

An Illegitimate Use of Legislative Power: Mississippi's Inappropriate Child Surname Law In Paternity Proceedings

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Introduction

“In these times of parental equality, arguing that the child of unmarried parents should bear the paternal surname based on custom is another way of arguing that it is permissible to discriminate because the discrimination has endured for many years.”¹

Current Mississippi law regarding changing the surname of a child of unmarried parents states, “in the event of court determined paternity, the surname of the child shall be that of the father, unless the judgment specifies otherwise.”² This is the last sentence of a detailed statute that was enacted to provide for the support of an illegitimate child when and if the child becomes dependent under the law.³ The statute as a whole is designed to lay out a uniform enforcement system for fathers to bear the reasonable expenses for children born out of wedlock.⁴ Basically, the last sentence of the statute says a

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¹ *Girten v. Andreu*, 698 S.2d 886, 888 (Fla. Dist. Ct. App. 1997) (quoting *Bobo v. Jewell*, 335, 528 N.E.2d 180, 185 (Ohio 1998)).

² MISS. CODE ANN. § 93-9-9 (2003).

³ *Dunn v. Grisham*, 157 So. 2d 766, 769 (Miss. 1963).

⁴ *Harper v. Harper*, 300 So. 2d 132, 133 (Miss. 1974).

child's surname must be changed to the father's surname after paternity is determined.

On its face, this portion of the statute determines that once a chancery court establishes paternity, the child's name is automatically changed to the surname of the biological father. The statute has no boundaries for the chancery judge when she is changing the child's name because there are no listed exceptions or alternatives. The law is strictly construed and universally applied. This statute presumes a fact that is not necessarily or universally true – that a child's best interest will be served by the child bearing the name of the declared father.⁵

No recorded case law exists in Mississippi regarding the name change of a minor whose parents were unmarried at the time of birth. The state's sole case, *Marshall v. Marshall*,⁶ deals with the issue of a name change, but it is about parents who were married at the time of the birth, thus excluding paternity as an issue.⁷ This article contends this archaic law, which presumes that once paternity is established, the name of a child should be the surname of the biological father, is legally flawed because every situation in which a child is born out of wedlock is different. Therefore, no single law presuming a child's surname to be that of the father's should apply to all situations. As the Arkansas Supreme Court stated when ruling on this exact issue: "A rule which makes the result automatic would be neither prudent nor consistent with the established traditions of the law."⁸

The first section of this article discusses Mississippi's current law regarding a child's surname after the court establishes paternity. The next section discusses the history of surnames. The third section addresses how national courts have abolished the paternal presumption of surnames, how the states surrounding Mississippi have dealt with the same issue,

⁵ *Roe v. Conn*, 417 F. Supp. 769, 782 (M.D. Ala. 1976).

⁶ 93 So. 2d 822 (Miss. 1957).

⁷ *Id.* at 825.

⁸ *McCullough v. Henderson*, 804 S.W.2d 368, 369 (Ark. 1991).

and how Mississippi's sole case pertains to the law. The fourth section lists the constitutional reasons Mississippi's statute needs legislative reform. Finally, the last section proposes alternative wording for the Mississippi statute.

A hypothetical presented throughout this article involves a situation in which a mother would not want her child's surname to be that of the court-determined father. The hypothetical is date rape. The victim is too scared to report the rape to the police, and she becomes pregnant. Much to the mother's horror, the rapist eventually files for custody, visitation, and a name change even though he has never been a part of the child's life. According to Mississippi law, regardless of how the man impregnated the woman, that man can establish paternity and have the child's surname changed to his, even if that man is a rapist.⁹ This date rape hypothetical is used to show the paternal presumption in Mississippi's law is legally flawed and morally unsound.

The Date Rape Reality

Statistics prove this hypothetical is not a mythical situation, and pregnancy by rape is a reality. Estimates show 15 percent to 40 percent of all women are victims of attempted or completed rapes.¹⁰ Most of these rapists are never criminally punished because 60 percent to 90 percent of sexual assault victims do not report the crime to the police.¹¹ Many do not report the rape because they worry they might not be

⁹ See MISS. CODE ANN. § 93-9-9 (2003).

¹⁰ Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1103, n.4 (1993); see *Victims of Rape: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 2d Sess. 5 (1990) (statement of Hon. George Miller including fact sheet entitled "Victims of Rape") [hereafter *Victims of Rape*].

¹¹ Remick, *supra* note 10 at 1103, n.4, citing Mary Nemeth, *Chilling the Sexes: Women's Growing Militancy About Harassment and Date Rape Alarms Many Men*, *Maclean's*, Feb. 17, 1992, at 42, 43 (reporting study conducted by Bureau of Justice Statistics found over 50 percent of rapes and assaults are not reported to police officials); see also Federal Bureau of Investigation, U.S. Dep't. of Justice, Uniform Crime Reports 107 (1991).

taken seriously, do not trust the criminal justice system, and fear the alleged assailant.¹²

The fears of victims are justified. The crime of rape has a significantly lower conviction rate than other crimes.¹³ A 1993 report prepared by the Majority Staff of the Senate Judiciary Committee found a rape case is more than two times as likely to be dismissed than a murder case and nearly 40 percent more likely to be dismissed than a robbery.¹⁴ The committee found less than one half of those arrested for rape are convicted -- many are found guilty of lesser charges¹⁵ -- and over one half of all convicted rapists serve an average of one year or less in prison.¹⁶ A House report listed the following statistics: 91,460 rapes were reported to the police nationwide in 1986, but only 19,685 individuals were convicted of rape that year; 71 percent of those arrested and charged with rape in Manhattan in 1986 had their cases dismissed although the average dismissal rate for all felons was 37 percent; in Washington, D.C., the dismissal rate for rapists was 50 percent compared with an average of 29 percent for all felonies.¹⁷

Date rape is the most unreported felony in the United States.¹⁸ Date rape, also referred to as acquaintance rape,

¹² Remick, *supra* note 10 at 1103, n.4, citing *Nemeth*, *supra* note 11, at 43.

¹³ Elizabeth Dietz, Note, *Violence Against Women in the United States: An International Solution*, 13 ARIZ. J. INT'L & COMP. L. 551, 571 (1996).

¹⁴ *Id.* at 571; see Senate Comm. on the Judiciary, *The Violence Against Women Act of 1993*, S. Rep. No. 138, 103d Cong., 1st Sess. 38 at 42 (1993) (citing Majority Staff of the Senate Judiciary Committee, *The Response to Rape: Detours on the Road to Equal Justice* 30 (1993)) (also citing Surgeon General Antonia Novello, *U.S. Public Health Services*, 267 JAMA 3132 (1992)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Remick, *supra* note 10, at 1103, n.4; see also *Victims of Rape*, *supra* note 10.

¹⁸ *Id.*; see also Fred Bruning, *A Lousy Deal for Women-and Men*, *Maclean's*, Aug. 12, 1991, at 9 ("Authorities say that date rape is among the most unreported felonies in the United States, and everyone knows that there are plenty of Neanderthal pretty boys and self-adoring Casanovas who persist in thinking that women 'want it', whether the women in

occurs more frequently than “stranger” rape and is less likely to be reported.¹⁹ This is because of the relationship between the victim and the offender.²⁰ A distinction is made between rapes committed by the classic “armed stranger jumping from the bushes,” as opposed to rapes committed by a friend, acquaintance, date, or relative of the victim.²¹ Victims of acquaintance rape also often fail to report the crime because they believe they cannot successfully prove the rape.²² A 1988 study revealed 17 percent of female victims were raped by strangers, while approximately 83 percent of rape incidents involved “acquaintances, dates, boyfriends, lovers, husbands, friends, relatives, or authority figures.”²³ Similarly, an earlier 1987 study reported 84 percent of victims already knew their assailants.²⁴

Date rape is a serious crime, and an even more serious situation for the victim when she becomes pregnant.²⁵ According to a study of reported rapes, rapists impregnated 2 percent of victims.²⁶ Fifty percent of these pregnant rape victims terminated their pregnancy through therapeutic

question have been asked their opinions or not.”) (article reviewing the movie *Thelma & Louise*).

¹⁹ Kathleen F. Cairney, Note, *Recognizing Acquaintance Rape in Potentially Consensual Situations: A Re-Examination of Thomas Hardy's Tess of the D'Urbervilles*, 3 AM. U. J. GENDER SOC. POL'Y & L. 301, 317 (1995).

²⁰ *Id.*

²¹ *Id.* See *Most Women Victims Know Assailants*, ORLANDO SENTINEL, Jan. 31, 1994, at A4 (stating that two-thirds of attacks on women are by acquaintances); see also Neil A. Lewis, *Crime Rates Decline; Outrage Hasn't*, N.Y. TIMES, Dec. 8, 1993, at B6 (reporting criticism by women's groups that rape statistics are unreliable due to women's reluctance to report sexual assaults).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *People v. Sargent*, 150 Cal. Rptr. 113, 115-16 (1978) (saying that victim of forcible rape who becomes pregnant as result of that rape suffers “great bodily injury” under forcible rape statute).

²⁶ Elisabeth A. Lloyd, Note, *IX. Criminal Justice: Science Gone Astray*, 99 Mich. L. Rev. 1536, 1551 (May 2001) (reviewing RANDY THORNHILL & CRAIG T. PALMER, *EVOLUTION AND RAPE: A NATURAL HISTORY OF RAPE: BIOLOGICAL BASES OF SEXUAL COERCION* (2000)).

abortions, and another 12 percent ended in spontaneous abortion.²⁷ Thus, an estimated 40 percent chose to have their baby.²⁸ Keep in mind, 60 percent to 90 percent of rape victims do not even report the crime, therefore, this figure is likely underestimated to a large extent.

When the rapist, much to the mother's horror, decides to assert parental rights, the rapist can successfully have the child's last name changed to his own under the current Mississippi law. One of the standard "Best Interests of the Child" factors²⁹ is whether a name change will affect the relationship of either parent. In this situation, when the court eventually changes the child's surname to the rapist's last name, the mother then has to see the rapist's name on a daily basis.³⁰ This would definitely have an effect on her relationship with her child, as it is another daily reminder of the night she was raped. The name change and these devastating results could be avoided if Mississippi did not have a parental presumption of the child's surname once paternity is established.

