16 Fam LR 803 FAMILY COURT OF AUSTRALIA

AUSTRALIAN FAMILY LAW REPORTS

In the Marriage of MAHONY and McKENZIE

FAMILY COURT OF AUSTRALIA

16 Fam LR 803

3 June, 18 August 1993 -- Brisbane

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CATCHWORDS:
Children - Change of name - Whether a child registered at birth with his father's surname may now take a hyphenated name comprising his mother's and father's surnames following the separation of his parents - (QLD) Registration of Births, Deaths and Marriages Act 1962-1987 .

HEADNOTES:
On 14 May 1988 Ms McKenzie (the wife) married Mr Mahony (the husband) and commenced using the surname Mahony for herself. In October 1988 a child was born and registered under the surname "Mahony".

In July 1989 the wife and husband separated. The child resided with his mother at her parents' home. The wife ceased using the name "Mahony" for herself and returned to her maiden name of "McKenzie".

In July 1992 the Family Court at Brisbane made a consent order that the parties have joint guardianship and that the wife have sole custody of the child. The husband was granted access on alternate weekends.

In January 1993 the wife enrolled the child in a pre-school in Brisbane under the surname "McKenzie". The husband experienced difficulties with access at this time and commenced proceedings relating to both the access issues and the use of the registered surname "Mahony" for the child.

The wife sought orders that a hyphenated surname be now used for the child "McKenzie-Mahony".

Held, granting the application:

(i) In determining the issue of what is the appropriate surname for the child, the key element is the welfare of the child, including its comfort in the use of a surname in its social circumstances.

(ii) The registration of the child under the surname of the father at the time of birth in accordance with the Registration of Births, Deaths and Marriages Act 1962-1987 is of no real significance in relation to the appropriate "everyday" surname for the

comfort and welfare of the child.

(iii) In this case, the use of a hyphenated surname was appropriate.

INTRODUCTION:
Application This was an application for an order directing that the surname of the child should be the registered surname.

COUNSEL:
McKenzie instructed by Bruce S Dulley for the husband. Carew instructed by Gilshenan & Luton for the wife.

JUDGES: WARNICK J

JUDGMENTS: Warnick J. On 14 May 1983 Ms McKenzie married Mr Mahony. Thereupon, Ms McKenzie commenced to use the surname Mahony in respect of herself.

On 11 October 1988, J Mahony was born and his birth, under that name, duly registered.

Mr Mahony and Ms McKenzie separated on 17 July 1989, ie when Jake was about nine months old.

Ms McKenzie has in recent months resided at Newmarket in Brisbane but, for most of the time since separation, she resided at Noosa in Queensland with her parents and her brother. She deposes that she used the name "Mahony" for herself for only the period (or a little less), of her cohabitation with the husband. After that time she reverted to the usage of her family name. She does not intend to change her name from McKenzie in the future, even in the event of remarriage.

Ms McKenzie further deposes that J identifies strongly with her family and the name "McKenzie". She does not, however, say when she, or J, first used the name "McKenzie" with regard to J.

On 7 July 1992 an order was made in the Family Court at Brisbane, by consent of the parties, that they have the joint guardianship of J, the wife to have sole custody and the husband to have access on alternate weekends.

It would seem from Mr Mahony's deposition that, some time around the beginning of 1993, he received information that J was attending a pre-school under the name "McKenzie". It seems that there had also been some difficulties with access. Mr Mahony instituted these proceedings, seeking orders with regard to access and orders designed to ensure the use of the surname "Mahony" for J. The application was amended by leave given when the matter came before me in the duty list on the first return date, to include a plea for interim orders, which however were in the same terms as the final orders sought. The issue of access was resolved by agreement between the parties and I was handed minutes of consent orders intended to be "final" orders. This left only the issue of by which surname J should be known, to be decided on a final basis.

Neither party wished to add any further evidence to the single affidavit relied upon by each and neither party was cross-examined.

Mr Mahony deposes that, notwithstanding his position as a joint guardian, he was not consulted by Ms McKenzie about the pre-school to which J would be sent at the beginning of 1993. When Mr Mahony raised the subject with Ms McKenzie she told him that it was none of his business. He was not consulted about the use of a surname for J other than Mahony. He expresses the belief that Ms McKenzie's actions with regard to J's surname are a further attempt to limit his involvement in J's life. The implicit reference to some other attempt to so limit his involvement is no doubt a reference to the difficulties which Mr Mahony says he has had with regard to the exercise of access. I am not in a position to judge the validity of those allegations.

