[2018 Gib LR 225]

IN THE MATTER OF SK

MP v. FK

SUPREME COURT (Butler, J.): May 7th, 2018

Family Law—names—change of surname—child's welfare paramount—court to consider all circumstances, welfare checklist in Children Act 2009, s.4(3) and no order principle—name changed without consent of both parents only if improves child's welfare—unlike in United Kingdom, not unusual in Gibraltar for child's surname to reflect surnames of both parents

The applicant sought to change her child's surname.

The parties' child, S, was five years old. The parties had agreed a joint residence order, though the applicant, S's mother, was the primary carer. The mother was pregnant with S's half-sibling. S currently had the respondent father's surname, and her name had been registered. The mother wished to change S's surname to a double-barrelled, hyphenated name including both parties' surnames. The father had parental responsibility for S and did not consent to the change.

Held, granting the order sought:

(1) The following principles had to be applied: (i) The child's welfare was the paramount consideration. (ii) All circumstances had to be taken into account, including the matters mentioned in the welfare checklist in s.4(3) of the Children Act 2009. (iii) A change of name without the consent of both of a child's parents was an important matter and should not be permitted unless there was at least some evidence that such a change would lead to an improvement concerning the child's welfare. (iv) The court was not to make an order unless to do so would be better for the child than making no order. In almost all cases, it would be best for parents to reach agreement for the sake of their child in relation to such matters. (v) The fact of registration was a relevant and important factor. (vi) Each case was fact sensitive. It was important to take into account all of the circumstances, including the Children Act welfare checklist and the no order principle. (vii) There was recognition in English case law of the difference in culture in regard to surnames (para. 3).

(2) In the present case, factors of particular importance in considering S's welfare included the following: (i) She was only five years old and it would be a difficult exercise for her if asked whether she would prefer her

name to be changed. This did not mean that she could not have valid views or some understanding of the issue, and the subject should have been discussed with her by an experienced social worker. (ii) The mother's proposal was not to deprive S of her father's surname but to add her own surname to it. (iii) The matter of a change of name had not been raised with S. It was unlikely that a change would distress her. (iv) Whilst change of a child's registered name without the consent of both parents was an important and serious matter, it was time to recognize that the issue of a child's surname following the breakdown of his or her parents' relationship was sometimes materially different in Gibraltar from the position in the United Kingdom. There was no widespread culture in the United Kingdom of double-barrelled surnames. In contrast, in Gibraltar it was in no way unusual for a child's surname to reflect those of both parents. Many children born in Gibraltar had at least one parent of Spanish heritage and in Spain such surnames were commonplace. The importance to a child of recognizing parentage should be accorded rather more weight than hitherto. (v) An additional relevant feature of life in Gibraltar was that many families crossed the border with Spain frequently (in many cases daily). Border checks might take longer if the child and accompanying parent had different surnames. Whilst this alone might be of little weight, it helped to tip the balance in favour of allowing the proposed change. It was also relevant and to be weighed in the balance that the child would have the, perhaps small, advantage of her primary carer's name included in her name at school and elsewhere. (vi) The father's previous alleged domestic abuse, to the extent that it was proved, was also a circumstance to add in the balance. It would not be given significant weight, as it had not been dealt with or tested in oral evidence. (vii) The mother was likely to have other children who would bear her name and that of their biological father. It would seem natural to S that she should be treated in the same way as her half-siblings. (viii) The only reason given by the father for opposing the application was his alleged fear that the mother might later apply again for a change of surname to exclude his altogether or that she might change S's name without his consent or court permission. That was a misguided fear. Such an application would be almost certain to fail unless there were very significant changes. (ix) S's age was an important factor. She was used to her present surname but at her age the proposed change would not be difficult for her to understand. Indeed, she could accept it was a positive change, symbolizing that both of her parents were equally important. Weighing up all the circumstances, including the welfare checklist and the no order principle, and bearing in mind that S's welfare was the paramount consideration, the court would grant permission for S's name to be changed (paras. 4–5).