History of the Surname

In today's society every person is born with a surname given by his or her parents. This, however, has not always been true because "[t]he use of surnames is a relatively recent historical practice."³¹ Surnames were not known in England until "about the 10th century and they did not come into general use or become hereditary until many years later."³²

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Marshall v. Marshall*, 93 So. 2d 822, 825-27 (Miss. 1957) (setting forth best interests of child factors in name change proceedings).

³⁰ It is unfortunate in itself that the victim has to live the rest of her life with the horrors of the night of the rape. In essence, the chancery court is further victimizing the rape victim in these situations.

³¹ *Gubernat v. Deremer*, 657 A.2d 856, 859 (N.J. 1995).

³² *Smith v. United States Casualty Co.*, 90 N.E. 947, 948 (N.Y. 1910).

Around the time of the Norman Conquest in 1066, the use of surnames began to increase³³ when the “growth of population and the development of cities required establishing a means of distinguishing between individuals with the identical given names.”³⁴ The Normans also “introduced a number of social practices, such as the imposition of a feudal land system and the use of primogeniture³⁵ as a system of inheritance, that likewise spurred the development of surnames.”³⁶ The surname was not inherited from the father by law, but was “either adopted by the son, or bestowed upon him by the people of the community where he lived.”³⁷ Furthermore, “[f]ather and son did not always have the same surname and it was not regarded as important, for both frequently had more than one.”³⁸ Other times a surname was granted “based upon one’s occupation, place of habitation, appearance, or other characteristics.”³⁹ Further, in the rush of conversation, certain words of a person’s name were skipped over. For example, “one ordinarily described as ‘John from the hill’ might eventually [become] ‘John Hill.’”⁴⁰ The same would be true of someone identified by his profession, such as John the Carpenter would become John Carpenter.⁴¹

Sometimes surnames were chosen to indicate affinity, but “patronymics, a name derived from that of the father, was neither compelled nor universal.”⁴² On the other hand,

³³ *In re Shipley*, 205 N.Y.S. 2d 581, 586 (N.Y. Sup. Ct. 1960).

³⁴ *Huffman v. Fisher*, 987 S.W.2d 269, 271 (Ark. 1999).

³⁵ Primogeniture is the right of the eldest child, especially the eldest son, to inherit the entire estate of one or both parents. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

³⁶ *Huffman*, 987 S.W.2d at 271 (citing Beverly S. Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1324-25 (1984)).

³⁷ *Smith v. United States Casualty Co.*, 90 N.E. 947, 948 (N.Y. 1910).

³⁸ *Id.*

³⁹ *Huffman*, 987 S.W.2d at 271.

⁴⁰ *Gubernat v. Deremer*, 657 A.2d 856, 860 (N.J. 1995). See also Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 6 (1992).

⁴¹ *Gubernat*, 657 A.2d at 860.

⁴² *Id.*

“[m]atronymics, names derived from the maternal line, have been employed in several Western cultures, including modern Spain and medieval England.”⁴³ During the late 14th century in England, “both sons and daughters adopted their mothers’ surnames, often upon succeeding to their mothers’ estates or in hopes of doing so.”⁴⁴ Husbands also assumed their wives’ surnames if they had inherited property from the wife’s family.⁴⁵ The children of these couples also took their mothers’ surnames.⁴⁶

An illegitimate boy might be called by his mother’s name, but it was equally natural and useful to refer to the son of a highly respected widow in the same way, or even, when the father was alive but away for years on some distant expedition or married to a dominant wife, the lad might be spoken of...as belonging to Moll or Alison or Margery.⁴⁷

After the 14th century, surnames were provided because some property could only be inherited if they had a specific surname.⁴⁸ A married woman at that time could not bring a lawsuit on her own, but rather had to go through her husband, who was considered the family’s sole legal representative.⁴⁹ Thus, “the custom of patrilineal succession seems to have been a response to England’s medieval social and legal system, which came to vest all rights of ownership and management of marital property in the husband.”⁵⁰

Because women at those times were relegated to secondary status, masculine surnames became the dominant system of lineage.⁵¹ Women belonged legally to their father

⁴³ *Id.* at 860-61.

⁴⁴ *Id.* at 861.

⁴⁵ *Id.*

⁴⁶ *Gubernat v. Deremer*, 657 A.2d 856, 861 (N.J. 1995).

⁴⁷ Seng, *supra* note 36 at 1322.

⁴⁸ Richard H. Thornton, Note, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303, 305 (1979).

⁴⁹ *Huffman v. Fisher*, 987 S.W.2d 269, 272 (Ark. 1999).

⁵⁰ *Id.* See also *In re Marriage of Schiffman*, 620 P.2d 579, 581 (Cal. 1980).

⁵¹ *M.D. v. A.S.L.*, 646 A.2d 543, 544 (Ch. Div. 1994).

first, then to their husbands.⁵² Under the law, married women were considered “legally to be like children: they could not sue or be sued, draft wills, make contracts, or deal in property.”⁵³ Accordingly, the importance of the maternal surname waned significantly.⁵⁴

A distinction arose in English common law in regards to a child born out of wedlock.⁵⁵ At common law, a child out of wedlock was referred to as “*fillius nullius*, the son of no one, or *fillius populi*, the son of the people.”⁵⁶ The child out of wedlock had no mother or father recognized by the law, and “thus had no legal rights.”⁵⁷ Because the child could not inherit property, the child’s interest in assuming the paternal surname decreased.⁵⁸ The child’s name was not determined by custom.⁵⁹ Instead, the child obtained a name by his reputation in the community.⁶⁰ Thus, neither “custom nor common law recognized a father’s right to have non-marital children bear his name.”⁶¹

Through its adoption of the English common law, the American colonies naturally carried on many of the English traditions, including patronymic custom.⁶² By the 19th century, the status of children born out of wedlock went through a reformation.⁶³ Legislation changed the “child of nobody” to a legal family unit in which the mother obtained custody of the child.⁶⁴ The mother became the natural

⁵² *Gubernat v. Deremer*, 657 A.2d 856, 862 (N.J. 1995).

⁵³ *Id.*

⁵⁴ *Huffman*, 987 S.W.2d at 272.

⁵⁵ *Gubernat*, 657 A.2d at 862.

⁵⁶ *D.R.S. v. R.S.H.*, 412 N.E. 2d 1257, 1261 (Ind. Ct. App. 1980); see also *Whited v. Fleenor*, 2003 WL 1092968, at *4 (Tenn. Ct. App. Mar. 13, 2003).

⁵⁷ *Gubernat*, 657 A.2d at 862.

⁵⁸ *Id.*

⁵⁹ *D.R.S.*, 412 N.E. 2d 1257 at 1261.

⁶⁰ *Id.*

⁶¹ *James v. Hopmann*, 907 P.2d 1098, 1100. (Okla. Civ. App. 1995).

⁶² *Gubernat*, 657 A.2d at 862.

⁶³ Thornton, *supra* note 48 at 312.

⁶⁴ *Id.*

guardian of the child with the duty to support him.⁶⁵ This legislation also codified that a child born to unmarried parents would bear the surname of the mother.⁶⁶ Children born of married parents still bore the paternal surname.⁶⁷ At some point, American law began to reflect “the subordinate role of women by deferring to the superior status of the father” in naming the child.⁶⁸ A 1953 Ohio court stated: “From time immemorial it has been the custom for male children to bear the family name of their father throughout life.”⁶⁹

American courts have declared a child’s surname to be “that customary right as one of inherent concern⁷⁰ to the father, as the [father’s] right to expect his kin to bear his name ...”⁷¹ Furthermore, the custom dictated a man owned whatever he paid for.⁷² Therefore, he was legally allowed to attach his name to anything he bought: “He wrote his name more often than a little boy with chalk signs his [name] to a fence. He put it on his land, his house, his wife and children, his slaves when he had them, and on everything that was his.”⁷³

Fortunately, the 20th century has made great strides with regard to women and their roles in society.⁷⁴ The 20th century has done away with many gender-based differences in parental rights, and has refocused the standards regarding the best interests of the child.⁷⁵ Courts use this best interest of the child standard whenever asked to interfere in the life of a child

⁶⁵ *Commonwealth v. City Clerk of Lowell*, 366 N.E.2d 717, 726 (Mass. 1977).

⁶⁶ *M.D. v. A.S.L.*, 646 A.2d 543, 545 (Ch. Div. 1994). These states included Florida, Georgia, Indiana, Kentucky, Nebraska, New Hampshire, North Carolina, North Dakota, Tennessee, and Wyoming.

⁶⁷ *Gubernat*, 657 A.2d at 860.

⁶⁸ *Id.* at 865.

⁶⁹ *Kay v. Kay*, 112 N.E.2d 562, 567 (Ohio Ct. App. 1953).

⁷⁰ *Gubernat*, 657 A.2d at 865 (quoting *Robinson v. Hansel*, 223 N.W.2d 138, 140 (Minn. 1974)).

⁷¹ *Id.* (quoting *Sobel v. Sobel*, 134 A.2d 598 (N.J. Super. 1957)).

⁷² *Id.* at 866 (quoting Priscilla R. MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. J. 91, 138 (1985)).

⁷³ *Id.*

⁷⁴ *Gubernat*, 657 A.2d at 865.

⁷⁵ *Gubernat*, 657 A.2d at 866.

and its parents.⁷⁶ Likewise, this standard should be used when courts decide whether to change a child's surname to that of the unmarried father's.⁷⁷

National Laws On Surname Changes in Paternity Proceedings

Most courts have adopted the best interest of the child standard when dealing with decisions involving children.⁷⁸ This standard requires a trial judge to decide and subsequently order what is best for the child at issue.⁷⁹ This standard is prevalent throughout the 50 states, with each state utilizing the same basic best-interests structure.⁸⁰ Most states' frameworks contain factors specifically for the array of issues concerning juveniles, such as custody, name changes, and visitation.⁸¹ In the end, the trial judge has the discretion to choose what is actually best for the child.⁸² While each state's factors vary slightly, the basic ones for determining the best interests of the child in name change proceedings include: (1) the length of time the surname was used by the child; (2) whether the surname helps the child identify with the family as a unit; (3) the effect of the name change on the mother-child and father-child relationships; (4) whether the surname would cause embarrassment, inconvenience, or discomfort; (5) the child's preference if the child is of an age and maturity to express a meaningful preference; (6) the degree of community respect associated with the present and proposed surname; (7) misconduct by one of the child's parents; (8) a parent's failure to support the child; (9) parental failure to maintain contact with the child; and (10) the custodial parent's preference.⁸³

⁷⁶ *Matter of Baby M.*, 537 A.2d 1227, 1256 (N.J. 1988).

