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Brief of Appellee – *McMahon v. Wirick*, Record No. 131910

To Whom It May Concern:

Please find enclosed on behalf of my client, Melanie White Wirick, the Appellee in the above-reference matter, the following:

- Fifteen copies of Appellee's Brief;
- One copy of the Appellee's Brief with a self-addressed stamped envelope.

Please file the fifteen copies with the court. Please kindly date stamp the copy and return in the enclosed envelope. Please let my office know if there are any questions or concerns.

Sincerely,

H. Eugene Oliver, III

cc: Mary E. White, Esq. (by USPS and e-mail with three copies)
cc: Melanie White Wirick (by e-mail)
Enclosures

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 131910

STACY MCMAHON
Appellant

v.

MELANIE WHITE WIRICK
Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This case involves a petition by the Appellant/Father, Stacy McMahon (hereinafter "Father"), to change the legal name of the parties' minor child, Addison Grace White (hereinafter "Child") to Addison Grace McMahon. The parties share joint legal custody of the Child with the Father having primary physical custody during the school year and Appellee/Mother, Melanie White Wirick (hereinafter "Mother"), having primary physical custody during the summer. Mother objected to Father's petition on the grounds that such a change was not in the best interests of the child and that the Father's concerns amounted to minor inconveniences and embarrasment.

This matter was heard by the Fairfax County Circuit Court on July 18, 2013. After hearing the evidence presented by both counsel, the trial court determined that the name change was not in the best interests of the parties' child. A final order was entered by the Court on September 6, 2013 denying the Father's petition.

STATEMENT OF FACTS

The parties are the natural parents of Addison Grace White, born February 28, 2007. The parties were never married and the parties entered a consent order simultaneously with this proceeding to put the

Father on the birth certificate. The parties shared custody of the Child until she reached school age and, now, they share joint legal custody of the child with the Father having primary physical custody during the school year and the Mother having primary physical custody during the summer. The Father lives in Fairfax County and the Mother lives in the Metro Richmond area (Joint Appendix p. 19-22, 26).

The Father filed this petition due to alleged difficulties that he has had in the past including confusion among school staff and doctors and insurance companies regarding which last name was either his or Addison's (J.A. p. 22, 25-26) and that he wished for the child to share his surname. No allegation was made that the confusion over Addison's name has continued to the present or presented any serious or permanent harm to the child.

The Father did not allege that the Mother has abandoned any ties with her child, did not allege that any misconduct had occurred which would embarrass the child, did not allege that the child would suffer any detriment by continuing to use her current surname, nor did he proffer any evidence that the child desired a name change (J.A. p. 46-48).

The child's current surname is her Mother's maiden name, which is used when the Mother uses her full name, and shared with her half-brother (J.A. p. 62). The child has used had her current surname her entire life and self-identifies with her surname (J.A. p. 61-62).

The Fairfax County Circuit Court held a hearing on this matter on July 18, 2013 based on the proffers of evidence by counsel and upon argument of law.

STANDARD OF REVIEW

Father's first assignment of error presents a question of law as to whether the test previously laid out by this Court in *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004) and its predecessors applies in cases where the child's surname is not the current surname of either parent. The proper standard of review of a question of law on appeal is *de novo*. *Banks v. Mario Indus.*, 274 Va. 438, 451, 650 S.E.2d 687, 694 (2007).

The Father's second and third assignment of errors present questions of whether the evidence was sufficient to support the findings of the trial court that the proposed name change was not in the best interests of the Child. On these assignments of error, the Court shall view the evidence in the light most favorable to the prevailing party at trial. *Spero v. Heath*, 267

Va. 477, 479, 593 S.E.2d 239, 240 (2004); *Banks v. Mario Indus.*, 274 Va. 438, 451, 650 S.E.2d 687, 694 (2007).

ARGUMENT

I. The trial court did not err as a matter of law in applying the standard from *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004) to this case in determining whether the proposed name change was in the best interests of the child.

There have been five published decisions of this Court on the matter of what test trial courts should apply in determining when a proposed name change is in the best interests of the child pursuant to VA Code § 8.01-217(C). In interpreting and applying the best interests test, this Court has followed the four-prong test first set forth in *Flowers v. Cain*, 218 Va. 234, 236-37, 237 S.E.2d 111, 113 (1977) that generally a change will only be ordered when (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.[1] In later cases such as *Beyah v. Shelton*, 231 Va. 432, 344 S.E.2d 909 (1986), *May v. Grandy*, 259 Va. 629, 528 S.E.2d 105 (2000), and *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239, 240 (2004), this Court expanded the application of the test to include cases with unwed parents and where the objection is by the mother to the proposed name change.

