

NO. A10-1775

State of Minnesota
In Court of Appeals

In Re the Marriage of:

Todd Allen Foster,

Appellant,

vs.

Jennifer Elizabeth Soliday,
f/k/a Jennifer Elizabeth Foster,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. DID THE COURT ABUSE ITS DISCRETION IN GRANTING THE ADDITION OF THE MOTHER'S NAME TO THE CHILD'S NAME IN A HYPHENATED FASHION OVER THE OBJECTION OF THE FATHER.

The Court determined that it was in the child's best interest to modify the minor child's surname over the objection of the father. The trial court refused to reconsider that decision.

- II. DID THE COURT ERR BY NOT REQUIRING THE RESPONDENT TO SHOW BY CLEAR AND COMPELLING EVIDENCE THAT ADDING THE MOTHER'S MAIDEN NAME TO THE CHILD'S NAME WAS IN THE CHILD'S BEST INTEREST.

The Court determined that it was in the child's best interest to modify the minor child's surname over the objection of the father based upon the evidence presented. The trial court refused to reconsider that decision.

STATEMENT OF THE CASE

This appeal is from an Order of the Hennepin County District Court, Fourth Judicial District, State of Minnesota, Family Court Division, Honorable William H. Koch, presiding District Court Judge, which arose out of a dissolution proceeding. The appeal is specifically from the District Court Amended Order dated August 11, 2010 changing the minor child's name and the subsequent Order Denying Reconsideration dated September 9, 2010. The applicable statutes are found in Minnesota Statutes § 259.10 - § 259.13.

The parties were engaged in a contested divorce proceeding filed in Hennepin County District Court in 2010. The parties stipulated to joint legal and physical custody of the minor child, Nathan Marion Foster. At trial, Respondent sought to modify the minor child's name from his birth name to incorporate her maiden name via a new hyphenated name of Nathan Marion Soliday-Foster. Appellant opposed the requested modification arguing that it was not in the best interest of the minor child to change his son's name.

Following the trial, Appellant brought a motion seeking relief from the Amended Order filed by the Court on August 11, 2010 that authorized the change of the minor child's name. Appellant requested that his motion for reconsideration be heard by the Court. The request was denied by the Court in the Order Denying Reconsideration dated September 9, 2010.

Appellant seeks substantive modification of the Court's decision to change the minor child's name from his birth name of Nathan Marion Foster to the hyphenated name of Nathan Marion Soliday-Foster.

STATEMENT OF FACTS

The parties were married on August 21, 2004 in the City of Lakeville and State of Minnesota. During the marriage, the parties had one minor child, Nathan Marion Foster, born February 9, 2009, presently 22 months old. The minor child's Birth Certificate reflects the name as agreed to by the parties at the time of his birth. (T. 12) That name is the only name the child has ever been recognized by and is the name on the child's Social Security card and medical coverage cards.

The Appellant served his Summons and Petition for Dissolution of Marriage upon the Respondent on November 2, 2009. The Appellant sought joint legal custody and sole physical custody of the minor child in his pleadings. The parties participated in the Social Early Neutral Evaluation (SENE) and Financial Early Neutral Evaluation (FENE) processes.

Following the SENE process, the parties agreed that the best interests and welfare of the minor child, Nathan Marion Foster, would best be served if they were granted joint legal and physical custody. The agreement reached by the parties as to custody and their parenting time schedule was reported to the Court for incorporation into the parties' final Order. The issue of changing the minor child's name was never raised or addressed by the Respondent in her pleadings or at the SENE. It was first raised at the parties' pretrial conference and was immediately objected to and opposed by the Appellant.

The parties participated in a pretrial conference before Judge William Koch on April 20, 2010. The parties reported to the Court that they had reached an agreement on most of the disputed issues. The Respondent informed the Court that she was requesting that the minor child's last name be changed from Nathan Marion Foster to Nathan Marion Soliday-Foster. The Appellant objected to the name change being raised at that time and did not agree to the name change sought by the Respondent. The Court identified the issues for trial as the name change of the minor child and the final division of assets and liabilities for the parties.