⁷⁷ *In re Marriage of Schiffman*, 620 P.2d 579, 585 (Cal. 1980).

⁷⁸ Melodie Pillitire, *Grandparent Visitation Rights: The Pitfalls and the Promise*, 2 LOY. J. PUB. INT. L. 177, 195-96 (2001).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Gubernat v. Deremer*, 657 A.2d 856, 870 (N.J. 1995); *Bobo v. Jewell*, 528 N.E.2d 180, 185 (Ohio 1988); *Lalley v. Whitt*, 2003 WL 2121212, at

Furthermore, the party proposing the name change has the burden of proving, based on the above factors, the name change is in the best interests of the child.⁸⁴

Having no in-state authority for Mississippi courts to turn to for precedent, it is imperative to look to out-of-state cases regarding surnames.

Abolishing the Paternal Presumption is a Nationwide Movement

The New Jersey Supreme Court stated: “The presumption that children must bear their father’s name ... shall no longer apply in this State.”⁸⁵ Likewise, courts nationwide have ruled it inappropriate to change a child’s name to the father’s under the best interests framework when a baby born out of wedlock was originally given the mother’s surname.

In the paternity proceeding of *Pizziconi v. Yarbrough*,⁸⁶ the Arizona Supreme Court held the trial court did not err in denying the father’s petition to have the child bear his surname.⁸⁷ The court ruled the best interests of the child controlled.⁸⁸ Other factors the court looked to were (1) the child never bore the father’s surname, (2) the father did not initially want to be involved in the child’s life, (3) the child had already used her mother’s surname for four years, and (4) the child’s half-brother used the name.⁸⁹ Furthermore, the mother could not have given her child the father’s surname.

*6 (Neb. App. May 27, 2003); *Pizziconi v. Yarbrough*, 868 P.2d 96, 1009 (Ariz. 1993); *Barabas v. Rogers*, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993); *Tibbetts v. Mueller*, 52 P.3d 1067, 1073 (Or. 2002); see also *Iowa Dep’t of Human Servs. v. Rickers*, 666 N.W.2d 620 (Iowa App. 2003).

⁸⁴ *Bardin v. Dep’t of Revenue*, 720 So. 2d 609, 612; *Halloran v. Kostka*, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988); *Lalley*, 2003 WL 21212122, at *6.

⁸⁵ *Gubernat*, 657 A.2d at 860.

⁸⁶ 868 P.2d 96, 1009 (Ariz. 1993).

⁸⁷ *Id.* at 1009.

⁸⁸ *Id.*

⁸⁹ *Id.*

Under Arizona law,⁹⁰ an unmarried woman who gives birth may not use the putative father's name on the birth certificate without his consent.⁹¹ The court noted there would be no estrangement between the father and the child if the child kept the mother's name because the evidence showed the child and father had already bonded.⁹² The Arizona Supreme Court stated the courts should not give greater weight to the father's interest in changing the child's surname because "society no longer adheres to the notion that the husband is the sole legal representative of the family."⁹³

In *Aitkin County Family Service Agency v. Girard*,⁹⁴ the Minnesota Appeals Court held the trial court erred in granting an unwed biological father's petition to legally change the surname of the children from hers to his because his reasons for the change did not establish by clear and compelling evidence that the substantial welfare of the children warranted it.⁹⁵ The court pointed out that if the child kept the mother's surname, the bond between the father and child would not be affected because the parents were never married and the children had never used the father's surname.⁹⁶ The court cited a Minnesota Supreme Court case, noting two particular factors to be considered in determining whether a name change is in the child's best interests.⁹⁷ The two factors were the length of time the child has had a given name and the difficulties the child might have with the proposed name.⁹⁸ In this case, the children used the mother's surname their entire lives, and the mother and a social worker testified a change of name would be disruptive. Thus, the confusion would outweigh any benefits the change would bring.⁹⁹ Furthermore, the court said no reason could be found

⁹⁰ ARIZ. REV. STAT. ANN. § 36-322 (West 2003).

⁹¹ *Pizziconi*, 868 P.2d at 1007.

⁹² *Id.* at 1008.

⁹³ *Id.* (citing *Hamby v. Jacobson*, 769 P.2d 273, 276 (Utah Ct. App. 1989)).

⁹⁴ 390 N.W. 2d 906 (Minn. Ct. App. 1986).

⁹⁵ *Id.* at 910.

⁹⁶ *Id.* at 908-09.

⁹⁷ *Id.* at 909 (citing *Application of Saxton*, 309 N.W.2d 298 (Minn. 1981)).

⁹⁸ *Id.*

⁹⁹ *Id.*

to put aside the custodial mother's preference, especially because it is in the best interests of young children to provide them with stability and continuity.¹⁰⁰ The preservation of the family unit as the children had always known it included having the same name as the custodial parent.¹⁰¹

The New Jersey Supreme Court in *Gubernat v. Deremer*¹⁰² held that keeping the name given by the custodial parent is consistent with the child's best interests.¹⁰³ This presumption may be rebutted by contrary evidence that another surname would be in the child's best interests.¹⁰⁴ In *Gubernat*, the unmarried father failed to rebut the presumption that his child's name should be changed to his.¹⁰⁵ The court looked to the best interests of the child in determining which name the child should bear.¹⁰⁶ The factors the court looked at included (1) the length of time the surname was used, (2) whether the surname helps the child identify with the family as a unit, (3) whether the surname would cause embarrassment, and (4) the child's preference.¹⁰⁷ The father argued the name needed to be changed so the child will know he "will always have a father."¹⁰⁸ The court, however, noted the father's proven devotion, support, and commitment to the child was already enough to ensure the continued relationship between son and father.¹⁰⁹

In *Meadows v. Meadows*,¹¹⁰ a divorce action in the Supreme Court of North Dakota, a baby was born before the parents' marriage in which the mother gave the child her surname.¹¹¹ The court held the trial court erred in ordering the child's surname be changed to that of the father because

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 657 A.2d 856 (N.J. 1995).

¹⁰³ *Gubernat*, 657 A.2d 856, 860 (N.J. 1995).

¹⁰⁴ *Id.* at 867.

¹⁰⁵ *Id.* at 870.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Gubernat*, 657 A.2d at 860.

¹¹⁰ 312 N.W.2d 464, 465 (N.D. 1981).

¹¹¹ *Id.* at 465.

neither parent requested a change.¹¹² Furthermore, the father did not appear in the proceedings and did not even request a change.¹¹³

In *Bobo v. Jewell*¹¹⁴ the Supreme Court of Ohio affirmed the reversal of a trial court's granting of a father's petition to change the child's name.¹¹⁵ The unmarried mother had custody of the child and gave the child her surname.¹¹⁶ The court ruled the father did not show the change would be in the best interests of the child.¹¹⁷ The court's factors in determining the best interest of a child whose parents were never married were (1) the length of time the surname was used by the child; (2) whether the surname helps the child identify with the family as a unit; (3) the effect of the name change on the mother-child and father-child relationships; (4) whether the surname would cause embarrassment, inconvenience, and discomfort because it differed from the custodial parent's surname; and (5) the child's preference if the child is of an age and maturity to express a meaningful preference.¹¹⁸ The court held there was no paternal preference and the mother had an equal interest in having the child bear her maternal surname.¹¹⁹ The name remained that of the mother's because the mother was the custodial parent, the child had been known by the mother's surname, and no evidence supported the conclusion the change was in the child's best interests.¹²⁰

In *In re Stollings*¹²¹, the Third Appellate District for the Court of Appeals of Ohio relied on the precedent set forth in *Jewell*.¹²² The court held the trial court erred in changing the child's name to the father's when the child was born out of

¹¹² *Id.* at 468.

¹¹³ *Id.*

¹¹⁴ 528 N.E.2d 180 (Ohio 1988).

¹¹⁵ *Id.* at 185.

¹¹⁶ *Id.* at 181.

¹¹⁷ *Id.* at 184-85.

¹¹⁸ *Id.* at 185.

¹¹⁹ *Id.*

¹²⁰ *Bobo v. Jewell*, 528 N.E.2d 180, 184-85 (Ohio 1988).

¹²¹ 583 N.E. 2d 367 (Ohio App. 3d 1989).

¹²² *Jewell*, 528 N.E.2d at 184-85.

wedlock and the parents subsequently married and divorced with the child bearing the mother's surname throughout the marriage.¹²³ The trial court's reasoning for changing the child's name was because of the child's identification as part of the family group, and because the child should have the same name as his parents or otherwise embarrassment, discomfort, and inconvenience may result.¹²⁴ The trial court, however, erred in changing the child's name to that of the father because, after the divorce, the mother restored her maiden name so she and her child had the same name.¹²⁵

In *Daves v. Nastos*,¹²⁶ the Supreme Court of Washington ruled the trial court erred in changing the child's name to the father's pursuant to a judgment of paternity because the trial court did not look to the best interest of the child.¹²⁷ *Daves* was a paternity proceeding and was not brought until the child was 1 1/2 years old.¹²⁸ The court reasoned neither parent of a non-marital child has a superior right to determine the surname of the child.¹²⁹ The court remanded the case for the trial court to apply the best interest of the child factors.¹³⁰

In the following cases, the courts likewise held the trial court erred in changing a child's name to the father's surname.¹³¹ In each case, the baby was born out of wedlock and given the mother's surname. The higher courts utilized the best interests of the child standard when deciding which name the child should bear. These cases demonstrate a higher court will reverse the trial court when a trial court does not abide by the best interests of the child standard in deciding to change a child's surname to the father's once paternity has

¹²³ *In re Stollings*, 583 N.E. 2d 367, 371 (Ohio App. 3d 1989).

¹²⁴ *Id.* at 370.