In addition to the four-part test from *Flowers*, this Court has provided additional guidance for circuit courts in applying the best interests test. A circuit court cannot change a child's name because of minor inconvenience or minor embarrassment. *May v. Grandy*, 259 Va. 629, 632, 528 S.E.2d 105, 107 (2000). There is not a presumption under VA Code § 8.01-217(C) or the case law that a child should have the father's surname. See *Spero v. Heath,* 267 Va. 477, 480, 593 S.E.2d 239, 240 (2004). The burden is upon the petitioning party, under the circumstances of [the] case, to prove by satisfactory evidence that the change is in the child's best interest. *Rowland v. Shurbutt*, 259 Va. 305, 525 S.E.2d 917, 919 (2000).

Father is correct in his assertion that the facts of this case are different from this Court's prior cases on this subject because the child shares her surname with the Mother's maiden name and, now, middle

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[1] This is the same test referred to by the trial court as the *Spero* test and this brief will use the terms "*Flowers* test" and "*Spero* test" interchangeably to refer to the four-prong test first set out in *Flowers v. Cain*.

name instead of with the current surname of one of her parents. However, as evidenced in the progression of the case law from *Flowers v. Cain* through *Spero v. Heath*, this Court has not abandoned application of the *Flowers* test just because the courts are called to apply the test to different family situations than that which existed in *Flowers*. In fact, this Court in *Flowers* recognized that courts across the country, with near unanimity, have declined to change the name of a child over a natural parent's objection[2] unless substantial reasons exist for the change. *Flowers*, 218 Va. at 236-37.

The law of the Commonwealth of Virginia as set forth in this Court's jurisprudence is that when a natural parent objects and there is an absence of substantial reasons for that change, then the name change should not be ordered. *Id.* The four prong test is how a petitioning party may meet their burden in showing that a substantial reason for the change exists and that the proposed name change is in the best interests of the child. See *Spero*, 267 Va. at 479-80. When combined with the additional guidance from this Court that a circuit court cannot change a child's name because of

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[2] The Court in *Flowers v. Cain* used the term "natural father," instead of "natural parent"; however, application of the Fourteenth Amendment's Equal Protection Clause would necessitate that a natural father and natural mother share the same rights under VA Code §8.01-217(C). See *Spero*, 267 Va. at 480; U.S. Const. Amend. XIV.

minor inconvenience or minor embarrassment, *May*, 259 Va. at 632, and that there is no presumption under VA Code § 8.01-217(C) that a child should have the father's surname, See *Spero,* 267 Va. at 480, it becomes quite apparent that the current case law is equipped to cover the current facts of this case. The tests require that a petitioning party show that a substantial reason for the name change exists to override the objection of a natural parent.

Father's argument that since the Mother uses the child's surname only as a middle name, it is in the best interests of the child to take the radical step of changing a child's name is inconsistent with this Court's prior rulings. This Court in *Spero* rejected the contention that VA Code § 8.01-217(C) contains any presumption that child should have the father's surname and, by extension, the mother's surname. See *Id.* at 480. A child's use of a surname may be relevant to a best interests determination; however, the language in *Spero* makes it clear that no presumption currently exists that the child should have a particular surname. Father's line of argument would require this Court to reverse *Spero* and create a presumption in VA Code § 8.01-217 that is inconsistent with the prior case law and simply does not exist in the language of the statute.

There is no basis for this Court to deviate from its prior rulings that when a natural parent objects and there is an absence of substantial reasons for that change and the four-prong test from *Flowers* to measure whether the petitioner has met their burden has not been met, then the trial court should deny the petition. Father argues that there is an implied condition precedent to application of the *Flowers* test; however he provides no test for this Court to use in these types of cases other than a bright-line rule that a child must share a name with a natural parent. Such a rule would remove the discretion of the circuit courts to consider the unique and particular facts of each case and would shift the evidentiary burden from the petitioning party to that party objecting to the change, all of which are contrary to this Court's holding in *Spero*, 267 Va. at 480. Additionally, such an implied condition precedent would allow circuit courts to change a child's name not only for minor inconveniences or embarrassments, but for no reason whatsoever other than a parent's request – a rule that would be contrary to all of this Court's prior jurisprudence on the issue. The trial court did not err as matter of law in applying the standard from *Spero* in measuring whether the petitioner met his burdens in proving the proposed change was in the best interests of the child to this case as required in VA Code § 8.01-217(C) because the test laid out in *Spero* is the appropriate

test for a circuit court apply in determining whether the proposed name change is in the best interests of the child.