Cases cited:

(1) *AB* v. *BB*, [2013] EWHC 227 (Fam); [2014] FLR 178, referred to.

(2) *B (Minors) (Change of Surname)*, *Re*, [1996] 1 FLR 791; [1996] 2 F.C.R. 304, referred to.

(3) *Dawson* v. *Wearmouth*, [1999] 2 A.C. 308; [1999] 2 W.L.R. 960; [1999] 2 All E.R. 353; [1999] 1 FLR 1167; [1999] All E.R. (D.) 330, considered.
(4) *R (A Child) (Surname: Using Both Parents')*, *Re*, [2001] EWCA Civ 1344; [2001] 2 FLR 1358; [2002] 1 F.C.R. 170, *dicta* of Hale, L.J. considered.
(5) *T (orse. H) (An Infant)*, *In re*, [1963] Ch. 238; [1962] 3 W.L.R. 1477; [1962] 3 All E.R. 970, referred to.
(6) *W (A Child) (Illegitimate Child: Change of Surname)*, *In re*, [2001] Fam. 1; [2000] 2 W.L.R. 258; [1999] 2 FLR 930; [1999] 3 F.C.R. 337, referred to.
(7) *WG*, *In re* (1976), 6 Fam. Law 210, referred to.

J. Rodriguez for the applicant;
C. Pitto for the respondent.

1 **BUTLER, J.:** In this matter I am concerned with the welfare of the parties' daughter, S, born on March 13th, 2013 and aged 5. The main issues in the case have concerned issues of S's residence and contact with her father, the respondent. Those issues have now been resolved in accordance with the recommendations in the helpful welfare report prepared by Ms. Burke and the agreed draft order now before me. I have considered the whole of the evidence contained in the judge's bundle and am satisfied that the agreed draft accords with S's welfare, which is my paramount consideration.

2 There remains the issue of the applicant mother's desire to change S's surname to a double-barrelled, hyphenated name including the father's surname followed by the mother's. Currently, the child's surname is her father's surname alone. The father has parental responsibility and does not consent to this change. S's name has been registered.

The law

3 I must apply the following principles when deciding this issue:

(i) S's welfare must be my paramount consideration.

(ii) I must take into account all the circumstances, including the matters mentioned in the welfare checklist contained in s.4(3) of the Children Act 2009.

(iii) A change of name without the consent of both of a child's parents is an important matter and should not be permitted unless there is at least some evidence that such a change would lead to an improvement concerning the child's welfare. This was the conclusion of the majority in the case of *Dawson* v. *Wearmouth* (3), in which the facts were very different from those in the present case. The mother in that case had always been known

by the surname Wearmouth, as had her two other children, who lived with her. Following a two-year relationship she separated from the father, taking the three children with her. She then registered the child's name without consulting the father, knowing that he wished the child to have his surname. Under the then current UK legislation, it was the mother's duty alone to register the child's name, since the parents were not married. The trial judge rejected the propositions that (a) it is generally in a child's interests to have the same surname as his or her mother when she is bringing the child up, and (b) that a difference in names between children in the same household would embarrass or adversely affect the mother or the child. The child's awareness of his identity would be maintained by residence and contact. The Court of Appeal held that registration was a profound matter, to which the trial judge should have given more weight and which he should not have "put to one side." Wearmouth was the mother's name and as well as the child's half-siblings' name at the time it was chosen for the child by the mother. Her choice could not be criticized. The only countervailing argument was that a change to the father's name would assist in maintaining the child's connection with the father and emphasize the paternal connection. There was no suggestion of substantial usage of a name prior to the application. Their Lordships held that an order for change of name should not be made unless there is some evidence that this would lead to an improvement from the point of view of the child's welfare.