¹²⁵ *Id.*

¹²⁶ 711 P.2d 314 (Wash. 1985).

¹²⁷ *Id.* at 318.

¹²⁸ *Id.* at 315.

¹²⁹ *Id.* at 318.

¹³⁰ *Id.* at 319.

¹³¹ See Jay M. Zitter, Annotation, *Rights and Remedies of Parents Inter Se With Respect to the Names of Their Children*, 40 A.L.R. 5th 697 (2002).

been established. These cases also further illustrate a mother should not be discouraged by the undesirable results from the trial court, and should appeal her case to a higher court to obtain a judgment that accurately reflects the state's legislative intent in enacting the law.

In *State ex rel. Spence-Chapin Servicers to Families & Children v. Tedeno*,¹³² the mother had custody and was the primary caretaker of the child.¹³³ The 20-month-old child never used her father's surname.¹³⁴ The New York County Supreme Court noted that as children grow older, they generally prefer to use the name of the parent with whom they live.¹³⁵ The court further noted it could not assume the mother would give up her maiden name in the event she later married.¹³⁶

In *Sullivan v. McGaw*,¹³⁷ an Illinois appellate court ruled the trial court did not appear to have considered any of the best interest factors.¹³⁸ The trial court erred because it based its ruling solely on the finding of paternity.¹³⁹

In *Ribeiro v. Monahan*,¹⁴⁰ other members of the child's household shared the mother's surname, the mother's surname was on the child's birth certificate, and the three-year-old grew up with the mother's surname.¹⁴¹ The Rhode Island Supreme Court rejected the idea of patrimonial control of surnames, and noted the best interest of the child was the proper standard.¹⁴²

Likewise, in *In re Welfare of C.M.G.*,¹⁴³ the trial court appeared to not have deferred to the best interests of the child

¹³² 421 N.Y.S.2d 297 (Misc. 2d 1979).

¹³³ *Id.* at 300.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ 480 N.E.2d 1283 (Ill. App. 1985).

¹³⁸ *Id.* at 1291.

¹³⁹ *Id.*

¹⁴⁰ 524 A.2d 586 (R.I. 1987).

¹⁴¹ *Id.* at 587.

¹⁴² *Id.*

¹⁴³ 516 N.W.2d 555 (Minn. Ct. App. 1994).

standard.¹⁴⁴ An appellate court of Minnesota remanded the case so the trial court could determine whether a name change to that of the father's was in the child's best interests.¹⁴⁵

A court in the third appellate district of the Ohio Court of Appeals in *Dorsett v. Wheeler*¹⁴⁶ also found no evidence as to whether the trial court considered the best interests of the child factors.¹⁴⁷ The trial court's only reasoning in changing the twins' surnames was the court "always did so upon the request of the father after paternity had been established."¹⁴⁸ The appellate court reversed, ruling the twins were 10 years old and had always used their mother's surname.¹⁴⁹

In *J.S. v. D.M.*,¹⁵⁰ during a domestic violence hearing, the father moved for custody and a change in the child's name.¹⁵¹ As a compromise, the trial court ordered the child's middle name to be that of the father's surname.¹⁵² A New Jersey appellate court found the father failed to prove the name change was in the best interests of the child.¹⁵³ Alternatively, the evidence in the record supported the finding that the mother's surname was in the best interest of the child.¹⁵⁴ The Appellate Court ruled accordingly.¹⁵⁵

Likewise, the civil court in New York City refused to automatically change a child's name to bear the father's, even upon the petition of the mother.¹⁵⁶ In *In re Szemplinski*,¹⁵⁷ the court denied a petition to change the surname of a child from the mother's maiden name to the deceased father's surname.¹⁵⁸

¹⁴⁴ *Id.* at 561.

¹⁴⁵ *Id.*

¹⁴⁶ 656 N.E.2d 698 (Ohio Ct. App. 1995).

¹⁴⁷ *Id.* at 702.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 667 A.2d 394 (N.J. Super. Ct. App. Div 1995).

¹⁵¹ *Id.* at 394.

¹⁵² *Id.* at 395.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *In re Szemplinski*, 509 N.Y.S.2d 475 (N.Y. App. Div. 1986).

¹⁵⁷ 509 N.Y.S.2d 475 (N.Y. App. Div. 1986).

¹⁵⁸ *Id.*

The petition, at the mother's request, was an attempt to avoid problems in the child's qualification of social security benefits.¹⁵⁹ The court denied her petition because the court realized the mother sought to change the child's name because she wanted the son to receive his deceased father's benefits.¹⁶⁰ The court stated it is the sole duty of the Social Security Administration to determine whether the child qualifies for the payments.¹⁶¹ Therefore, the court denied her petition for the change of name.¹⁶²

Southern States Abolished the Parental Presumption in Response to the National Movement

The South has a history of being at the bottom of national ratings in various subjects, such as education and standard of living.¹⁶³ However, regarding the parental presumption of surnames, the South has taken the lead. Below are the surrounding states of Alabama, Arkansas, Georgia, Florida, Louisiana, and Tennessee. Listed are the states' current laws regarding a child's surname once paternity is established. Also listed are the states' courts' interpretations of the statute. Mississippi is the only Southern state that continues to hold on to the outdated parental presumption in surname law.

Alabama

Alabama's prior surname statute mirrored the current Mississippi statute. Alabama's previous surname statute¹⁶⁴ read that once paternity was established, "[t]he father may, at

¹⁵⁹ *Id.* at 475.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Majorie Coeyman, *Mississippi Improves a Poor Report Card*, CHRISTIAN SCIENCE MONITOR, June 3, 2003, at <http://www.csmonitor.com/2003/0603/p14s01-lepr.html>.

¹⁶⁴ The code referred to in this case is ALA. CODE § 26-12 prior to 1976.

the same time, change the name of such child, setting in his declaration the name it is then known by, and the name he wishes it afterwards to have.”¹⁶⁵ In 1976, a U.S. district court in *Roe v. Conn*¹⁶⁶ struck down Alabama’s paternal presumption statute based on its violations of constitutional Due Process and Equal Protection.¹⁶⁷

In response to the court’s opinion, the legislature revised Alabama’s paternal presumption. The current Code of Alabama sets forth a specific procedure in the Alabama code section 26-11-3 for the trial courts to follow in name change proceedings. A father whose paternity has been established can petition to have the child’s surname changed to his own surname.¹⁶⁸ If the mother of the child objects to the proposed change, the court appoints a *guardian ad litem* to represent the child.¹⁶⁹ A hearing is then scheduled at which the parties present evidence for determining whether the name change is in the best interests of the child.¹⁷⁰ The court then denies the request of the father or issues an order of name change.¹⁷¹

Since the enactment of the new name change law, an Alabama court of civil appeals decided *Clark v. Clark*,¹⁷² where the mother objected to the father’s petition of a name change.¹⁷³ Upon the mother and father’s divorce, a court granted the mother’s request for the child’s surname to be changed to her maiden name.¹⁷⁴ Five years later, the father petitioned to have the child’s surname changed back to his surname.¹⁷⁵ The court held it could not change the child’s last name pursuant to Alabama code section 26-11-3 because that statute only deals with situations in which a father petitions

¹⁶⁵ *Roe v. Conn*, 417 F. Supp. 769, 782-83 (Ala. 1976). For a more detailed explanation of this case, see section IV of this note.

¹⁶⁶ 417 F. Supp. 769 (Ala. 1976).

¹⁶⁷ For a more detailed explanation of this case, see section IV of this note.

¹⁶⁸ ALA. CODE § 26-11-3(a) (2003).

¹⁶⁹ *Id.* § 26-11-3(b).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 682 So.2d 1051 (Ala. 1996).

¹⁷³ *Id.* at 1051.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

the court to change a child's surname once paternity is established.¹⁷⁶ The court noted that where the parents were divorced, it could not apply that statute.¹⁷⁷ The court further stated the motive for the name changes in this case stemmed from spite between the parents rather than from the best interests of the child.¹⁷⁸ The court determined it lacked subject matter jurisdiction in this case, and the child's surname ultimately reverted back to the father's original name.¹⁷⁹

Arkansas

Arkansas law states that once paternity has been established, the name of the father and surname of the child shall be entered on the birth certificate in accordance with the finding of the court.¹⁸⁰

A finding of paternity under this section does not mean the surname of the child should necessarily be that of the father.¹⁸¹ Nothing in the language suggests the two must be the same.¹⁸² This subdivision does not direct that the surname of the child become that of the father.¹⁸³ When one parent submits a petition for a child's name, the other parent must be notified. Failure to do so is a violation of the due process clauses of both the state and federal constitutions.¹⁸⁴ Name-change decisions are to be made on a case-by-case basis.¹⁸⁵ Arkansas case law has further defined the meaning of the state's name-change statute.

In *Mathews v. Oglesby*,¹⁸⁶ an Arkansas court of appeal reversed a trial court ruling that changed the child's surname

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1052.

¹⁷⁹ *Id.* 1052 (Ala. 1996).

¹⁸⁰ ARK. CODE ANN. § 20-18-401(f)(3) (2003).

¹⁸¹ *Mathews v. Oglesby*, 952 S.W.2d 684, 685-86 (Ark. App. 1997).

¹⁸² *McCullough v. Henderson*, 804 S.W.2d 368, 369 (Ark. 1991).

¹⁸³ *Reaves v. Herman*, 830 S.W.2d 860, 860-61 (Ark. 1992).

¹⁸⁴ *Carroll v. Johnson*, 565 S.W.2d 10, 17 (Ark. 1978).

¹⁸⁵ *Mathews v. Smith*, 97 S.W.3d 418, 421 (Ark. App. 2003).