II. The trial court did not err in finding that it was not in the Child's best interests to change the child's surname to that of her Father under the test set forth in *Spero v. Heath,* 267 Va. 477, 593 S.E.2d 239 (2004).

In petitioning the court for a name change of a minor child over a natural parent's objection, the petitioning parent may prove that the name change is in the best interest of the minor by showing that: (1) the parent has abandoned the natural ties ordinarily existing between parent and child, (2) the parent has engaged in misconduct sufficient to embarrass the child in the continued use of the parent's name, (3) the child otherwise will suffer substantial detriment by continuing to bear the parent'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.[3] *Flowers v. Cain,* 218 Va. 234, 236-37, 237 S.E.2d 111, 113 (1977). This is the same test as set forth in this Court's other rulings on the name change of a minor child. It is the burden of the petitioning party to prove by satisfactory evidence that the change is

[3] As stated previously, *Flowers* uses the term "father" which can be used interchangeably with "mother" and/or "parent" per application of the Equal Protection Clause.

in the child's best interest. *Rowland v. Shurbutt*, 259 Va. 305, 525 S.E.2d 917, 919 (2000).

There was no evidence put forth at trial that the Mother had abandoned the natural ties ordinarily existing between parent and child, that she had engaged in misconduct sufficient to embarrass the child in the continued use of the name "Addison White," or that the child would suffer substantial detriment by continuing to bear the name "Addison White." It was also uncontested that the child was not of sufficient age and discretion to make an intelligent choice nor was it alleged that she desired for the name to be changed. Counsel for Father admitted at the hearing in this matter that none of the four prongs of the *Flowers* test had been met (J.A. p. 46-48). In fact, the child self-identifies with her current surname (J.A. p. 61-62).

In viewing the evidence presented at trial, it is quite clear that none of the four prongs in the *Flowers* test were met or even alleged to have existed – only that minor inconveniences and/or embarrassment had occurred in the past. A change of name will not be authorized merely to save minor inconvenience or embarrassment to parent or minor. *Spero v. Heath*, 267 Va. 477, 480, 593 S.E.2d 239, 240 (2004). Therefore, the trial court did not err in finding that Father had not met his burden under the

Flowers test and that the proposed name change was not in the child's best interests since no evidence was presented to the trial court that would allow the court to rule differently.

III. The trial court did not err in concluding that, even if the test set forth in *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004) does not apply, it was not in the Child's best interests to change her name to that of the Father's because the difficulties encountered by Father and Child from the current status were merely "minor inconvenience and embarrassment."

When a natural parent objects to a name change and there is an absence of substantial reasons to order the name change, the change should not be ordered. *Flowers v. Cain*, 218 Va. 234, 237, 237 S.E.2d 111, 113 (1977). Even if this Court deems that the four prong test in determining the best interests of the child is inapplicable to this case, there still exists the requirement that substantial reasons for the change must exist in order to override the natural parent's objection. A change of name will not be authorized merely to save minor inconvenience or embarrassment to parent or minor. *Spero v. Heath*, 267 Va. 477, 480, 593 S.E.2d 239, 240 (2004).

Father's reliance on the concept that the child must share a surname with a parent is misguided in light of this Court's ruling in *Spero* that rejected the idea that that VA Code § 8.01-217(C) contains any presumption that child should have the father's surname (and, by extension, the mother's surname). See *Id.* The child in fact does share her surname with the mother, even if the Mother uses it more as a middle name or full name instead of her official surname. Any reliance on the cultural concept that a child should share their name with their father creating a legal presumption of such is misplaced due to the Court's holding in *Spero* and the Fourteenth Amendment's Equal Protection Clause. In citing *May v. Grandy* as proof of such a presumption underlying any best interests analysis, the Father leaves out the key distinction that the minor child in that case recognized that her name was different and she wanted to fit in – the exact situation contemplated by prong #4 of the *Flowers* test.