The Court held a trial on the remaining issues on June 10, 2010. The Appellant testified at great length regarding his opposition to the proposed hyphenated name. (T. 10-24) The Appellant claimed that it was not in the best interest of their son to have a hyphenated name and provided a proper basis to deny the request. (T.10-24) The Appellant testified as to the historical source of the name of the child being his great-grandfather and the great significance of Nathan to his family as being the first male great-grandchild. (T. 11 and T. 18) The Appellant gave numerous examples of how he believed it would be detrimental to his young son in the future to have a hyphenated name. (T. 12-15 and T. 18) The Appellant also discussed his desire to maintain the surname lineage for the minor child. (T. 17)

The Appellant's father, Scott Foster, testified as to the importance of maintaining the child's name as Nathan Marion Foster and specific concerns he had with respect to the change. (T. 7-9) Scott Foster also testified to the historical significance of the child's name and the heritage link of Nathan Marion Foster to his ancestors in the past, present and future by preserving the Foster name. (T. 7-8)

The Respondent testified on the name change issue. The Respondent acknowledged that she was changing her name from her married name to her maiden name as part of the divorce. (T. 60) The Respondent confirmed the decision to name the child after the Appellant's grandfather and the importance of tying it to the Foster family heritage. (T. 59) The Respondent testified as to her preference in having the child's name to be reflective of her maiden name in the future based upon the fact that the parties were getting divorced and that hereinafter she would be known as Jennifer Elizabeth Soliday. (T. 60-61) The Respondent also testified that she would never be changing her name regardless of her future marital status. (T. 60 and T. 69)

The parties submitted proposed orders regarding the disputed name change issue pursuant to the Court's Order dated June 12, 2010. Those submissions were received by the Court on June 14, 2010. The parties also submitted an executed Marital Termination Agreement, and Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on the other issues which granted the parties their divorce on

August 11, 2010. The Respondent's name was changed to her maiden name of Soliday in that document.

The Court issued the initial Order regarding the name change on August 5, 2010. Following the issuance of its Order, the Court was made aware of the existence of errors that were substantially related to the minor child's name. The Court issued an Amended Order filed August 11, 2010 in which it granted the name change requested by the Respondent and correcting the prior errors.

The Appellant requested reconsideration of the Court's Order. The Appellant's request was denied by the Court in the Order Denying Reconsideration dated September 9, 2010 arising out of a dissolution proceeding.

Appellant appeals the Order of the District Court of Hennepin County entitled Amended Order filed August 11, 2010 changing the minor child's name and the Order Denying Reconsideration dated September 9, 2010.

LEGAL ARGUMENT

I. THE COURT ABUSED ITS DISCRETION IN GRANTING THE ADDITION OF THE MOTHER'S NAME TO THE CHILD'S NAME IN A HYPHENATED FASHION OVER THE OBJECTION OF THE FATHER.

This is a review of a proceeding for a legal name change under Minn. Stat. § 259.11. The current law on this issue is outlined in In Re Application of Saxton, 309 N.W.2d 298 (Minn. 1981), cert denied, 455 U.S. 1034, 102 S. Ct. 1737, 72 L.Ed.2d 152 (1982). See also, Young v. Young, 356 N.W.2d 823 (Minn. Ct. App. 1984 at 824) and In Re Marriage of Jacobs, 309 N.W.2d 303, 305 (Minn. 1981) for authority that Saxton is still the applicable law on this issue.

Prior to Saxton, the applicable law on this issue was outlined in Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974). The Court previously considered the proper interpretation of Minn. Stat. § 259.11 (2010) in resolving the issue of “whether a change in a child’s name should be ordered over the objection of a natural parent” Robinson, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974). Applying the statute, the Minnesota Supreme Court has held that the “welfare of the children must ultimately be the controlling consideration in any change of status”. In Re Aitkin County Family Serv. Agency v. Girard, 390 N.W. 2d. 906, 908 (Minn. Ct. App. 1986) citing Robinson, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974).