(iv) I must not make an order unless to do so would be better for S than making no order. In virtually all cases it is best for parents to reach agreement for the sake of their child in relation to such matters, taking into account the views of both and the child's best interests.

(v) The fact of registration is a relevant and important factor.

(vi) Each case is fact sensitive. It is important to take into account all of the circumstances, including the Children Act welfare checklist and the no order principle.

(vii) I have reminded myself of the other reported authorities to which I have been referred, including *In re W (A Child) (Illegitimate Child: Change of Surname)* (6); *Re B (Minors) (Change of Surname)* (2); *AB* v. *BB* (1); and *Re R (A Child) (Surname: Using Both Parents')* (4). In *In re R (A Child)*, Hale, L.J. (now President of the Supreme Court in the United Kingdom) said ([2001] EWCA Civ 1344, at para. 15):

> "In my judgment, parents and courts should be much more prepared to contemplate the use of both surnames in an appropriate case, because that is to recognise the importance of both parents. As it happens, it is the common practice in Spain so to do. It is not unknown, for that matter, in the United States of America, where women in particular will often use both names. I therefore echo what

> has fallen from my Lord, Lord Justice Thorpe, in urging both parents to contemplate that course in this case."

There is, therefore, recognition in England of the difference in culture in this regard to which I refer below.

4 In this case, I consider the following to be of particular importance in considering S's welfare:

(i) She is only five and it would be a difficult exercise for her if asked whether she would prefer her name to be changed as suggested by the mother. This does not mean that she cannot, even at that early age, have valid views or that she would not be able to have some understanding of the issue. During the years since the *Dawson* case (3), the ability of young children to express their views and the desirability of taking those views into account has been increasingly recognized. Whilst I understand the reticence of the court welfare officer in this case to burden her with the decision, I do not entirely accept that approach. I bear in mind also the United Nations Convention on the Rights of the Child which, though it has not been adopted in Gibraltar, is persuasive in this regard. In my view, an experienced social worker should be able to discuss the subject with a five-year-old child sensitively and in a way which does not leave the child with the impression or feeling that the choice is hers or that she is choosing between her parents. Indeed, raising the subject with her in advance in a low-key way may well assist her if a change were to be made later. The point is that the child will know that her feelings have been taken into account.

(ii) The mother's proposal is not to deprive S of her father's surname. It is to add her own surname to it. In my view this is an important distinction. In *In re T (orse. H) (An Infant)* (5) the mother had changed the child's surname from that of her first husband to that of her second. Buckley, J. said ([1963] Ch. at 242):

> "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 with and for both of its parents so far as the circumstances will permit. But to deprive the child of her father's surname . . . is something which is not in the best interests of the child because, I think, 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 name."

In *In re WG* (7), Cairns, L.J. said (6 Fam. Law at 210):

> ". . . [T]he mere fact that there had been a divorce, that the mother had re-married and had custody of the child, and had a name different from that of the child, was not a sufficient reason for changing the child's surname. The courts recognise the importance

> of maintaining a link with the father, unless he had ceased to have an interest in the child or there were some grounds—having regard to his character and behaviour—which made it undesirable for him to have access to the child at all."

In numerous cases the importance of a child's biological origin (including links to the paternal family) to the child has been emphasized.

(iii) The matter of change of name has not been canvassed with S. It is unlikely that a change at this stage would distress her. Indeed it should be presented to her as a positive thing, showing to her that both of her parents are equally her parents. I have little doubt that, even at her age, she would understand that (as opposed to changing her name in a way which would exclude one of her parents).

(iv) Whilst change of a child's registered name without the consent of both parents is an important and serious matter, I have concluded that it is time to recognize that the issue of a child's surname following breakdown of his or her parent's relationship is sometimes materially different from the position in the United Kingdom. There is no widespread culture in the United Kingdom of double-barrelled surnames. In contrast, in Gibraltar it is in no way unusual for a child's surname to reflect those of both parents. Many children born here have at least one parent of Spanish heritage. In Spain such surnames are commonplace. Most of the reported authorities in the United Kingdom are now historical. Whilst in a small community such as Gibraltar it may be said that most people will be aware of the identity of a child's biological parents and that therefore a change of name is less necessary in order to emphasize it, I have taken the view that the importance to a child of recognizing that parentage should be accorded rather more weight than it has been hitherto.