Additionally, Father misreads the line of cases from this Court to presume that a per se rule exists that a change shall be granted when the child does not share a common surname. *Spero* and its predecessors are clear that the parent petitioning to change the surname of the minor bears the burden of proving that the change is in the minor's best interest and

that a petition for changing a child's name must be considered on the particular facts of the case before the court. *Spero*, 267 Va. at 479-480. *Spero* rejected the application of a presumption or burden on anyone but the petitioning party to prove the proposed change is in the best interests of the child. See *Id.* In the case cited by the Father, the weight put on the child's surname is part of determining if the Petitioner had met their burden under the *Flowers* test that a proposed change is in the best interests of the child. *Flowers* is clear that courts should be hesitant in changing names and should do so only if substantial reasons exist for the change. See *Flowers*, 218 Va. at 236-37.

Father's proffered evidence at trial amounted to, in the words of this Court from *Spero*, "a catalogue of minor inconveniences and embarrassment." *Spero*, 267 Va. at 480. The evidence presented by the Father as to why a name change is necessary includes confusion over bills, mistake by third parties in calling him "Mr. White," and difficulties in getting information (which was ultimately obtained) and conjecture that these issues may continue into the future. While these incidents may be inconvenient or embarrassing, they certainly are minor in their nature and no different than those inconveniences or embarrassments suffered daily by unwed or divorced parents across the Commonwealth. No allegation

was made that the child suffered any harm, whether temporary or permanent, from these incidents. The fact that the Father has primary physical custody during the school year or that these issues are capable of repeating does not make these incidents rise above minor inconveniences or embarrassments. Changing the child's name for these reasons would just shift the inconveniences and embarrassments from the Father to the Mother. These inconveniences and embarrassments are a natural byproduct of a child having a different last name from a parent and are becoming increasingly common in today's society.

Finding that such minor inconveniences or embarrassments constitute sufficient grounds for a name change would reverse this Court's long-standing requirement that a substantial reason exist for a name change since *Flowers v. Cain* in 1977 and allow litigious unwed and divorced parents to petition the courts to change their child's name over the minor inconveniences or embarrassments of day-to-day life. The trial court correctly determined that the evidence presented at trial by the Father was the definition of minor inconveniences and embarrassments and did not justify changing the child's name.

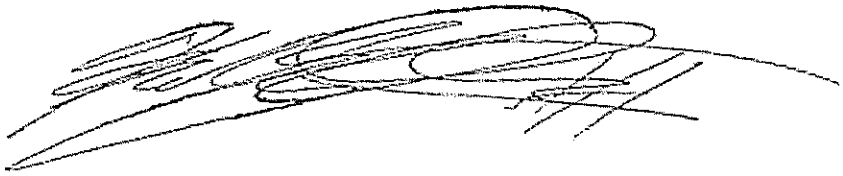
CONCLUSION

This case presents the question of what test should govern application of the best interests requirement from VA Code § 8.01-217(C) in determining whether the petitioning parent has met their burden to override a natural parent's objection to a proposed name change. In all of its prior decisions on the matter, this Court has found that a petitioning parent must show a substantial reason for the change and that such a request cannot be to save a parent or child from mere inconvenience or embarrassment. In defining "substantial reason," this Court set forth a four-prong test in *Flowers v. Cain* that it has reaffirmed in subsequent decisions. A name change is a drastic event with long-lasting impacts on both parents and child. The current law in Virginia balances the needs of the child with maintaining their sense of identity both individually and within the family unit. To change a child's name solely due to inconveniences and embarrassments caused by third parties and a father's wish to share his surname with his child do not overcome the impact that such a name change will have on the child and the rights of the other natural parent as to the name of her child. Upon hearing the evidence presented, the trial court correctly determined that while the fact pattern here may be a novel one compared to the prior cases, the tests set forth in this Court's cases from

Flowers v. Cain through *Spero v. Heath* applied in the current situation and that the Father failed to meet his burden of proving the proposed change is in the child's best interests. We respectfully request that the Father's appeal be denied and the ruling of the trial court be affirmed.

Respectfully Submitted,

MELANIE WHITE WIRICK
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify to 5:26(h) of the Rules of the Supreme Court of Virginia:

1) The name of the Appellee is Melanie White Wirick.

2) Counsel for Appellee is:

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4) On this 29th day of April, 2014 fifteen copies of the Brief of Appellee were sent via USPS Express Mail to the Clerk of the Supreme Court of Virginia for filing, one PDF copy was sent to the Clerk of the Court at scvbriefs@courts.state.va.us and to Counsel for Appellant at mary@marywhitelaw.com, and three copies of the same were sent via USPS to the Counsel for Appellant.