The Court reviews name changes under an abuse of discretion standard. In Re the Welfare of C.M.G., 516 N.W.2d 555 (Minn. Ct. App. 1994). The District Court did not honor the wishes of the child's father when he opposed this change to this son's name. The District Court inappropriately granted the name change despite only marginal evidence being provided by the Respondent. The Court abused its discretion without having made a finding of clear and compelling evidence that it would be in the best interest of the minor child to change the name and override the father's interest in maintaining the given surname of the child.

A. It is in Nathan Marion Foster's Best Interest to Retain the Surname of His Natural Father.

In Robinson, the Court noted that the best interest of the child controlled the resolution of the issue and held "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. Robinson, at 36, 223 N.W.2d at 140. (Emphasis added.)

The Court in Saxton, supra at 301, retained and further elaborated on the standard outlined in Robinson. The Court stated 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 interest. Saxton, supra at 301. The Court further retained the requirement of

Robinson and further required that there be **clear and compelling evidence** that the substantial welfare of the child necessitate such a change and outlined some factors that the trial court could utilize in making such a determination. Saxton, supra at 301.

(Emphasis added.)

The basis of the name change that Respondent sought was created due to the fact that she sought to change her married name in the divorce proceeding to her maiden name of Soliday. Had the Respondent chose not to change her name there would be no issue to discuss. The Respondent's son would have not only identified with her but would have maintained the very lineage and historical value presented to the Court by the Appellant and Scott Foster, the minor child's grandfather. Respondent's argument centered on how it affected her and not the child's best interest after she changed her name back to her maiden name.

The Respondent expressed no prior desire about identifying herself or the minor child as part of Respondent's birth family (Soliday) by including that name in her own or that of the child prior to the time the parties divorced. She admittedly chose not to hyphenate her own name to include the maiden name of Soliday after her marriage to the Appellant despite her present claim of a benefit to her son. (T. 66-67)

While it is true that neither parent has a superior right to determine the initial surname their child shall bear they did agree on the Foster name. In Re Marriage of Jacobs, 309 N.W.2d 303 (Minn. 1981). In this case, the parties had mutually agreed to

the child's birth name and the Respondent confirmed that in her testimony before the Court. Once this surname was selected for the child, be it the maternal, paternal or some combination of the child's parents' surnames, the Respondent's requested change in the child's surname should not have been granted unless the change promotes the child's best interest as supported by clear and compelling evidence.

II. DID THE COURT ERR BY NOT REQUIRING THE RESPONDENT TO SHOW BY CLEAR AND COMPELLING EVIDENCE THAT ADDING THE MOTHER'S MAIDEN NAME TO THE CHILD'S NAME WAS IN THE CHILD'S BEST INTEREST.

The evidence supporting the Respondent's request for a name change was neither clear nor compelling and certainly not in the best interest of the child as required by legal precedent. The District Court did not clearly delineate a factor or factors that were clear and compelling enough to allow the Court to ignore the staunch opposition of the Appellant/Father and his preference to retain the surname of the minor child.

The Court in Saxton specified several factors that trial courts may consider in determining the child's best interest. Further, the Court stated that trial courts need not limit their consideration to those factors but they should set out their reasons for granting or denying an application to change the child's surname. Id.

The Court must consider the child's best interest as determined by (1) how long the child has had the current name; (2) any potential harassment or embarrassment the change might cause; (3) the child's preference; (4) the effects of the change in the

child's relationship with each parent; and (5) the degree of community respect associated with the present and proposed names. LaChapelle v. Mitten, 607 N.W.2d 151, 166 (Minn. App. 2000). In Re Saxton, supra at 301.

The District Court findings reflect the review of the Saxton factors but reaches a conclusion without evidence that is neither clear nor compelling to support the request for the name change. The District Court improperly concluded that it is in the best interest of the child to make the name change because of the value of the Soliday name within the community. The child was just 16 months of age at the time of trial and certainly is not impacted by this factor. Much of the Respondent's argument was speculative as to how the child may benefit from the name change in the future especially the potential benefit within a community Nathan may or may not be raised in for the majority of his life.

