief at xi-xii.

18. 309 N.W.2d at 301.

19. *Id.* at 302; *see also* Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974) (set standard for deciding whether a name change is in the best interests of the children).

20. 302 Minn. 34, 223 N.W.2d 138 (1974).

21. *Id.* at 35, 223 N.W.2d at 140.

22. *Id.* at 36, 223 N.W.2d at 140. At least one other jurisdiction has held the name change must be of substantial benefit to the child. *See In re* Spatz, 199 Neb. 332, 258 N.W.2d 814 (1977).

23. *See In re* Saxton, 309 N.W.2d at 301. In analyzing the *Robinson* case, the *Saxton* court did not adequately distinguish between the type of name changes sought in the

may consider in determining whether to grant or deny the child's name change.[24]

The *Saxton* court prefaced its discussion of the factors by noting that:

> neither parent has a superior right to determine the initial surname their child shall bear. . . . However, once a surname has been selected for the child, be it the maternal, paternal, or some combination of the child's parents' surnames, a change in the child's surname should be granted only when the change promotes the child's best interests.[25]

To determine the child's welfare and best interest, the *Saxton* court stated that the trial court may consider, but it is not limited to, the following factors: the child's preference; the effect of the change of the child's surname on the parent-child relationship; the length of time the child has borne a given name; the degree of community respect associated with the present and the proposed surnames; and the embarassment, confusion, and inconvenience the child may experience from the present or proposed surname.[26] The *Saxton* court continued, "In weighing these factors to reach a decision, the trial court should set out its reasons for granting or denying the application to change the minor's surname."[27]

The petitioner also contended that the trial court erred in its determination of whether the children's name change is in their best interest when it refused to take the children's testimony.[28] The *Saxton* court recognized the importance of ascertaining the child's preference and agreed with the petitioner that the children's preference is relevant.[29] The court held, however, that the error was harmless "since it [did] not appear that their testimony 'might reasonably have changed the result if it had been

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cases. In *Robinson*, the petitioner sought to add to the children's natural father's surname the surname of petitioner's new husband; whereas, in *Saxton,* petitioner sought to add the natural mother's maiden surname to the children's natural father's surname. The fact that in *Saxton* the children's surname would have included both natural parents' surnames would seem to be a controlling factor in support of the name change was emphasized in Justice Wahl's dissent. *Id.* at 302.

24. *See infra* notes 26-32 and accompanying text.

25. 309 N.W.2d at 301. For a case decided simultaneously with *Saxton* reaffirming the *Robinson* comment that neither parent has a superior right to determine the *initial* surname their child shall bear, see Jacobs v. Jacobs, 309 N.W.2d 303 (Minn. 1981).

26. 309 N.W.2d at 301. The Minnesota court relied on California and West Virginia caselaw in delineating these various factors. *See In re* Schiffman, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980); *In re* Harris, 236 S.E.2d 426 (W. Va. 1977).

27. 309 N.W.2d at 301. Although the Minnesota Change of Name statutes, MINN. STAT. §§ 259.10-.11 (1980), does not require the court to set forth its reasoning for granting or denying the application, the *Saxton* court strongly suggests that the trial court adopt this procedure. In future minor's name change cases, the Minnesota Supreme Court may take into account the presence or absence of trial court reasoning in determining if the petitioner was given a fair hearing. When appropriate and helpful, the *Saxton* court also encourages the appointment of a guardian ad litem at the expense of the parties. *See* 309 N.W.2d at 301.

28. 309 N.W.2d at 301.

29. *Id.*

admitted.' "[30]

Due to the children's close relationship with their father, the *Saxton* court concluded that the evidence supported the trial court's conclusion that the children's best interest favored retention of their given surname.[31] In addition, the court justified its decision by reiterating dictum from the *Robinson* decision, where the court stated "the time may well come when the child may cause an appropriate change of surname as his or her voluntary act."[32]

In her dissent, Justice Wahl emphasized the numerous policy considerations which are to be considered in determining the child's best interest.[33] Justice Wahl noted that a trial court must weigh several competing interests in deciding whether to change the child's name over the objection of a natural parent. One of the policy considerations is the father's interest in having his children retain his surname.[34] Justice Wahl argued, "The mother's interest in having her children bear and perpetuate her surname should be recognized as coextensive with the father's interest, as are other parental rights and responsibilities, such as custody and support."[35] Other policy considerations are the societal interests of preserving the parental relationship, perpetuating the family name, and the desire for children to know their parentage.[36]

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30. 309 N.W.2d at 302, (quoting Poppenhagen v. Sornsin Constr. Co., 300 Minn. 73, 80, 220 N.W.2d 281, 285 (1974)).

31. 309 N.W.2d at 300.