(v) An additional relevant feature of life in Gibraltar is that many families cross the border with Spain frequently (in many cases daily). Border checks may take longer and may feature questions about the fact that the parent accompanying the child (and the child's siblings) have different surnames. Whilst that alone may be of little weight, it is one of the circumstances to be taken into account. In the present case, in my view, it helps to tip the balance in favour of allowing the proposed change. It is also relevant and to be weighed in the balance that the child will have the, perhaps small, advantage of her primary carer's name included in her name at school and elsewhere.

(vi) The father's previous alleged domestic abuse, to the extent that it was proved, would also be a circumstance to add in the balance. I have not, however, found it necessary to give significant weight to that factor in this case, given that it has not been dealt with or tested in oral evidence. I do not propose to mention the details in this judgment. Suffice it to say that the father has admitted that he has behaved at least inappropriately.

The parties have now agreed that there should be a joint residence order, though the mother will be S's primary carer. That accords with the recommendation of the court welfare officer. I have had reservations about this but am persuaded that it would be counterproductive to prevent the agreed arrangement from proceeding. I have caused the Agency to make full enquiries about the father's conduct and the safety of the child in his care. No one suggests that he would harm S physically. The risk is that he might expose her to violent scenes or aggression as a result of his inability to control himself. If the father were to allow S to witness violent scenes in the future, the court may well find that his contact with her should be seriously restricted. To the court welfare officer, S has indicated that she does not like it when the father becomes angry with her.

(vii) The mother is likely to have other children who will bear her name and that of their biological father. She is due to give birth to S's half-brother soon. It will seem to S natural that she should be treated in the same way as her half-brother and any future half-siblings.

(viii) The only reason given by the father for opposing this application is his alleged fear that the mother might later apply again for a change of surname to exclude his altogether or that she might change S's name without his consent or court permission. That, in my view, is a misguided fear and shows some lack of insight on his part. Such an application would be almost certain to fail unless he had behaved in such a way as to exclude him from contact with S. Even then, S will know who he is and there would probably be no advantage in removing him from her name. My decision must be based upon S's welfare, rather than the father's fears. Having heard him give evidence, however, I do find, on balance, that he finds it difficult to concede anything suggested by the mother or to understand her position. Having said that, he has accepted the recommendations of the court welfare officer, as has the mother. He does understand that the mother could not change the child's name further without his consent or further order of this court. I make it clear that, absent very significant changes, it is virtually certain that any application by the mother to exclude the father from S's name would fail.

(ix) Despite the allegations of threats and abuse made by the mother against the father, she has consistently confirmed that she is sure that he would not directly harm S. The court welfare officer has confirmed that the Agency has no concerns about the child in the care of either parent and that is also the view of the school. Fortunately, S appears to be a balanced and happy child generally, who is doing well at school. Her family on both sides are blessed that they have the opportunity now to work together in S's interests, to make sure that the remainder of her childhood is happy and to appreciate the joy and happiness which she can give to her maternal and paternal families. The current hostility described in the two welfare reports before me is extremely unhealthy. If the two families cannot make

a concerted effort to mend their relationship now that the arrangements for the foreseeable future are settled, it is S who will suffer, not only short-term and medium-term but for the remainder of her life.

(x) S's age is an important factor. Whilst the parties and the welfare officer agree that it would not be right to burden S with having to decide the issue of her surname, I do not agree that she should not have been asked how she felt about it. No one sought an adjournment and all wished me to make a decision today. S is used to her present surname but at her age I do not think that the proposed change would in any way be difficult for her to understand and to cope with. Indeed, provided that both parents think of her welfare and assist with this, she can be made to accept it as a very positive change, symbolizing that both of her parents (and their families) are equally important to her. A later change would probably be more difficult for her.