Mr Mahony alleges that J has had the surname "Mahony" for the majority of his life and closely identifies with it. He does not disclose a basis for his assertion that J closely identifies with that name, nor is there evidence that J has used that name, or had it used in respect of him, in Ms McKenzie's household or in respect of matters under her control.

Mr Mahony pays maintenance for J to the Child Support Agency.

Ms McKenzie supports a "regular, stable, predictable access arrangement".

Access is to be each alternate weekend and there is provision for holiday access and access on special occasions. Thus Mr Mahony is likely to, and indeed seems highly motivated to, continue to play a prominent parental role in J's life.

Following Ms McKenzie's move to Brisbane in about May of this year, J was enrolled at a child care centre under the surname "McKenzie". Ms McKenzie says that she felt it minimised confusion if J and she had the same surname. She says that it had been her intention to interchangeably use the surnames "McKenzie" and "Mahony", for J. It appears however that following the husband's objection to the use of the surname "McKenzie" she has proposed the use for J, in the future, of the surname "McKenzie-Mahony". She acknowledges the competing interests that each party has in the use of his or her surname.

There are then, bare assertions by each party that J strongly identifies with that party's surname. There is scant material from which I might find one or other of these assertions to be true. Both might be true; neither might be true. One could draw the inference that since J has lived primarily in a "McKenzie" household since nine months of age and Ms McKenzie commenced re-using that surname at the time of separation, her assertion is likely to be correct. But I do not regard that inference as strongly indicated on the evidence. Apart from the instance I have referred to, I do not know of the times at which or circumstances in which otherwise the name "McKenzie" might have been used with regard to J.

In the circumstances, the question of which surname is best used in J's interests, seems, because of the competing, unresolved assertions, sparse evidence and J's tender years, one more of general principle.

This sense of detachment of the question from the particular child concerned is increased by Ms McKenzie's proposition that the name by which J should be known is one by which he has not so far ever been known, and which represents a compromise, constituted by the hyphenated surname, of the competing interests of the parents.

It is then, with something of a sense of academic discussion of philosophical and social issues that I turn to a consideration of the arguments and matters pertaining to the issue.

Significance of registration

I apprehend that Ms McKenzie's claims should not be defeated *merely* because she, having herself adopted the name "Mahony" while cohabiting with Mr Mahony, was party to the registration of J under that surname. It is submitted on Ms McKenzie's behalf, and it was the case, that at the time of J's birth the law of this state required the registration of that birth to be in the father's surname.

At the time of J's birth, s 27A of the Registration of Births, Deaths and Marriages Act 1962-1987 (as it then stood) [the Registration Act] provided that, where a person was registered as the father of the child, the surname of the child should be the surname of the father.

In any event, it would seem to me inappropriate and punitive to find such a decision made during the cohabitation, whether compelled by law or not, "binding" upon a party, after the cohabitation breaks down.

The real questions are as to the degree of identification of the child with the registered surname, and as to any difficulties or embarrassment for the child, if using a surname other than that by which he or she is registered.

With regard to the latter question, in 1991, significant amendments were made to the Registration Act, both by way of amendment to s 27A and the insertions of new ss 27C and 27D. These sections provided the opportunity to persons, in various circumstances and with some qualifications, to cause the registration, as the surname of a child, or to alter the registration of the surname of a child to, "a surname formed by combining the surnames of the mother and the person registered as the father of that child in any separated order and whether or not joined by a hyphen".

It was submitted that the orders sought by Ms McKenzie should lead to the alteration of the register to record, for J, the hyphenated surname. A possible point of difficulty, namely that in some situations the surnames comprising the combined surname must be those used by each parent at the date of birth of the child, at which time Ms McKenzie was using the name Mahony, was not the subject of comment by either counsel. There is no evidence of the Registrar-General's application of the sections in practice.

With regard to the former question, I have already indicated that I am not in a position to decide upon any degree of identification of J with either surname, though I consider I can express the view that the degree of identification in a child of J's age with any particular name is less likely to be problematical if there is a change, than if he were somewhat older. Moreover, both surnames of his parents have been used in respect of him.

I am of the view that the present form of registration is, in this case, of no particular significance, and would remain of little significance even if the present registration cannot be changed. I regard the "everyday" name as of much greater significance to

a child's comfort, than the registered name which in any event would be a component of the combined surname.