¹⁸⁶ 952 S.W.2d 684 (Ark. App. 1997).

to that of the father.¹⁸⁷ The mother and father were never married.¹⁸⁸ The mother was the child's custodian and opposed the name change. The chancellor stated it was her policy to change the last name to that of the father unless the child was older, around 10 or 11 years old.¹⁸⁹ The appeals court noted that in a name change proceeding, the chancellor was required to determine the best interests of the child based upon the facts of each case.¹⁹⁰ The case was reversed and remanded back to the trial court to determine which name would be in the best interests of the child.¹⁹¹

In *Huffman v. Fisher*,¹⁹² the Arkansas Supreme Court furthered the reasoning set forth in *Mathews*.¹⁹³ In *Huffman*, the mother sought child support from the father.¹⁹⁴ Upon the establishment of paternity and child support, the court changed the child's name to that of the father, pursuant to the father's request.¹⁹⁵ On appeal, the state Supreme Court reiterated a previous ruling from *Reaves v. Herman*¹⁹⁶ by stating the Arkansas statute did not require the child to bear the father's surname.¹⁹⁷ The court set forth the following factors in determining the best interests of the child: (1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment the child may experience from bearing the present or proposed surname; and (6) the existence of any parental misconduct or neglect.¹⁹⁸

¹⁸⁷ *Id.* at 684.

¹⁸⁸ *Id.* at 685.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 686.

¹⁹¹ *Id.*

¹⁹² 987 S.W.2d 269 (Ark. 1999).

¹⁹³ *Id.* at 273.

¹⁹⁴ *Id.* at 270.

¹⁹⁵ *Id.* at 271.

¹⁹⁶ 830 S.W.2d 860 (Ark. 1992).

¹⁹⁷ *Huffman*, 987 S.W.2d at 273.

¹⁹⁸ *Id.* at 274.

Furthermore, the court held that in order to successfully petition to change a minor child's surname, the moving party bears the burden of demonstrating the change is in the best interest of the child.¹⁹⁹

Florida

Florida statutory law provides if the mother is not married at the time of birth, the parent who will have custody will choose the child's given name and surname.²⁰⁰ If a court determines paternity, the name of the father and the surname of the child shall be entered on the birth certificate in accordance with the finding of the court.²⁰¹ If the court fails to specify a surname for the child, the parent who has custody selects the child's given name and surname.²⁰²

Florida courts have interpreted this statute to connote changing a child's surname to that of the father based only on a finding of paternity is in error.²⁰³ The party seeking the change has the burden of proving the change is in the best interests of the child.²⁰⁴ Changing the name of a minor requires a showing in the record that such change is necessary for the welfare of the minor.²⁰⁵

In an appellate court in Florida, *Collinsworth v. O'Connell*²⁰⁶ dealt with an unwed mother contesting a court order that established the paternity of the natural father, gave the father shared parental responsibility, increased visitation privileges, and changed the child's surname to that of the father.²⁰⁷ The court reversed the name change based on the

¹⁹⁹ *Id.*

²⁰⁰ FLA. STAT. ANN. § 382.013(3)(c) (West 2002).

²⁰¹ *Id.* § 382.013(2)(d).

²⁰² *Id.* § 382.013(3)(c).

²⁰³ *Bardin v. Dep't of Revenue*, 720 So. 2d 609, 612 (Fla. App. 1998).

²⁰⁴ *Id.*

²⁰⁵ *Collinsworth v. O'Connell*, 508 So. 2d 744, 747 (Fla. App. 1987); *see also Lazow v. Lazow*, 147 So.2d 12, 14 (Fla. 3d 1962).

²⁰⁶ 508 So. 2d 744 (Fla. App. 1987).

²⁰⁷ *Id.* at 747.

trial court's failure to make a finding that the change was required for the welfare of the child.²⁰⁸

A Florida court of appeals in *Levine v. Best*²⁰⁹ also reversed the trial court's decision to change the child's surname from the mother's to the father's.²¹⁰ In *Levine*, the court's ruling was based upon the fact that everyone, especially his doctors, knew the child by his mother's surname.²¹¹ The trial court's record failed to show whether the change was necessary for the child's welfare.²¹²

In *Durham v. McNair*,²¹³ a mother appealed the trial court's decision to change her child's surname to that of the father.²¹⁴ The appellate court remanded the case to the trial court to reconsider whether the name change was required for the welfare of the minor child.²¹⁵ The court also noted the mere fact that McNair happened to be the father did not automatically entitle him to insist the child be given his surname.²¹⁶ The appellate court remanded the case with directions for the trial court to rule based on the best interests of the child.²¹⁷

Georgia

According to Georgia law, superior courts have discretion in specifying the name by which a child shall be known once paternity has been established by the court.²¹⁸ If a father wishes to legitimize a child, he can petition the superior court in the county in which he lives.²¹⁹ If he desires

²⁰⁸ *Id.*

²⁰⁹ 595 So. 2d 278 (Fla. App. 1992).

²¹⁰ *Id.* at 279.

²¹¹ *Id.*

²¹² *Id.*

²¹³ 659 So. 2d 1291 (Fla. App. 1995).

²¹⁴ *Id.* at 1292.

²¹⁵ *Id.* at 1293.

²¹⁶ *Id.* at 1292.

²¹⁷ *Id.*

²¹⁸ GA. CODE ANN. § 19-7-22(c) (2002).

²¹⁹ *Id.* § 19-7-22(a).

the child's name be changed, the statute requires that the biological father must specify the intended name of the child in the petition.²²⁰ The Georgia courts utilize the best interests of the child standard in determining whether a name change should be granted.²²¹

In *Palmer v. Pinkston*,²²² a trial court denied the father's request to change the child's name.²²³ Upon appeal, the Georgia Court of Appeals ruled the trial court did not abuse its discretion in denying the name change request.²²⁴ The court noted the child lived with the mother and used her last name for two years prior to the paternity proceeding.²²⁵ After the proceeding, the child continued to live with the mother.²²⁶ Furthermore, no evidence was presented at the trial court to reveal any reason why a name change would be in the child's best interests.²²⁷

Louisiana

The Louisiana law states if paternity has been judicially declared in a paternity proceeding, the surname of the child will be that of the father unless the mother agrees otherwise.²²⁸ The father and mother can also agree to a hyphenated combination of the surname of the natural father and the maiden name of the mother.²²⁹

Once a child's surname information is correctly provided at birth, any change would require compliance with the Louisiana revised statute, section 12:4751.²³⁰ This statute even provides that one parent, if granted custody of the minor

²²⁰ *Id.* § 19-7-22(b).

²²¹ *Tolbert v. Tolbert*, 206 S.E.2d 63, 65 (Ga. App. 1974).

²²² 492 S.E.2d 285 (Ga. Ct. App. 1997).

²²³ *Id.* at 285.

²²⁴ *Id.* at 286.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ LA. REV. STAT. ANN. § 40:34(iv) (West 2003).

²²⁹ *Id.*

²³⁰ *Fielding v. Andrews*, 715 So. 2d 66, 68 (La. App. 1998).

child, can change the child's name if the non-custodial parent fails to support the child.²³¹

In *Morace v. Waller*,²³² a Louisiana appellate court interpreted the name-change statute and reversed a child's name change.²³³ The trial court changed the child's name to the father's upon the father's petition and against the mother's consent. The Court of Appeals reiterated the statute that the child shall have the mother's maiden name if the natural father is unknown or if the natural father is known but the mother does not agree to the use of his surname. Thus, the court held in a situation when the natural father is known, any changes to a child's surname have to be done with the consent of the mother.²³⁴

Tennessee

Tennessee law states if a mother was not married at the time of conception or birth, the name of the father will not be entered on the birth certificate and the surname of the child will be the mother's surname.²³⁵ If the court establishes paternity, the name of the father and the child's surname will be entered on the birth certificate in accordance with the order of the court.²³⁶

Tennessee case law interprets this statute to mean paternity proceedings do not automatically result in a name change as a matter of law.²³⁷ There is no presumption in the law that a child should bear the father's surname under all circumstances.²³⁸ The party seeking the change has the burden of proving the change is in the best interests of the

²³¹ LA. REV. STAT. ANN. § 13:4751(C)(2) (West 2003); *see also Gold v. Liner*, 822 So. 2d 166, 168 (La. App. 1 Cir. 2002).

²³² 755 So. 2d 905 (La. App. 1999).

²³³ *Id.* at 907.

²³⁴ *Id.*

²³⁵ TENN. CODE ANN. § 68-3-305(b)(1) (2003).

²³⁶ *Id.* § 68-3-305(c).

²³⁷ *Id.* § 68-3-306(c); *see also Story v. Shelton*, No. M2001-01009-COA-R3-JV, 2001 WL 980767, at *4 (Tenn. Ct. App. Aug. 28, 2001).

²³⁸ *Barabas v. Rogers*, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993).

child.²³⁹ Tennessee courts further set forth factors in considering whether a name change is in the best interests of the child: (1) the child's preference, (2) the change's potential effect on the child's relationship with each parent, (3) the length of time the child has had her present surname, (4) the degree of community respect associated with the present and proposed surname, and (5) the difficulty, harassment, or embarrassment the child may experience from bearing either her present or proposed surname.²⁴⁰ In Tennessee, a name change is only appropriate if established by a preponderance of the evidence that the change would be in the best interest of the child.²⁴¹ Routinely, the court also appoints a *guardian ad litem* to determine the child's best interest. It has also been suggested the moving party must make some objective showing of harm if the name is not changed.²⁴²

In *Barabas v. Rogers*,²⁴³ a father did not sufficiently prove his child's name should be changed to his own surname.²⁴⁴ The juvenile court ordered the name change based solely on the court's rule that fathers who agree to support their nonmarital children "deserve" to have their children named after them.²⁴⁵ The trial judge stated,

The father requests his name, I'm going to grant that. That's just one of my rules. Maybe I'm wrong, and maybe I'm not looking at it right. But in my mind, if he's going to pay and help pay, which he should for this child and support this child, he deserves that. That's just the way I've always looked at it.²⁴⁶

A Tennessee appellate court held the juvenile court's rule had no basis in common law or custom, and the best

²³⁹ *Halloran v. Kostka*, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988).

²⁴⁰ *Barabas*, 868 S.W.2d at 287.

²⁴¹ *Story*, 2001 WL 980767, at *4.

²⁴² *Layman v. Replogle*, No. 01A-01-9312-CV-00516, 1994 WL 228227, at *5 (Tenn. App. May 27, 1994).

²⁴³ 868 S.W.2d 283 (Tenn. Ct. App. 1993).

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 286.