(xi) It is a relevant feature of this application that the mother has suffered from anxiety, panic attacks, stress and irritable bowel syndrome. The current proceedings (though brought by her) will have been stressful for her. She is due soon to give birth to her present partner's son. It is intended that he have a double-barrelled surname, incorporating that of both of his parents. That is, in my view, a relevant consideration to weigh in the balance. It is, in my view, a legitimate wish of the mother that her children be treated the same in this regard.

(xii) It is also relevant that the mother is content for the last part of S's name to remain that of the father. She was even content to accept that her surname should simply be included as a middle name for S, rather than as part of her surname.

(xiii) Since I have not heard full oral submissions on the issue, I cannot make findings about the reasons for the mother recently having changed S's school without consultation with the father. I do observe, however, that even if the father was given some notice of the decision, it does appear that he was not properly consulted. The result is that the relationship between the parents and their respective families has deteriorated further. The mother must accept that the father is entitled to be involved fully in all important decisions affecting S and the parents must find a way to communicate in an adult and responsible way about all matters affecting their welfare. On balance, I believe that but for that move without proper consultation, the father would have been more sympathetic to the mother's position.

(xiv) The father also claims that S has told him that she has been told by her mother that she should refer to the mother's partner by a name which would suggest that he is her father. I make no finding about that but emphasize that that must not happen. This father is a committed father. Unless there are extreme contrary changes in circumstances in the future,

she should always know him as her father, to the exclusion of anyone else. That, of course, does not mean that her step-father will not also be an important part of her life, the more so now that he will be the father of her half-brother. The father should not oppose or seek to undermine that relationship and I am encouraged by the court welfare officer's confirmation that the father has said that he has no objection to it.

Conclusions

5 I have decided on the particular facts of this case, weighing up all the relevant circumstances, including the no order principle and the welfare checklist, and bearing in mind that S's welfare is my paramount consideration, that I should grant permission for S's name to be changed. This is no reflection on the father as a father. It should be regarded as reflecting the reality that both parents love their child equally and are equally important for her. She will thus be treated similarly to her half-brother. Difficulties at the border with Spain will be minimized (although that alone would have been insufficient to persuade me that I should grant permission). She will have the real benefit (in this case) of the importance of both parents to her being reflected in her name. It will in no way detract from the father's importance to her. It is perhaps too soon to consider the father's future relationship with S's half-brother but I hope that once the parents begin acting responsibly, the father will be accepted by the mother and her partner as able to get to know him. That would be a particularly healthy development.

6 I give permission for this judgment (though it is given *ex tempore*) to be reported in anonymized form, since I have made observations in relation to a change of emphasis in Gibraltar (as opposed to the United Kingdom) as to the weight which may be given in an appropriate case to the potential advantage to a child (especially a very young child) of permitting a change of surname to reflect the surnames of both parents. Each case will depend upon its peculiar facts and it should not be thought that change of a registered name is a formality or justified simply by convenience or the wish of a parent.

7 The court welfare officer is of the view that a change of name, on balance, would be of benefit for S in this case. I have considered whether simply allowing the addition of the mother's surname as S's middle name would be appropriate. Had this been done by consent, it would not have harmed S but it would be unusual and, on balance, I believe that it is better for her parents both to be recognized in her surname, the emphasis remaining with the father by virtue of his name being last, which is his preference if permission is to be granted.

8 In all these cases, it is by far preferable for parents to reach agreement in the interests of their child and their child's happiness. In the absence of

agreement, there will remain a need to justify a change in name, particularly in cases where the name change will exclude one parent's name rather than adding the name of a parent who is a primary carer.

Order accordingly.