The question of **discrimination** in the choice of a family name for J

Counsel for Ms McKenzie, in support of her client's case, referred me to the Sex **Discrimination** Act 1984 (the Act) and in particular to Article 16 paragraph 1(g) of the **Convention on the Elimination** of all Forms of **Discrimination** Against **Women (the Convention)**, certain provisions of which form the schedule to the Act. No arguments were developed however, as to just in what way the provisions of the Act or the **Convention** might impact on the decision which I am called upon to make.

The objects of the Act are:

(a) To give effect to certain provisions of the **Convention on the Elimination** of all Forms of **Discrimination** Against **Women;**

(b) To eliminate, so far as is possible, **discrimination** against persons on the ground of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs, in the administration of Commonwealth laws and programs;

(c) To eliminate, so far as is possible, **discrimination** involving sexual harassment in the workplace and in educational institutions; and

(d) To promote recognition and acceptance within the community of the principle of the equality of men and **women.**

The part of the article above referred to provides:

1. States parties shall take all appropriate measures to eliminate **discrimination** against **women** in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and **women:**

(g) the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

Thus the federal legislature has demonstrated a commitment to equal rights to husbands and wives in the choice of a family name, at least for themselves.

I do not see that the Act affects the discharge of this court's judicial responsibilities, but in the absence of argument do not express a concluded view. Even should the Act have application in this case, I cannot see that it would impinge upon my decision-making process, which must be to weigh those factors bearing upon the best interests of the child, except insofar as the Act might require me not to give preference to the position of one party as against the other, on the basis that one party has an exclusive or more significant parental right in relation to choice of the child's surname, than does the other party.

In this regard I note sub-paragraph (d) of Article 16 of the **Convention** provides for measures to ensure:

the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

In my view, well before the Act, any suggestion that "prima facie" a legitimate child should continue to bear the surname of the father as a matter of principle was put aside in Chapman v Palmer (1978) 4 Fam LR 462;[1978] FLC 90-510.In that case (at Fam LR 471; FLC 76,675) their Honours Evatt CJ, Asche and Marshal SJJ referred to passages in ; George v Radford (1976) 1 Fam LR 11,510;[1976] FLC 90-060 (Watson SJ) (at Fam LR 11,514;FLC 75,296); in ; Arthur v Comben (1977) 3 Fam LR 11,199;[1977] FLC 90-245 (Demack SJ) (at Fam LR 11,201;FLC 76,321);and in ; Sampson and Sampson [1977] FLC 90-253 (Fogarty J) (at FLC 76,367) which suggested the above proposition. After referring to that and other propositions, their Honours said:

There is a tendency in these decisions to speak in terms of principles and it appears that in some of the cases the court may have approached the problem with a pre-conceived notion that a change of name will be authorised only in 'extreme' or 'exceptional' circumstances. We believe that each such cases should be approached in an even-handed manner with the object of making a decision which will promote the welfare of the child. . .

Their Honours then summarised the factors to which the court should have regard in determining whether there should be any change in the surname of a child and, though such summary did not purport to be exclusive, it did not include any reference to a preferred or prima facie advantage attaching to the surname of either parent.

The use of the combined surnames

In circumstances then, where I attach no significance to the manner of registration itself, and do not find a particular attachment to, or identification with, either parent's surname, I turn to a consideration of whether J should be known for the foreseeable future by a combination of the surnames of the parties, notwithstanding that this name has not been used for him so far and his only familiarity with it might come from some identification with each of the two names together forming the whole.

Mr Mahony's position was that his surname should be the preferred name for J, but that if I was against him on that he would prefer the hyphenated surname. The name propounded by Ms McKenzie was, "McKenzie-Mahony". Happily, no submissions were made to the effect that the hyphenated surname should be "Mahony-McKenzie".

A number of benefits may be expected to arise from the use of the hyphenated surname for J.

Firstly, Ms McKenzie would be happy with the use of that name. Though she may well abide by an order that she use only the name "Mahony" with regard to J, it is likely that she would have some resentment to the use of that name which, notwithstanding her cooperation with an order, might result in tension perceived by J or communicated to J. It is generally in a child's best interests to be free of recognition of such tensions.

Secondly, Mr Mahony would be, at least, less dissatisfied than if the surname "McKenzie" were used for J.

Thirdly, if each of the parties correctly perceives J to identify with each of the surnames, the use of the hyphenated surname allows him a chance to retain a connection with the name of each parent.

