In the

Supreme Court of Virginia

At Richmond

Record No. 131910

STACY MCMAHON,

Appellant,

– v. –

MELANIE WHITE WIRICK,

Appellee.

OPENING BRIEF OF APPELLANT

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MATERIAL PROCEEDINGS IN THE LOWER COURT

On July 18, 2013, the Appellant Father appeared in the Fairfax Circuit Court before the Honorable Randy I. Bellows on a petition to change the name of his minor child to his own. A tangential proceeding, not included in this appeal, involved entering an Order of Paternity to have the Father's name added to the Child's birth certificate. This Petition to the Circuit Court of Fairfax was denied. Appellant timely filed an appeal and filed a Petition for Writ to this Court. The Appeal to this Court was granted on February 24, 2014.

QUESTIONS PRESENTED

A. Whether the hearing court erred as a matter of law in applying the standard from *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004), descended from *Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977), to the facts of this case when the hearing court recognized that the standard from *Spero* and *Flowers* clearly contemplates a child sharing a surname with the objecting parent and in this case both parties and the hearing court acknowledge that the Child in this case does not share the surname of either parent. App. 40, 46, 47, 49, 52, 53, 67, 68, 71, 72.

B. Whether the hearing court abused its discretion by finding that the name change would not be in the Child's best interests when the Appellee, as the objecting parent, provided no evidence to the contrary and the evidence presented by the Appellant showed the confusion, problems and embarrassment to the Appellant and the minor child and the hearing court acknowledged that a name change would provide a benefit by alleviating that confusion. App. 22, 25, 26, 30, 44.

C. Whether the hearing court abused its discretion by denying the name change as not in the child's best interests when all the previous authority contemplates that a child's best interests are served by sharing a surname with a parent and this Child does not share a surname with either one. App. 21, 66 -72.

ASSIGNMENTS OF ERROR

A. The hearing court erred when it applied the test in *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004), a holding that reiterates the test originally developed in *Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977) to this case when the entire line of cases descended from *Flowers* hold to the belief that a child is better off with the name of a (father) parent and this Child shares no surname with either. App. 40, 46, 47, 49, 52, 53, 67, 68, 71, 72.

B. The hearing court abused its discretion when it ruled that the name change would not be in the Child's best interests when the controlling statute contemplates that the court shall change the child's name unless it is not in the best interests and the Appellee presented no evidence to rebut the Appellant's claims of problems, confusion and embarrassment to him and the child. App. 22, 25, 26, 30, 44.

C. The hearing court abused its discretion when it found that having the Child share surname with a parent was not in the child's best interests when the child sharing a surname with a parent has been the main premise of all the authority from, and including *Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977) and its progeny. App. 21, 66 -72.

STATEMENT OF FACTS

The parties are the natural parents of Addison Grace White, born on February 28, 2007. The parties were never married and the Father, Stacy Crofter McMahon, was not listed on the birth certificate. The parties shared custody of Addison on a week-on, week-off schedule from the initial Order in 2008 and then custody was modified when she began school to an agreed Order providing Father with primary physical custody during the school year in Fairfax County and Appellee the majority of the summer in Richmond. App. 19-21. Appellee resides in the Richmond area with her husband and her other child, Tyler White. App. 20.

Both parties married after the initial trial; the Father married Louise McMahon, with whom he has another child, Daniel McMahon. The Appellee married Weldon J. Wirick IV and changed her name to Wirick. App. 20. She retained the name of White as a middle name but uses the full name infrequently. The middle name White was not used in her billing statement from her attorney. App. 89-98. The Father has experienced numerous difficulties throughout the years obtaining information about his

child from preschools and doctors—the child, whose surname remained White, was frequently identified with the step-father's name, Wirick. App. 22, 23, 25, 26. The Father and his family were identified as the "White" family at the child's school. App. 60, 85. The Father was denied access to information about his child at preschool and told she was not there because she was not listed under "White" but under Wirick, the step-father's name. App. 26. The insurance companies listed the child as "Wirick" and the doctors identified the child as "Wirick." App. 22.

Father requested to give the child his last name as the child does not share a surname with either parent, but does share a surname with a half-sibling. App. 62. The Appellee objected saying that the child already has an identity as "Addie White". App. 61. Father filed and noticed Appellee and the Fairfax Circuit Court held a hearing on July 18, 2013 based primarily on proffers of evidence and argument.

ARGUMENT

Standard Of Review:

The first assignment of error presents a novel issue of law in the Commonwealth; what is the standard to be applied to a petition to change a child's last name to the surname of one parent where the child currently does not share a surname with either parent. The proper standard of

review is a question of law, which this Court reviews *de novo*. *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 285 Va. 358, 369, 741 S.E.2d 599, 604 (2013) (questions of law reviewed *de novo*); *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007) (same).