²⁴⁶ *Id.*

interests of the child is the standard to be considered.²⁴⁷ The best interests were to be determined, according to the court, (1) by considering the child's preference, (2) the effect of the choice on the child's relationship with either parent, (3) the length of time the surname had been used, (4) the degree of community respect associated with the present and proposed surnames, and (5) any difficulty stemming from the use of either surname.²⁴⁸ The court pointed out the father did not prove how changing the surname would affect the child's relationship with his parents or other family members.²⁴⁹ He also failed to prove that using the father's surname would be more beneficial than using the mother's surname, or that the child would encounter difficulties, inconvenience, and embarrassment if the child's surname remained the mother's.²⁵⁰ Accordingly, the court reversed the juvenile court's decision to change the child's name to that of the father's.²⁵¹

Mississippi's Sole Case Regarding Surname Change

Only one case in Mississippi addresses the issue of changing a child's surname.²⁵² Though this 1957 case deals with a formerly married couple and is distinguishable from the date rape hypothetical, the principles regarding the best interests of a child during a name change dispute are still applicable. The Mississippi Supreme Court in this case noted that neither party cited authorities regarding the name change.²⁵³ Because this was a case of first impression in front of the Mississippi Supreme Court, the parties could not cite to any other Mississippi law.

Why is there no case law in Mississippi regarding surname changes in paternity proceedings? Certainly mothers

²⁴⁷ *Id.* at 287.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 288.

²⁵⁰ *Barabas v. Rogers*, 868 S.W.2d 283, 288 (Tenn. Ct. App. 1993).

²⁵¹ *Id.*

²⁵² *Marshall v. Marshall*, 93 So. 2d 822 (Miss. 1957).

²⁵³ *Id.* at 824.

and fathers do not all agree on the name of their child. With a lack of case law, one is tempted to think there is no controversy. However, the nonexistence of case law cannot be the proof that there are no adverse rulings to a mother and father in the lower courts. I further reject the argument that the nonexistence of case law is due to a lack of enforcement by the chancery courts. In chancery courtrooms across Mississippi, mothers are subjected to this law once paternity has been established.

There is no case law on this subject because the women involved in these controversies are unmarried women,²⁵⁴ usually seeking child support from the absent father. These women usually cannot afford a private attorney²⁵⁵ and resort to the state's Child Support Enforcement Department in order to begin receiving child support from the absent father. At that point, the court establishes paternity and the child's name is changed to the father's. The mothers in these situations might feel the name change is a small price to pay in order to receive court-ordered child support. In these situations, the mothers do not have the financial resources to appeal the final judgment of the chancery court.²⁵⁶ These mothers do not know the case law in other states, do not know their constitutional rights are affected,²⁵⁷ and do not have an attorney who will appeal their case.

²⁵⁴ According to the Mississippi Center for Public Policy, 45 percent of all the babies born in Mississippi in 1995 were born out of wedlock. http://www.msppolicy.org/publications/statistics/unwed_births.htm (citing Nicholas Eberstadt, *Prosperous Paupers and Affluent Savages*, SOCIETY, Jan./Feb. 1996 at 23-24).

²⁵⁵ According to the Mississippi Center for Public Policy, 61 percent of families with children headed by a single mother in 1989 met the criteria for poverty status. <http://www.msppolicy.org/publications/statistics/poverty.htm> (citing Interview with Robert Rector, Senior Policy Analyst for Welfare and Family Studies, Heritage Foundation (Apr. 25, 1996)).

²⁵⁶ *Id.*

²⁵⁷ See Section IV of this note for a complete explanation as to the statute's unconstitutionality.

Mothers typically want their child to have the surname of the father.²⁵⁸ In the event of a controversy, however, the chancellor reasonably allows the child to keep the mother's maiden name.²⁵⁹ Furthermore, in practice the burden actually shifts to the mother to articulate a valid reason why the child should keep her name.²⁶⁰ The mother usually cannot meet this burden of proof, and the court rules against her, changing the name of the child to the father's.²⁶¹ Generally, mothers do not feel strongly enough about the name change to go forward with an appeal.²⁶²

If all name change hearings were this accommodating, then there would be less of a problem with the Mississippi code section 93-9-9. However, consider again the mother in the date rape hypothetical.²⁶³ This mother was raped by an acquaintance and was too scared to contact the police. Upon the father's assertion of his parental rights, the chancery court conducts a hearing to establish paternity, visitation, and to change the child's surname to that of the father. Obviously, the mother would not want her child's surname to be that of the father. Using the rapist's last name would be yet another daily reminder of her attack. The mother cannot reveal this concern to the chancery court at the name change hearing because she fears being accused by the court of making up the story to avoid the name change. The mother cannot put forth any other objective reasons for the child's name to remain hers, and the court changes the child's name to that of the father's.

Although *Marshall v. Marshall* is distinguishable from the date rape hypothetical, its principles regarding the best

²⁵⁸ E-mail interview with Lisa S. Nored, J.D., Assistant Professor of Criminal Justice, University of Southern Mississippi (Oct. 20, 2003).

²⁵⁹ *Id.*

²⁶⁰ E-mail interview with Penny Jones Alexander, family law solo practitioner (Oct. 20, 2003).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See Section I of this article, which further explains the date rape hypothetical.

interests of a child during a name change dispute are still applicable.

On December 3, 1947, Mr. Marshall, and Mrs. Marshall divorced.²⁶⁴ Mrs. Marshall was granted custody of their 11-year-old son, Jerry Allen Marshall.²⁶⁵ On July 15, 1950, Mrs. Marshall married William Maxwell Reeves.²⁶⁶ Mr. Marshall also remarried.²⁶⁷ On May 7, 1956, Mrs. Marshall filed a petition in the Chancery Court of Hinds County seeking her son's name be changed to her second husband's surname.²⁶⁸ The chancellor granted the request, but 10 days later rescinded the decree to issue process by publication to the biological father.²⁶⁹ Subsequently, the court conducted a hearing regarding the name change with the biological father.²⁷⁰ On August 10, 1956, the court entered a decree changing the child's name to the mother's second husband.²⁷¹ The father appealed the decision of the lower court.²⁷²

At the hearing, the son testified he had lived with his mother and stepfather since their marriage.²⁷³ He sees his biological father only twice a year when his father comes down from Michigan.²⁷⁴ He also testified his biological father wrote to him once a week and occasionally called.²⁷⁵ His father sent him presents and did "all in his power to keep as close in contact as possible."²⁷⁶ The boy testified he loved both his father and his mother and stepfather.²⁷⁷

²⁶⁴ *Marshall v. Marshall*, 93 So. 2d 822, 823 (Miss. 1957).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 824.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

Mrs. Reeves testified the father did not support the child following their initial divorce decree, but the father was currently paying double payments each month because he was making more money and wanted to catch up with the delinquencies.²⁷⁸ She also testified her son was the one who initiated the name change.²⁷⁹

The Mississippi Supreme Court quoted 65 C.J.S. Names section 11 entitled "Change of Name of Infant."²⁸⁰ The court state "an application to change an infant's name should only be granted where such a change is clearly in the best interests of the child."²⁸¹ Furthermore, the C.J.S. states a name change for a child of divorced parents should not be granted when it might contribute to an estrangement of between the child and father.²⁸² The change can be granted, however, when the father is indifferent to the son's welfare over a period of years.²⁸³

The court quoted at length the Ohio Supreme Court in *Kay v. Kay*.²⁸⁴ There, the court said an application to change a child's name to the surname of the mother's second husband should only be granted when the biological father has abandoned the child or failed to support the child.²⁸⁵

The court further quoted *Application of Wittlin*,²⁸⁶ which set forth the same standard.²⁸⁷ Based on these two opinions, the court reversed the order of the trial court and ruled the minor's name would remain the name of his biological father.²⁸⁸ The court also noted that once the child reached majority, he could change his name to anything he

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 825.

²⁸¹ *Id.*

²⁸² *Id.* at 825.

²⁸³ *Id.*

²⁸⁴ *Kay v. Kay*, 112 N.E.2d 562 (Ohio 1953).

²⁸⁵ *Marshall*, 93 So. 2d at 825-26.

²⁸⁶ 61 N.Y.S. 2d 726, 726-728 (1946).

²⁸⁷ *Marshall*, 93 So. 2d at 826-829.

²⁸⁸ *Id.* at 827.

desired.²⁸⁹ The court stated this ruling deals solely with the change of the name of a minor.²⁹⁰

The Mississippi Statute Needs Legislative Reform

The Mississippi code section 93-9-9 needs to be changed for several reasons. First, the statute is inherently prejudicial based upon the name of the chapter of the statute. Second, the statute violates procedural due process,²⁹¹ which forbids the state from depriving anyone of life, liberty, or property without adequate procedures, such as notice and an opportunity for a hearing.²⁹² Third, the current statute violates the Equal Protection clause of the Fourteenth Amendment.²⁹³

Statute is Inherently Prejudicial

The paternity name-change statute, is located in the Mississippi Code under Title 93: Domestic Relations, Chapter 9: Bastardy. The wording of this chapter makes the statute inherently prejudicial. Using the term “bastard” to label a child out of wedlock is antiquated and insulting. The term “bastard” is a highly offensive expletive not even proper in everyday conversation,²⁹⁴ and especially not proper statutory wording in a state’s code.

Through the years, various labels have been used to describe the class of individuals born to unmarried parents.²⁹⁵ Initially, the term “bastard” was thought fitting. “Illegitimate children” then came into fashion, and this has largely given way to the categorization of children “born out of wedlock.”²⁹⁶

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ U.S. CONST. amend. V.

²⁹² *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985).

²⁹³ U.S. CONST. amend 14, § 1.

²⁹⁴ *Gill v. Ripley*, 724 A.2d 88, 100 (Md. 1999).

²⁹⁵ *In re Estate of Greenwood*, 587 A.2d 749, 751 (Pa. Super. Ct. 1991).

²⁹⁶ *Id.*; see *Moore v. Goode*, 375 S.E.2d 549, 553 (W.Va. 1988), citing *Matter of Legitimation of Locklear by Jones*, 334 S.E.2d 46 (N.C. 1985).

