In the

Supreme Court of Virginia

At Richmond

Record No. 131910

STACY MCMAHON,

Appellant,

– v. –

MELANIE WHITE WIRICK,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Mother fails to take into consideration that the stringent test for *Flowers v. Cain* and *Spero v. Heath* has its genesis in the belief that a child's best interests are served by having a surname that provides the child with an identity (in these cases, the Father's) and that the test placed a high bar to changing a child's name away from the father's for just that reason.

The first of the five published cases that Mother cites begins with the proposition that a child's best interests are served by having her father's surname. "This emphasis reflected the recognition by other courts of a father's interest in having his child continue to use his name and of the proposition that this parental interest is relevant to a determination of the child's best interest. *E.g., In re Lone*, 134 N.J. Super. 213, 220, 338 A.2d 883, 887 (1975)" *Flowers v. Cain,* 218 Va. 234, 236, 237 S.E.2d 111, 113 (1977). The Court there goes on to say that this view has been adopted by numerous other courts. "Thus, while applying the best interest test, other courts, with near unanimity, have declined to change the name of a child over the natural father's objection unless substantial reasons exist for the change. *E.g., In re Application of Robinson*, 302 Minn. 34, 36, 223 N.W.2d 138, 140 (1974)". *Id.*

This test was reiterated in *Beyah v. Shelton,* 231 Va. 432, 436, 344 S.E.2d 909 (1986), when the Court reversed a hearing court's decision to change the child's name over the father's objection by again recognizing

that the test developed in *Flowers* must be observed to prevent the capricious changing of a child's name.

> In *Flowers*, we said that when a natural father objects to the proposed change of name of his minor child, the burden is on the mother to prove by satisfactory evidence that the change would be in the child's best interest. *Id.* at 237, 237 S.E.2d at 113. We also recognized in *Flowers* the importance of "a father's interest in having his child continue to use his name and . . . that this parental interest is relevant to a determination of the child's best interest." *Id.* at 236, 237 S.E.2d at 113. Additionally, we stated that a court should decline to change the name of a child over the natural father's objection "unless substantial reasons exist for the change." *Id.* Moreover, the change of a child's name should not be granted over the father's objection "merely to save the mother and child minor inconvenience or embarrassment." *Id.* at 237, 237 S.E.2d at 113. Finally, we stated that when a natural father objects, a change of name generally will not be ordered unless (1) the father has abandoned the natural ties ordinarily existing between parent and child, (2) the father has engaged in misconduct sufficient to embarrass the child in the continued use of the father's name, (3) the child otherwise will suffer substantial detriment by continuing to bear the father's name, or (4) the child is of sufficient age and discretion to make an intelligent choice and he desires that his name be changed. *Id.* at 236-37, 237 S.E.2d at 113.

Beyah v. Shelton, 231 Va. 432, 434-435, 344 S.E.2d 909 (1986).

In *Rowland v. Shurbutt*, 259 Va. 305, 525 S.E.2d 917 (2000), this Court did not allow a natural father to change a child's surname to his own because the child already shared a surname with the mother and the mother objected. Despite Justice Koontz's belief that a child was better off

having the father's surname than a step-father's, this Court refused to take a child's surname away from that of the other parent, even recognizing that it was the step-father's. And in *May v. Grandy,* 259 Va. 629, 631, 528 S.E.2d 105 (2000), when the Court affirmed a hearing court that allowed a child to have input into changing her own name, Justice Koontz, in his dissent, decried the "watering down" of a standard that allowed a child's name to be changed away from her father's. When this Court reiterated the *Flowers* test in *Spero v. Heath*, it re-emphasized the "higher bar" encouraged by Justice Koontz in his dissent.

Mother focuses on the rule but ignores the genesis of this rule, which is that a child is better off with the father's name than a step-father's as a child's surname is her identity. It is not a great stretch to extend that belief to one that recognizes that a child is better off with the father's name than a surname she does not share with either parent. Mother has essentially abandoned her shared surname with her child when she married and changed her name to the step-father's.

CONCLUSION

The remaining arguments regarding "minor inconveniences and embarrassment" presented by the Mother have already been addressed in the Opening Brief of the Father. The issue is a narrow and focused one;

that is, does the stringent test developed in *Flowers* and its progeny—for very good reasons—have the same application when the child shares no surname with either parent? For the reasons set forth in the Opening Brief, the Father respectfully requests the relief previously requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that:

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5. On this date, fifteen copies of the Reply Brief of Appellant, along with a copy on CD, were hand-delivered to the Clerk of the Supreme Court of Virginia and three copies of the same, along with a copy on CD, were sent via third party commercial carrier, to counsel for Appellee at the address above, on this the 13th day of May, 2014.

/s/ Mary Elizabeth White
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