This Court reviews the second and third assignments of error to determine whether the evidence is sufficient to support the circuit court's findings. *May v. Grandy*, 259 Va. 629, 630, 528 S.E.2d 105, 106 (2000). The evidence is viewed in a light most favorable to the prevailing party below. *Spero v. Heath*, 267 Va. 477, 479, 593 S.E.2d 239, 240 (2004).

A. The hearing court erred when it applied the test in *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004), a holding that reiterates the test originally developed in *Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977) to this case when the entire line of cases descended from *Flowers* hold to the belief that a child is better off with the name of a (father) parent and this Child shares no surname with either.

In *Spero*, this Honorable Court considered the change of name for a minor child when the child bore the mother's surname and the natural father petitioned the court to change the child's surname to the father's. *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004). This Court reversed the hearing court in that case, stating that the father did not offer any evidence tending to show any of the criteria required by *Flowers*. *Flowers* at 480. This Honorable Court acted to strengthen the criteria to change a

child's name, which had, in the opinion of Justice Koontz, writing the dissent in *May v. Grandy,* 259 Va. 629, 631, 528 S.E.2d 105 (2000), become weakened since *Flowers*. This Honorable Court then laid out four specific criteria in *Spero*, stating that the petitioning parent may show that the name change is in the child's best interests. While only the first two criteria actually state that the "objecting parent" shares a surname with the child, each of the four criteria, and the test as a whole, clearly contemplates a situation where the child shares a surname with the objecting parent.

In *Spero*, as in all the relevant caselaw that preceded that 2004 case—*Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977), *Beyah v. Shelton,* 231 Va. 432, 436, 344 S.E.2d 909 (1986), *May v. Grandy,* 259 Va. 629, 631, 528 S.E.2d 105 (2000), and *Rowland v. Shurbutt*, 259 Va. 305, 525 S.E.2d 917 (2000)—the underlying facts were similar in one respect: the parent seeking to change the child's surname was attempting to change the child's name *away* from the surname of the other parent. This presumption that the criteria apply to situation where the child shares a surname with a parent is strengthened by Justice Koontz's statement in the dissent in *May*: "Until today, these decisions have stood for the simple proposition that absent "substantial reasons" to the contrary, it is in the best interest of a child to have the natural father's surname rather than the

stepfather's surname." *May, 633 (citing Flowers*, 218 Va. At 236, 237 S.E.2d at 113; *Beyah*, 231 Ca. at 434-35, 344 S.E.2d. at 911).

In this case, the objecting parent has already taken another surname, leaving the child sharing the surname of neither parent. App. 46, 49. The hearing court conceded during its own analysis that the standard from *Spero v. Heath*, 267 Va. 477, 593 S.E.2d 239 (2004) did not contemplate the situation where the parent had changed her surname to be a middle name and adopted a new surname, leaving the child sharing a surname with either. App. 53. The hearing court utilized a test laid out in the caselaw but failed to include an implied condition precedent; that is, that the parent from whom the surname would be changed shares a surname with the child, thereby establishing a link between the two. App. 46. The child in this case would not lose her shared identity with the objecting parent as that parent has already removed that identity by changing her surname. App. 19. Despite its own recognition that the test does not fit the facts, the hearing court applied a stringent test that actually flies in the face of established jurisprudence; that is, that a child should share a surname with a parent. The hearing court erred in applying a test that was clearly established to prevent the capricious changing of a child's established surname away from that of the other parent.

B. The hearing court abused its discretion when it ruled that the name change would not be in the Child's best interests when the controlling statute contemplates that the court shall change the child's name unless it is not in the best interests, and the Appellee presented no evidence to rebut the Appellant's claims of problems, confusion and embarrassment to him and the child.

Virginia Code Ann. §8.01-217(C) reads that "the court, shall, unless the evidence shows that the change of name is sought for a fraudulent purpose or would otherwise infringe upon the rights of another or, in a case involving a minor, that the change of name is not in the best interest of the minor, order a change of name." *Virginia Code Ann*. §8.01-217(C). The burden of proof on the petitioning party is "to prove by satisfactory evidence." *Spero* at 480 (citing *Rowland,* 259 Va. At 308, 525 S.E.2d. at 919; *May*, 259 Va. At 632, 528 S.E.2d. at 106).

All the evidence in this matter demonstrated why the name change would be in the child's best interests; in the hearing court's words, "that is it would eliminate a lot of the confusion Mr. McMahon is experiencing" App. 34; the child herself would not be confused as to which name to use when referring to herself and her family App. 48; and incidents such as the problems identifying the child at the school would be eliminated. App. 26. While situations such as the confusion of the insurance companies and schools may not reoccur given the current custodial situation, it is impossible to contemplate every situation in which the difference in names

may give rise to confusion and possible harm. While this is a possibility faced by many children in a two-home situation, this situation has the added distinction that there is no surname connection to either parent.

When compared to the lack of evidence presented by the Appellee, the father's evidence meets the "satisfactory" standard. The Appellee presented no evidence at all that the name change would not be in the child's best interests other than a speculation that it might be more confusing for the child App. 57 and the Appellee's belief that the name change would be in the child's best interests at this point in her life. App. 59. Other than these broad conclusions, the Appellee presented nothing to back up her contentions.

