

H v. P

SUPREME COURT (Kneller, C.J.): October 19th, 1995

Family Law—names—change of surname—unmarried mother may not change child's surname from that of father without father's consent or court order—child's best interests paramount in exercise of court's discretion

Family Law—names—change of surname—may be in best interests of child of separated parents living with mother to be known by mother's surname

Family Law—children—custody—joint custody—child's relationship with absent father to be maintained if possible—may be by joint custody—usual for unmarried mother as natural custodian to retain care and control

The applicant (H) applied for an order allowing her to change her daughter's surname from that of her former partner, the child's father, to her own, and for sole custody of the child. The respondent father (P) applied for joint custody of the child with the mother, care and control to remain with the mother.

The child, now aged 3½, was registered at birth under the respondent's surname, apparently in expectation that her parents would marry. However, they separated when the child was a year old and had not lived together since. The child remained with the applicant and had no contact with the respondent. They lived on the applicant's earnings, in an apartment to which the respondent had relinquished his claim and on which he no longer contributed to the mortgage. The respondent was unemployed and had a son from his previous marriage to whom he had weekly access.

The applicant had observed the necessary formalities to execute a deed poll to change her daughter's surname but required the father's consent, which he had so far withheld.

The applicant submitted that (a) it would be in her daughter's best interests to bear her mother's surname rather than that of someone who had shown no interest in her and with whom she did not live, since this would save her from embarrassment and confusion in social situations such as schooling; and (b) the respondent was an unsuitable person to share custody of the child, since he refused to maintain her despite having adequate means to do so and had a violent disposition, which had manifested itself in threats to the applicant and to her relatives (though not to the child) and had ultimately caused their separation.

The respondent submitted in reply that (a) the child should retain the surname with which she had been registered at birth until she was old enough to decide for herself how she wished to be known; (b) it was untrue that he had hitherto shown no interest in his daughter, since his one attempt to visit her had been rebuffed by the applicant; and (c) whilst he had no money with which to contribute to the child's maintenance, he would like to resume contact with the child on the same basis as his son, and this was best achieved by the granting of joint custody.

Held, granting leave to change the child's surname and making a joint custody order:

(1) Since neither parent had the right to change the child's surname from that of her father without the consent of the other, and since the father had withheld his consent, only the court could give the necessary authorization to change the child's name from P to H. In the exercise of its discretion, the court would apply the test of what was in the best interests of the child now and in the future (page 138, line 33 – page 139, line 2).

(2) Since it could prove distressing and confusing for the child living with her mother and attending a local school to be known by a different surname, the interests of the child were best served in this case by an order that the mother be given leave to execute and enrol a deed poll changing the child's name to her own, and requiring the father to concur in an application to the Registrar of Births to amend the Register accordingly. When the child was of sufficient age to understand the nature of her parents' dispute and choose for herself the name by which she wished to be known, she could apply to reverse the change if necessary (page 138, lines 23–32; page 139, lines 3–7).

(3) However, it was also in the child's best interests for her to recognize and maintain a relationship with her natural father. The mother's desire to have no further contact with the father was overridden by the child's welfare and, accordingly, the court would award custody jointly to the parties. The child would remain in the care and control of her mother, and no order would be made for access by the respondent at the present time since he had made no formal application for contact (page 139, lines 7–10; lines 24–27).

Cases cited:

- (1) *D v. B (Child: Surname)*, [1979] Fam. 38; [1979] 1 All E.R. 92.
- (2) *T (An Infant), Re*, [1963] Ch. 238; [1962] 3 All E.R. 970.
- (3) *Y v. Y (Child: Surname)*, [1973] Fam. 147; [1973] 2 All E.R. 574.

M. W. Isola for the applicant;
The respondent appeared in person.

KNELLER, C.J.: The child was born in Gibraltar on February 18th, 1992, so she is now 3½ years old. She is attending the Loreto Convent School. She is the only child of Mr. P and Miss H who lived together but have never been married. They are all British Gibraltarians. The
5 mother registered the birth of the child on March 24th, 1992 with the surname P because, I think, she expected to marry the father when he became divorced. She separated from the father, taking the child with her, on February 25th, 1993 because he was violent in his dealings with her and with her relatives—although not with the child. They have not
10 lived together since the end of February 1993 and probably never will.

The mother, with whom the child lives, is 26 years old, a company director and business woman. She is the daughter of a Gibraltar restaurant owner. She has had the sole care and control of the child since the
15 separation. The Attorney-General has interviewed the mother and child together and the father separately. She found the mother to be a well-balanced woman who deeply regretted ever becoming involved with the father, and was keen now to forget the episode and to get on with life with her daughter. The child came across as a well-adjusted, happy and
20 confident young girl.