32. Robinson v. Hansel, 302 Minn. 34, 38, 223 N.W.2d 138, 141 (1974), *quoted in Saxton,* 309 N.W.2d at 302.

33. 309 N.W.2d at 302. Chief Justice Amdahl joined in Justice Wahl's dissent.

34. *See* Robinson v. Hansel, 302 Minn. 34, 36, 223 N.W.2d 138, 140 (1974). The father argued that the rationale for protecting the father's interest was perpetuation of the bond between him and the children. *See* Respondent's Brief, at 16-17, *In re Saxton.* Evidence such as support, visits, love, and devotion demonstrates the extent of the father's concern. *See In re* Spatz, 199 Neb. 332, 258 N.W.2d 814 (1977) (although expert testimony revealed that failure to change the children's names would be detrimental to their personality development, trial court did not abuse discretion in disallowing change where father has supported children and exercised visitation rights); *see also* Note, *Domestic Relations: Change of Minor's Surname: Parental Rights in Minor's Surname,* 44 CORNELL L.Q. 144, 147 (1958) (discussion of factors determinative of extent of father's protectable interest). An informal change may be desirable where the evidence shows a long absence, failure to support, or abandonment, and the absent parent does not protest. *See* Kay v. Kay, 51 Ohio Op. 434, 112 N.E.2d 562 (1953). *But see In re* Rounick, 47 Pa. D. & C. 71 (1942) (where father had not seen child for several years or contributed support, but name change denied because the change would further estrange the two).

Some courts have suggested fathers hold a natural right for children to bear their surname. *See* Carroll v. Johnson, 263 Ark. 280, 565 S.W.2d 10 (1978); De Vorkin v. Foster, 66 N.Y.S.2d 54 (Sup. Ct. 1946).

Although some courts have stated that the father's right is predominant over the mother's wishes, the courts uniformly hold that the child's best interests will be determinative over both. *See* Note, *supra,* at 147.

35. 309 N.W.2d at 302.

36. *See* Robinson v. Hansel, 302 Minn. 34, 36, 233 N.W.2d 138, 140 (1974).

The main thrust of Justice Wahl's dissent is that the policy considerations, which led to the formulation of the *Robinson* standard requiring clear and compelling evidence that the substantial welfare of the child necessitates the name change, should not be applicable when a parent seeks to change the child's surname so that no natural parent's name would be eliminated but rather both names would form the child's surname.[37] Thus, Justice Wahl contended that the *Robinson* standard imposes an undue burden on the petitioner when the proposed name change adds a natural parent's name rather than eliminates a natural parent's name.[38]

The *Saxton* decision is important for its elucidation of the factors which a trial court may consider in granting or denying a minor's name change.[39] The ultimate test for the name change of a minor is still the best interests of the child.[40] Nonetheless, where all of the policy interests may be harmonized, for example by allowing a change of the minor's name to a hyphenated combination of both natural parents' surnames, the burden of proof should be easier for the petitioning parent. The majority of the court, however, still maintains that a child's name will not be changed over the objection of a natural parent unless clear and compelling evidence that the substantial welfare of the child necessitates the change.[41]

Franchise Law—THIRD-PARTY ASSIGNEE OF FRANCHISOR SUBJECT TO ALL DEFENSES AVAILABLE TO FRANCHISEE—*Chase Manhattan Bank v. Clusiau Sales & Rental, Inc.,* 308 N.W.2d 490 (Minn. 1981).

Franchising is a twentieth century phenomenon.[1] Except for some recently enacted state statutes,[2] there is little common law or statutory law

37. 309 N.W.2d at 302.

38. *See id.* Justice Wahl continues:

> In this situation, instead of being required to show that the name change is necessary for the substantial welfare of the child, the petitioner should be required to show only that the name change promotes the child's best interests. Thus, a change of the minor's surname would be appropriate where the change is beneficial for the child, even though the given name is not detrimental to the child's well-being.

Id. at 302-03.

39. *See supra* note 26 and accompanying text.

40. *See supra* notes 20-27 and accompanying text.

41. 309 N.W.2d at 301.

1. *See generally* C. ROSENFIELD, THE LAW OF FRANCHISE (1970) (discussion of history of franchise law). The years from 1910 to 1940 witnessed the growth of franchise systems, especially in the automobile industry and soft drink bottling industry. *Id.* at 37.

2. *See* MINN. STAT. §§ 80C.01-.22 (1982); *see also* ARK. STAT. ANN. §§ 70-807 to -826 (1979); CAL. CORP. CODE §§ 31000-31516 (West 1971 & Supp. 1977); CONN. GEN. STAT. ANN. §§ 42-133 to -133n (West Supp. 1981); DEL. CODE ANN. tit. 6, §§ 2551-53 (Supp. 1980); FLA. STAT. ANN. § 817.416 (West Supp. 1975); HAWAII REV. STAT. §§ 482E-1 to