The term “bastard” derives from a Saxon word, importing a bad, or base, original.²⁹⁷ The Maryland Supreme Court wrote the “term ‘bastard’ itself has been regarded as odious, not fit for use in polite conversation.”²⁹⁸ Webster’s Dictionary gives as secondary definitions of the word, “anything of inferior quality or varying from standard” and “a counterfeit; sham.”²⁹⁹

Under common law, children had limited rights and were seen to have a legal connection to their parents.³⁰⁰ A bastard was treated as the son of nobody and was regarded as having no rights, except those he could personally acquire.³⁰¹ Even the right of a surname could be acquired only by reputation, and when acquired, it was legally only a description of the person.³⁰² However, as the Maryland Supreme Court pointed out: “It is simply impermissible now for courts to refer to children in that manner.”³⁰³ Children are never “illegitimate,” and certainly are not so because of their parents’ circumstances.³⁰⁴

The Tennessee Supreme Court further expressed their view on the misuse of this term by stating:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. However visiting this condemnation on the head of an infant is illogical and unjust.³⁰⁵

Furthermore, imposing disabilities on a child born out of wedlock is contrary to the basic concept of the system that legal stigma should bear some relationship to individual responsibility or wrongdoing. The court said, “obviously, no child is responsible for his birth and penalizing the illegitimate

²⁹⁷ *Stevenson’s Heirs v. Sullivan*, 18 U.S. 207, 226 (1820).

²⁹⁸ *Gill v. Ripley*, 724 A.2d 88, 100 (Md. 1999).

²⁹⁹ *Id.* (quoting WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 156 (2d ed. 1983)).

³⁰⁰ *Id.*

³⁰¹ *Swanson v. Swanson*, 32 Tenn. 46, 453 (1852); see also *Stevenson’s Heirs v. Sullivan*, 18 U.S. 207, 227 (1820).

³⁰² *Id.*

³⁰³ *Gill*, 724 A.2d at 100.

³⁰⁴ *Id.*

³⁰⁵ *Allen v. Harvey*, 568 S.W.2d 829, 835 (Tenn. 1978).

child is an ineffectual -- as well as an unjust -- way of deterring the parent.”³⁰⁶ All children, by virtue of biological processes are the natural children of someone.³⁰⁷ An Eighth Circuit appeals court noted there are no illegitimate babies, although perhaps there may be illegitimate parents.³⁰⁸

Applying these rules to the date rape hypothetical, a mother and child would be more emotionally damaged by the Mississippi code’s label. An Eighth Circuit appeals court further noted the West Publishing Company, a leader in the legal publishing field, changed with the times and first retitled the digest topic “Bastards” first to “Illegitimate Children” and then to “Children Out-of-Wedlock.”³⁰⁹

The Georgia Supreme Court has also addressed the issue of the term “bastard.”³¹⁰ The court pointed out that in the past, the “bastard” and the taxpayers bore the weight of the “father’s folly.”³¹¹ The child wore the cruel label “bastard,” and the taxpayers bore the burden of financially assisting the single parent.³¹² The court noted how “[t]he law is changing. The term ‘bastard’ has been replaced with ‘child born out of wedlock,’ and both parents have the joint and several duty to provide for the maintenance, protection, and education of such children.”³¹³

The West Virginia Supreme Court of Appeals also expressed some dismay at the continued utilization of the term “bastard,” also pointing out the most enlightened authorities now use the term “children born out of wedlock.”³¹⁴

[I]t would seem to be in order to say something about the shocking injustice and unfairness of affixing the offensive

³⁰⁶ *Id.*

³⁰⁷ *State ex rel. Smith v. Memphis Light, Gas & Water Div.*, 602 S.W.2d 249, 251 (Tenn. Ct. App. 1980).

³⁰⁸ *Voss v. Shalala*, 32 F.3d 1269, 1274 (8th Cir. 1994).

³⁰⁹ *Id.*

³¹⁰ *Pruitt v. Lindsey*, 407 S.E.2d 750 (Ga. 1991).

³¹¹ *Id.* at 753.

³¹² *Id.*

³¹³ *Id.* (citing GA. CODE ANN. § 19-7-24 (2002)).

³¹⁴ *Shelby J.S. v. George L.H.*, 381 S.E.2d 269, 271 n.3 (W.Va. 1989); *see also Moore v. Goode*, 375 S.E.2d 549, 553 n.2. (W.Va. 1988).

term ‘bastard’ to a child, who, without any will or desire on his part, is brought into the world through the meretricious relationship of his parents. If the word is to be used derogatorily, as it most frequently is, it would seem that the ones to whom it should apply should be the ones who are responsible, not the guiltless offspring. Thus the parents of a child born out of wedlock would become known as the bastard parents, and the victim would be known as the innocent child - - not even the illegitimate child. Illegitimate? What crime has the child committed that he should be characterized illegitimate or illegal? Why should the bar sinister fall on him?³¹⁵

Also in response to the national movement, the surveyed surrounding states have incorporated chapter titles to their state’s code that are wholly more appropriate than Mississippi’s chapter title.³¹⁶

Name Change Statute Violates Procedural Due Process

The current Mississippi statute, as written and as interpreted by the chancery judges in Mississippi, violates the Due Process clause of the Fourteenth Amendment of the United States Constitution.³¹⁷ The Mississippi law holds that

³¹⁵ *Commonwealth v. Harris*, 27 Pa. D. & C. 466, 468 (1936).

³¹⁶ The names of the titles and chapters, respectively, of similar statutes in the surrounding southern states’ codes of Alabama, Arkansas, Florida, Georgia, Florida, and Tennessee follow. The Mississippi Code statute is also listed below to demonstrate how it compares to other states. Infants & Incompetents: Legitimation of Children, ALA. CODE § 26-11-3(a)-(b) (2003); Public Health & Welfare: Health & Safety: Vital Records: Births & Adoptions, ARK. CODE ANN. § 20-18-401(f)(3) (Michie 2003); Public Health: Vital Statistics: Birth Registration: Paternity, FLA. STAT. ANN. § 382.013(2)(d) (West 2002); Domestic Relations: Parent & Child Relationship Generally: Legitimacy, GA. CODE ANN. § 19-7-22(c) (2002); Public Health and Safety: Vital Statistics Laws: General Provisions, LA. REV. STAT. ANN § 40:34 34 (B)(1)(a)(iv) (West 2003); Health, Safety and Environmental Protection Health: Vital Records: Births, TENN. CODE ANN. § 68-3-305(b)(1) (2003); Domestic Relations: Bastardy, MISS. CODE ANN. § 93-9-9 (2003).

³¹⁷ U.S. CONST. amend. 14, § 1.

once paternity is established, a chancery judge must automatically change the surname of the child to the surname of the biological father. This statute gives no notice and no prior warning to the mother or her child that the chancery court intends to change the child's name. This is a violation of procedural due process because no notice or hearing is granted to the party whose rights are affected by the adverse decision of the court.³¹⁸

Before 1976, Alabama had a statute regarding the surname of a child that mirrored the current Mississippi statute.³¹⁹ The Alabama statutory requirements provided that once paternity was established, "[t]he father may, at the same time change the name of such child, setting in his declaration the name it is then known by, and the name he wishes it afterwards to have."³²⁰ In *Roe v. Conn*, a district court struck down this statute as unconstitutional, ruling it violated procedural due process.³²¹

In *Conn*, the biological father, pursuant to the above provision, petitioned to have his child's last name changed from Wambles to Coppage as part of his declaration of paternity.³²² At question on appeal was whether the former Alabama code section 27-12 violated due process by permitting a father to change a child's surname without providing the mother and/or the child with notice and an opportunity to be heard.³²³ The court was persuaded by two Texas opinions, holding "[t]he opinions ... have gone so far as to hold that the notice required by Due Process should be read into the Texas statute allowing for the name change of a minor."³²⁴

³¹⁸ See also *Blechle v. Poirier*, 110 S.W. 3d 853, 855 (Mo. App. 2003).

³¹⁹ *Roe v. Conn*, 417 F. Supp. 769, 782 (Ala. 1976).

³²⁰ ALA. CODE § 27-12 (prior to 1976).

³²¹ *Roe*, 471 F. Supp. at 782.

³²² *Id.*

³²³ *Id.*

³²⁴ *Roe*, 471 F. Supp. at 782, citing *Eschrich v. Williamson*, 475 S.W.2d 380 (Tex. Civ. App. 1972); *Scucchi v. Woodruff*, 503 S.W.2d 356 (Tex. Civ. App. 1972).

The court noted the Alabama statute claimed to be looking out for the best interests of the child but failed to list any factors that showed the best interests. The statute presumed the child's best interest would be served by the child bearing the name of the declared father. That is not necessarily or universally true. The district court held that "Due Process requires an individual determination as to the appropriateness of the name change. To enable the probate judge to make this determination, notice and an opportunity to be heard must be given to the mother and to the child before a name change takes effect."³²⁵ Based on these reasons, the court struck down the Alabama statute because it violated procedural due process.³²⁶

Mere notice and hearing, however, are not enough to satisfy due process if the statutory scheme also predetermines the outcome, as in the case of a paternal presumption statute.³²⁷ It is such an arbitrary action by the state, however accomplished, that the Due Process clause is designed to guard against.³²⁸ This is precisely what the Mississippi code section 93-9-9 currently imposes. No matter what the circumstances of the situation presented to the chancery court, the judge is bound by the statute to automatically change the name of the child to that of the court-determined father. Such a rubber stamp is unconstitutional, even if notice and a hearing are provided to the parties of the proceedings because the outcome is predetermined by the statute. The Mississippi statute is unconstitutional and needs to be struck down based on its procedural due process violations.

Name Change Statute Violates Equal Protection

The current Mississippi statute also violates the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. Under Mississippi code section 93-9-9,

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Jones v. McDowell*, 281 S.E.2d 192, 197 (N.C. Ct. App. 1981).

³²⁸ *Id.*

once paternity is established, a chancery judge must change the surname of the child to the surname of the biological father.