Miss H alleges that in late 1993 the father went to the restaurant and threatened to hit her mother and sister. The police were called and restored order. The father has not caused any trouble since then but, she
25 declares, he has evinced no interest in the child since the separation, would probably not recognize her if he saw her and has left her upbringing and maintenance to her. He has not contributed to the mortgage on their apartment. The father told the mother he had very little money but she knows he has substantial funds in Portugal.

The father is 47 years old and unemployed. He says he cannot afford to
30 pay any maintenance to the mother for herself or for the child. He asserts that, although he paid towards the purchase of their apartment, he gave up his claim to it and agreed to its title being registered in the name of the mother. He has a son by his first marriage and the boy spends every Saturday with him. He would like the same access to the child but
35 realizes this will be resisted. He says he took a present to the mother for the child once but it was rejected by the mother who considered it was an insult. Whether that was because it was inadequate or because it was a delayed gift is not clear.

Miss H, as the child's mother and next friend, applies by originating
40 summons for leave to execute and enrol in the Supreme Court of Gibraltar a deed poll to the effect that the child absolutely renounces and abandons the use of her surname P and instead assumes the surname of H. She asks for a declaration that the child be known henceforth by her new surname and that the father concurs in an application to the Registrar of
45 Births to make such alterations to that register to give effect to the change

of surname. She also asks for sole custody of the child and an order that the father pay the costs of her application.

The mother's solicitor swears that the mother has no interest in the matter adverse to that of the child. On November 23rd, 1993 she executed the deed poll for and on behalf of the child. On the same date a customs officer who is a British subject made a statutory declaration that he has known the mother for over ten years—tying up, so to speak, the mother with the deed poll, the child and her birth certificate. The formalities were thus observed. The father was invited in a letter from the mother's solicitors to swear and sign an affidavit agreeing to the orders sought by the mother in her originating summons, but he did not reply.

Miss H submits that it is in the best interests of the child that she should bear the same surname as her mother and not that of her father because it will save the child embarrassment and unhappiness at her school and thereafter in other institutions and organizations. The father, in his submissions and in his interview with the Attorney-General, opposed the making of these orders. He wants the child to bear his surname until she is old enough to understand the issue and choose a surname for herself. He wants, I think, an order for joint custody with the mother of the child, giving care and control to the mother, and defined reasonable access for himself, and no order for costs.

The issues call for the exercise of the court's discretion in a judicial manner. The best interests of the child are paramount. She is too young to understand what is involved in her parents' dispute. It is usual for a child of unmarried parents to take the surname of her mother and in most cases the father agrees to it. The background to the application and the report of the Attorney-General indicate that it would probably be in the best interests of the child for the court to accede to the first three orders sought by her mother as next friend. When the child is of sufficient age to appreciate how this came about, she can apply to have her surname changed back to P if that is her wish.

The law on this in England and Wales is as follows: An infant's mother is not entitled to take any steps on behalf of the infant which would result in the infant being known by a surname other than that of the father—she has no status to do so (see *Re T (An Infant)* (2)). This is so even when the mother has obtained a decree of divorce from the father and been given custody of the child. She is not entitled to change the child's surname unless the father agrees or, if they cannot do so, the court reaches a decision that it should be changed. Likewise, the father cannot unilaterally change the child's surname when he obtains a decree of divorce from the mother and she is given custody of the child. The father is the natural guardian and the mother the custodian of the child. Their rights may not be infringed except by agreement between them or a decision of the court which would apply the test of what is in the best interests of the

child “as things now are and as they are likely to be in the future” (see *Y v. Y (Child: Surname)* (3)).

5 It is not in the child’s best interests to be generally known by the father’s name where his parents separate before his birth and re-marry. A very young child will be confused if he is called by a name different from that of his mother and other members of the family. He might be embarrassed by this later at school. The relationship between the child and the father should be maintained if possible so that the child recognizes his natural father. The court has to take into account what is
10 human, sensible and practical (see *D v. B (Child: Surname)* (1)).

That is the law in England and Wales and I shall apply it respectfully to the facts in this case. No Gibraltar law was cited in this case and my research has failed to unearth any. The result is that, in the exercise of the discretion vested in the court, I give leave to the child’s mother and next
15 friend, Miss H, to execute and enrol in the Supreme Court of Gibraltar a deed poll to the effect that the child will absolutely renounce and abandon the use of her surname P and, in lieu thereof, assume the surname of H. I grant a declaration that the child now be known by the surname H and that the father, the defendant in this action, or, in default, the Registrar of the Supreme Court on behalf of the father, do concur in an application to
20 the Registrar of Births to make such alterations to the Register of Births as may give effect to the change of name and/or take such other steps as are necessary to ensure that the said child is known by the surname of H.

25 In the exercise of the court’s discretion I grant custody of the child jointly to her father and mother. I think that is the best for the child. The mother is to retain care and control of the child. I will not deal with access for the father because he has not formally applied for it.

30 There will be no order for costs of this application to be paid by the father. He opposed it but he was not legally represented and I accept that he is unemployed. The riches in Portugal might be a mirage.

Orders accordingly.