Fourthly, the use of the hyphenated surname, in a number of ways, accords with the reality of J's life. His mother is Ms McKenzie, his father Mr Mahony. J is the product of their union. He would have a united surname. He has an on-going relationship with both of his parents, though they do not live together. The use of the hyphenated surname might facilitate the recognition by others of J's life circumstances and the ease with which J accepts his life circumstances.

Finally, the use of the hyphenated surname offers J a middle road in times of rapidly changing social attitudes. I would not purport to assess degrees by which segments of society hold pertinent attitudes, but I can, I believe, recognise attitudes commonly found in society at this time. Some persons would support the proposition that in theory, if not in the application to a particular child, there should no longer be a preference for the paternal surname. Some people would support the right in Ms McKenzie to revert to the use of her own family name upon the breakdown of her relationship with Mr Mahony. Some people would support the right in Ms McKenzie to apply her surname for J, where she is custodian. Some would support the use of the combined surnames.

As J grows he will become aware of attitudes in the community. He may develop feelings and ideas of his own about his surname and the use of the hyphenated surname would seem to provide him with a non-contentious platform from which he may choose to move in one direction or another, or to maintain the compromise.

I was referred by the solicitor for the husband to the decision of Rowlands J in In the Marriage of Skrabl and Leach (1989) 13 Fam LR 83;[1989] FLC 92-016.

In that case a child of the marriage, about six years of age at the time of the mother's remarriage, had, until that time, been known, as she was registered, by the father's surname. The mother changed her own name, and that of the child, upon the mother's remarriage, to that of the mother's then husband. Essentially the choice, as his Honour conceived it in the case before him, was between the reality of who the child was and the artificiality of the surname with which she had no blood connection. That was quite a different choice to that presented in the matter before me.

His Honour did say however, at Fam LR 84; FLC 77,338:

In a case where the mother assumes the father's surname on marriage, a child is born and registered with that name and the father remains in close and continuing contact with the child as an access parent, it is normal for the child to continue to use the original name although the custodial mother may remarry or revert to her maiden name -- that is currently our general custom.

His Honour made similar references to custom (applicable to other circumstances) in Re Skipworth (1989) 13 Fam LR 137;[1989] FLC 92-018.

As I indicated above, I would prefer not, even only four years after his Honour's assessment of general custom, to pass an opinion on whether one practice, in the same circumstances as those outlined by his Honour, is now more prevalent than any other, though his Honour's observations in both cases may remain accurate.

To give importance, of itself, to custom's favour, of the name of one parent over that of the other, might well appear discriminatory if the custom itself is discriminatory. The significance of custom to my consideration (and I would opine, as Rowlands J saw it, to his consideration) seems to be the assumed embarrassment which would arise for a child if his/her circumstances did not conform to the custom. Legislation, as noted, now specifically provides for combined surnames. Whether in the majority or not, the practice of departure from the father's surname for children of separated parents is recognisable in our society. I am not satisfied that the use of a combined surname would be a source of embarrassment for J, though such use may not conform with a custom which may be observed by more persons than not, in similar circumstances.

I have some reservations about the utility of a general adoption in our society of hyphenated surnames. One might enquire as to what would happen to the names of any progeny of J McKenzie-Mahony and a woman bearing another hyphenated surname. However, I am persuaded that the choices which might, in such circumstances (which are mere possibilities) need to be made, are best left to J in his mature years and that the fact that he may have to make those choices, though to be taken into account, ought not disturb a preference reached on a consideration of matters more immediately affecting his welfare.

Conclusion

In the circumstances of this case then, where I do not find a particular attachment to one surname to the exclusion of the other surname, I am persuaded by the benefits of the hyphenated surname that the use of that surname is in J's best interests.

It seems desirable that the orders cover some matters, such as payment of any fees for the alteration of the register, which matters were not the subject of express application or submissions. I will hear submissions about those matters, but subject to any such submissions, the orders will be:

(1) That each of the husband and the wife:

(i) henceforth exclusively use the name "McKenzie-Mahony" as the surname of the child of the marriage J, formerly known as Mahony and also known as McKenzie;

(ii) forthwith do all things necessary, individually and jointly including making application and executing documents, to seek the alteration of the registration of the name of the said child on the register of births in the State of Queensland, from the surname "Mahony" to the name "McKenzie-Mahony";

(iii) pay in equal shares such fees, if any, as are applicable to an application for alteration of the register as aforesaid.