Parents have a constitutionally protected right to choose the name of their child.³²⁹ The U.S. Supreme Court's decision in *Roe v. Wade*³³⁰ and other privacy rights cases, such as *Griswold v. Connecticut*³³¹ and *Loving v. Virginia*,³³² hold the liberty component of the Due Process clause encompasses a freedom of choice in certain matters of marriage and procreation.³³³ This constitutional right of liberty and privacy is broad enough to include the right of parents to choose a name for their child.³³⁴ Following the reasoning of the Supreme Court in *Roe v. Wade*, a Florida district court concluded the Due Process clause protects the plaintiffs' right to choose the name of their child from arbitrary state action.³³⁵

Thus, the state must show "any intrusion on that right has a reasonable relationship to some legitimate state purpose."³³⁶ The United States Supreme Court has held that "[g]ender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives to withstand judicial scrutiny under the Equal Protection clause."³³⁷ The Court furthered this reasoning by stating that "classifications based upon gender ... have traditionally been the touchstone for pervasive and often subtle discrimination." This Court's recent cases teach that such classifications must bear a close and

³²⁹ *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1982).

³³⁰ 410 U.S. 113, 152-153 (1973).

³³¹ 381 U.S. 479 (1965).

³³² 388 U.S. 1 (1967).

³³³ *See Fla. Women's Med. Clinic, Inc. v. Smith*, 536 F. Supp. 1048, 1053 (S.D. Fla. 1982).

³³⁴ *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979).

³³⁵ *Sydney*, 564 F. Supp. 412, 413 (S.D. Fla. 1982).

³³⁶ *Id.*

³³⁷ *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

substantial relationship to important governmental objectives and are in many settings unconstitutional.³³⁸

As mentioned earlier, before 1976, the Code of Alabama contained a surname statute that mirrored the current Mississippi law.³³⁹ The Alabama statutory requirements provided that once paternity was established, “[t]he father may, at the same time change the name of such child, setting in his declaration the name it is then known by, and the name he wishes it afterwards to have.”³⁴⁰ In *Roe v. Conn*, a district court struck down this statute as unconstitutional because it violated the Equal Protection clause.³⁴¹

The district court ruled Alabama’s statute discriminated on the basis of sex by permitting the declared father to control the child’s name, regardless of the wishes of the natural mother whose name the child had carried since birth.³⁴² The court recognized that surnames “give an individual a personal identity and self-awareness.”³⁴³ The child has a liberty interest at stake when his name is altered.³⁴⁴ As the court acknowledged, “[t]he name change touches on this right to maintain the integrity of established family relations.”³⁴⁵ This preference for the wishes of the father cannot be said to serve a legitimate state interest in administrative convenience or avoiding confusion.³⁴⁶ The name change imposes the administrative burden of changing all the child’s vital records, which might lead to confusion. Furthermore, the Supreme Court has made clear that the

³³⁸ *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). See also *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

³³⁹ *Roe v. Conn*, 417 F. Supp. 769, 782 (M.D. Ala. 1976).

³⁴⁰ ALA. CODE § 27-12 (prior to 1976).

³⁴¹ *Roe*, 417 F. Supp. at 782.

³⁴² *Id.*

³⁴³ *Id.* at 783.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* See also *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971).

state's interest in achieving administrative efficiency is, alone, not enough to support a sex-based classification.³⁴⁷

The district court struck down the statute as unconstitutional and concluded there is no rational basis for the state's policy of giving the declared father complete control over the child's name. The court said that "in changing a child's name pursuant to a declaration of father, the State should be directed not by the desires of the father but by the best interest of the child."³⁴⁸

In *Jones v. McDowell*, an appellate court in North Carolina also ruled the paternal presumption unconstitutional.³⁴⁹ The father in this case sought to have the child's surname changed.³⁵⁰ The child was given the mother's surname at birth.³⁵¹ The trial court granted the father's request under the state's statute,³⁵² which allowed the child's surname to be changed to that of the father's once paternity had been established.³⁵³ The mother filed an appeal in an attempt to retain the child's birth surname.³⁵⁴ The Court of Appeals reversed, holding the name change was invalid.³⁵⁵ The court cited recent U.S. Supreme Court opinions in which it declared the "freedom of personal choice in matters of ... family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment."³⁵⁶ Based on the Supreme Court's

³⁴⁷ *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

³⁴⁸ *Conn*, 417 F. Supp. at 782-783.

³⁴⁹ *Jones v. McDowell*, 281 S.E.2d 192 (N.C. Ct. App. 1981).

³⁵⁰ *Id.* at 193.

³⁵¹ *Id.* 53 N.C. App. at 437, 281 S.E.2d at 194.

³⁵² N.C. GEN. STAT. §§ 49-13 entitled New Birth Certificate on Legitimation: A certified copy of the order of legitimation when issued under the provisions of G.S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

³⁵³ *Jones*, 281 S.E.2d at 197.

³⁵⁴ *Id.* at 194.

³⁵⁵ *Id.* at 197.

³⁵⁶ *Smith v. Org. of Foster Families*, 431 U.S. 816, 842 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974)); see also *Roe v.*

rulings, the Court of Appeals of North Carolina subsequently held the constitutional protection of family life extends to the interest of the mother of an illegitimate child in retaining the surname given the child at birth.³⁵⁷ The court further held,

The valid purpose served by the provisions of [N.C. GEN. STAT.] G.S. 49-10 and 49-13 of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father. Such a requirement does not bear a close and substantial relationship to the important governmental objective underlying the statutes disputed here. Such a requirement denies the mother of an illegitimate child the equal protection of the laws, and because it requires arbitrary action on the part of an agency of the State, it denies such mothers a protected liberty interest without due process of law.³⁵⁸

Likewise, the valid purpose served by the provisions of Mississippi code section 93-9-9 (2003) establishing the paternal relationship is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement the child's surname be changed to that of the father.³⁵⁹ The paternal requirement does not bear a close and substantial relationship to any important governmental objective underlying the Mississippi law. The requirement denies the mother the equal protection of the laws because it requires arbitrary action on the part of an agency of the state.

Thus, Mississippi code section 93-9-9 violates the Equal Protection clause. The statute discriminates on the basis of sex by designating the child's name to be controlled by the

Wade, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972), *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁵⁷ *Jones*, 281 S.E.2d at 194; see *Commonwealth v. City Clerk of Lowell*, 366 N.E. 2d 717 (Mass. 1977); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976); see also *Rice v. Dep't. of Health & Rehabilitative*, 386 So. 2d 844 (1980) (Booth, J., dissenting).

³⁵⁸ *Jones*, 281 S.E.2d at 197.

³⁵⁹ *Id.*

biological father, regardless of the wishes of the natural mother whose name the child carried since birth. The statute has no requirements for chancery judges to look at the best interests of the child. There is no Mississippi case law for judges to turn to in deciding the best interests of the child.

The Arizona Supreme Court recognized courts should not give greater weight to the father's interest in having the child bear the paternal surname "because ... 'our society no longer adheres to the notion that the husband is the sole legal representative of the family, and its property and children, and therefore able to unilaterally determine the surname of the couple's children.'" ³⁶⁰ Such a standard, the court said, would raise equal protection problems. A standard which gives greater weight to the paternal surname could implicate equal protection concerns. ³⁶¹

Numerous courts have stated that a father has no greater right than the mother to have a child bear his surname. ³⁶² Instead, the only factor relevant to the determination of what surname a child should bear is the best interest of the child. ³⁶³ The New York County Supreme Court correctly concluded: "Recent legislation and case law reflect an increased concern for the rights of unwed fathers expressed is that an unwed father be accorded the same rights as an unwed mother. Nowhere is it suggested that the father should be entitled to *more* rights than the mother. Indeed, such a result would be unthinkable." ³⁶⁴

³⁶⁰ *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1008 (Ariz. 1993).

³⁶¹ *Id.*

³⁶² *Hazel v. Wells*, 918 S.W.2d 742, 745 (Ky. Ct. App. 1996); *Magiera v. Luera*, 802 P.2d 6, 7 (Nev. 1990); *e.g.*, *Bobo v. Jewell*, 528 N.E.2d 180, 185 (Ohio 1988); *Laks v. Laks*, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975).

³⁶³ *Hazel v. Wells*, 918 S.W.2d 742, 745 (Ky. Ct. App. 1996); *Magiera v. Luera*, 802 P.2d 6, 7 (Nev. 1990); *see, e.g.*, *Bobo v. Jewell*, 528 N.E.2d 180, 185 (Ohio 1988); *Laks v. Laks*, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975).

³⁶⁴ *State ex rel. Spence-Chapin Serv. to Families & Children v. Teden*, 421 N.Y.S.2d 297, 299 (1979).

Proposed Legislative Reform

None of the states surrounding Mississippi have statutes that routinely grant the biological father the right to automatically change the child's surname based merely upon the father's proof of paternity.

The Mississippi statute should not have a paternal surname presumption embedded within the wording of the statute. The last sentence of the Mississippi code section 93-9-9 would better read:

In the event of court determined paternity, the surname of the child *shall not be changed from the mother's name*, unless the father proves otherwise according to the following best interests of the child factors: (1) the child's preference, (2) the change's potential effect on the child's relationship with each parent, (3) the length of time the child has had its present surname, (4) the degree of community respect associated with the present and proposed surname, (5) the difficulty, harassment, or embarrassment that the child may experience from bearing either its present or its proposed surname, (6) the motive of the moving party in changing the name, and (7) the custodial parent's preference.

According to the proposed statute, the biological father bears the burden of proof in showing the child should bear his surname. The proposed statute does not contain a paternal surname presumption, yet it allows the court to determine which name is in the best interests of the child. The proposed statute lists the best interests factors that many courts use.³⁶⁵ This is imperative in order to avoid confusion among chancery judges as to how to determine the best interests of the child. Furthermore, if the judge fails to consider all the factors above, the judge has made a clear error and can be reviewed by a higher court. A clearly erroneous standard is reasonable because name change cases are life-altering decisions and

³⁶⁵ See Section III of this article, which cites authorities that use the best interests standard.

need to be treated with more professionalism. Also, the chapter title to the Mississippi code section 93-9-9 would better read, “Domestic Relations: Paternity Proceedings” as opposed to “Domestic Relations: Bastardy.” These proposed statute changes would allow the Mississippi law. The proposed statute gives a uniform standard for all chancery courts across Mississippi to abide by when using their discretion in determining a child’s name. The proposed statute does not predetermine the outcome as the current statute does, but it allows the chancellor to apply factors and decide the best interests of the child.