The Appellant provided to the Court clear and compelling evidence supporting his opposition to the name change to support a finding that it was not in his son's best interest to have a new surname. The District Court noted that this was a close call to make for this case. See Order filed August 11, 2010 at Finding of Fact 23 and 26.

The Court dismissed the Appellant's concerns. It based the decision primarily on the finding that "their son may be subject to wider, immediate, acceptance in the local south metro community based upon his immediate link to the Soliday name through a hyphenated surname". Id. The Court could only find a possible benefit for the

child that is tenuous at best given that the child may or may not be raised in that part of the metropolitan area. The Court in Finding of Fact 26 addressed the possibility of avoiding confusion after Respondent changed her name. The burden clearly rested with the Respondent to show clear and compelling evidence that it was in the minor child's best interest to change the name. That evidence was not shown in this case.

The change in the marital status would not have automatically required a change of the child's surname. In fact, it is the name change of the Respondent brought on by her own unilateral action which creates the issues she seeks to remedy. When the prior cases are reviewed it becomes clear that the Court has refused to grant name change applications in situations where the natural mother is attempting to change the name of a child over the objections of the natural father and pursuant to a dissolution of the parties' marriage. In such situations, the Court is focused on the risk of alienating the child-father relationship and has found the risk of confusion to the child to be significant. See Young, supra at 824. This name change has the same possibilities for this child and should be avoided by maintaining the original surname.

The name change in the instant case raises certain apprehensions as to its effect on the father/son relationship. Such a change could reasonably represent to Nathan "evidence that his father is deserving of rejection or contempt; or an attempt by his mother to deceive him as to his true identity; or a statement by his mother and potential future step-father that his true identity is a shame and embarrassment to them and others.

A name, in addition to furnishing a means of identification signifies a particular relationship between people. The paternal surname identifies the relationship between a father and his child.” Application of Hinrichs, 41 Misc.2nd 422, 426 N.Y.S.2d 25 (1964).

Nathan’s legal name represents his identity, his paternity and remaining bond with his father. The testimony was heartfelt and clearly demonstrated the value and importance to the Foster family that the child’s surname reflect their prior heritage. It would be the means by which the Foster name would be carried forward in future generations by Nathan. It would provide the backbone for his relationship with his father and grandfather in his lifetime.

While the Respondent/Mother certainly had the right to change her name from that of Foster she did so knowing it would create the issues at hand. The Respondent should not be allowed to punish the Appellant by taking away this connection to his family by creating an artificial issue in this manner.

The Appellant testified as to the basis for the naming of the minor child after the minor child’s great-grandfather. This request preserved the lineage of the male minor child from his father, grandfather and great-grandfather and the Respondent accepted that as important at the time of the child’s birth and should have done so once again at the time of the divorce. The Respondent agreed to name the child initially out of respect for the Appellant’s ancestry thereby giving Nathan a prominent role in the future of the Foster family. The Respondent provided no clear or compelling evidence to

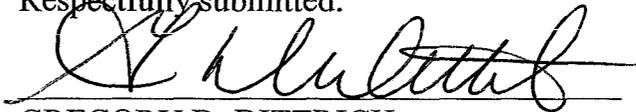
conclude that a change in name would advance Nathan's best interest in a definitive manner and therefore, the Court should have denied the request to modify the name.

CONCLUSION

It is the Appellant's contention that the Respondent failed to meet her burden of proof via clear and compelling evidence that it was in the best interest of the minor child Nathan Marion Foster to modify his surname. There was insufficient evidence to support a finding that the substantial welfare and best interest of the minor child warranted or necessitated a change in his surname. The Appellant provided to the Court substantial evidence supporting his opposition to the name change to support a finding that it was not in his son's best interest to change his name. In contrast, the Respondent did not provide the clear and compelling evidence required to override the father's objection to the name change. The Appellant respectfully requests that this Court reverse the trial court's decision on this issue and restore the surname of the minor child to that of Nathan Marion Foster.

Dated: 12-10-10

Respectfully submitted:



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