When compared to the evidence presented on the Father's behalf, the Court abused its discretion by denying the child the opportunity to have a parent's surname. This Honorable Court has already determined that sharing a surname with a parent—and the language specifically states "a father"—is determinative to the child's best interests. "As we stated previously, a child's use of her father's surname is relevant to a determination of the child's best interest; this may be especially important where, as here, the child is born out of wedlock." *Beyah v. Shelton,* 231 Va. 432, 436, 344 S.E.2d 909, (1986). This child's best interests cannot

be served by growing up without a family name; while specific examples cannot be projected or speculated upon, all the jurisprudence on this issue reflects the importance of the surname.

The burden in the hearing court was on the Father. "The burden is upon the petitioning party to "prove by satisfactory evidence that the change is in the child's best interest." *Rowland,* 259 Va. At 308, 525 S.E.2d. at 919; *May*, 259 Va. At 632, 528 S.E.2d. at 106. The burden is not "clear and convincing" nor is it "beyond a reasonable doubt." As compared to the evidence presented by the Appellee, that burden was satisfied here when the Father demonstrated that denying his request left the child without any parent's surname. This is a situation that cannot be in the child's best interests based on the established line of jurisprudence for changing a minor's name. Leaving the child without a parent's surname was an abuse of the hearing court's discretion.

C. The hearing court abused its discretion when it found that having the Child share surname with a parent was not in the child's best interests when the child sharing a surname with a parent has been the main premise of all the authority from, and including *Flowers v. Cain,* 218 Va. 234, 234, 237 S.E.2d 111 (1977) and its progeny.

When dealing with the name change of a minor, this Honorable Court has found that a child's surname, and sharing that surname with the father, is in the child's best interests, particularly when the child was born out of

wedlock. *Beyah v. Shelton,* 231 Va. 432, 436, 344 S.E.2d 909 (1986). By extension, and doing away with gender-specific language, sharing the surname of any parent rather than having a name different from both parents would be in the child's best interests. While gender-specific language has been neutralized, this Honorable Court has never deviated from the principle that a child should share a surname with a parent and that changing the surname away from a parent is a high burden to meet. This Honorable Court has also affirmed a hearing court's decision to effect a name change for a minor child when the minor child was old enough to recognize that she had a different last name than all her other family members, and wanted to "fit in". *May v. Grandy,* 259 Va. 629, 631, 528 S.E.2d 105 (2000). This decision led to the dissent that called for a strengthening of the test to change a child's name away from a parent.

In *Spero* in 2000, this Honorable Court again reinforced its position that a circuit court "must not" change the name of the child away from a shared surname with "the natural father" simply because the child wishes to share a surname with a step-parent. This holding recognizes the import of a surname—an identity—for a child. This Court then went on to say that the petitioning party needed to demonstrate by satisfactory evidence that the requested name change is in the child's best interests. *May v. Grandy,*

259 Va. 629, 633, 528 S.E.2d 105 (2000). Appellee's reliance on the language from that case took the statement completely out of context: A "change of name will not be authorized…merely to save…minor inconvenience or embarrassment to the parent or the minor. *Id*. at 480 (citing *Flowers* at 237, 237 S.E.2d. at 113). *Spero* clearly addressed a situation where the child had an established surname shared with a parent. That is not the case here, and the stringent rule related, above, applies when a child shares a surname with a parent.

The instant case involves a child who lives primarily with her Father during the school year and her identity and sense of belonging in the school environment is more relevant than in the summer months. App. 21. The hearing court acknowledged that a benefit of changing the child's name to the Father's surname would "eliminate a lot of the confusion" that the Father is experiencing because his daughter, of whom he has primary custody during the school year, has a different name. App. 34. It stands to reason that the child also experiences this confusion and difficulty at school and questions her Father about her difference in name. App. 48. The hearing court recognized that there is confusion at the child's school due to the Father having primary physical custody during the school year. App. 34.

The Appellee in this case took the voluntary step to change her surname away from that of the child yet believes it is in the child's best interests to have the surname of neither. App. 59. The hearing court denied the Father's petition. This directly contravenes this Court's previous findings in every published case of what constitutes the child's best interests when faced with a surname change.

CONCLUSION

The hearing court erred in applying the stringent test in *Spero v. Heath* to the instant set of facts when that test was established and strengthened to prevent changing a child's surname away from a parent; that is not the case here. The hearing court abused its discretion by denying the petition when the end result is that the child does not share a surname with either parent, a situation not previously encountered by this Honorable Court and one that leads to an unjust result for the child. The Father respectfully prays this Honorable Court reverse the ruling of the hearing court and grant the name change for the minor child.

ORAL ARGUMENT

The Appellant respectfully requests oral argument.

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 Opening Brief of Appellant and Joint Appendix, 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 7th day of April, 2014.

/s/ Mary Elizabeth White
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