No. 14-FM-1324

DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE RENEE MONIQUE MELBOURNE,

Appellant,

v.

MARCUS A. TAYLOR,

Appellee.

On Appeal from the Superior Court of the District of Columbia
(2013-FSP-688)

BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY AND FAVORING REVERSAL

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STATEMENT PURSUANT TO RULE 28(a)(2)(B)

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QUESTION PRESENTED

What factors should a court consider in determining the best interests of a child with respect to a contested application to change the child's last name?

INTEREST OF *AMICUS CURIAE*

The Legal Aid Society of the District of Columbia is the oldest general civil legal services program in the District of Columbia and frequently participates in appeals before this Court, including as an *amicus curiae*. Legal Aid often represents parents in custody disputes that can give rise to child naming disputes. Legal Aid seeks to assist the Court in ensuring that the appropriate factors are considered in judicial consideration of name-change applications generally, and takes no position on the ultimate question of whether the specific application to

change names here should ultimately be granted or denied. This brief is accompanied by a timely motion for permission to file.

INTRODUCTION

A contested application to change a child's last name is decided based upon the best interests of the child. In this case, the trial court erred in attempting to determine the child's best interests by analyzing the four factors employed by the Massachusetts Supreme Judicial Court in a case decided nearly six decades ago. Those factors are impermissibly sexist, incorporate outdated and inaccurate assumptions, and do not accurately measure a child's best interests.

Proper consideration of a child's best interests in this context requires consideration of all relevant factors, including: (1) how long and how widely the child has been known by the current name in the community; (2) the extent to which the child's current name and identity has become embedded in the child's own mind; and (3) the view of the child (to the extent feasible). A number of additional factors may be considered as appropriate in individual cases, but courts must avoid presumptions regarding the effect of a name change that are not supported by case-specific evidence and that may be based on outdated, inaccurate, or sexist assumptions, such as the assumption that having the same last name as a father is beneficial to the father-child relationship or the assumption that having the same last name as a parent who has committed any kind of "misconduct" is detrimental to a child.

The parties were hampered in their presentation of evidence in this case by the trial court's prior statement that it would consider the improper and outdated factors in determining the child's best interests. Accordingly, this Court should vacate the judgment below and remand with instructions to hold an additional hearing and apply the appropriate factors to determine the best interests of the child.

STATEMENT

1. Renee Melbourne and Marcus Taylor married and had one child, Lolita Rain Marion Taylor, who was born on May 11, 2012 in the District of Columbia. According to trial testimony, Ms. Melbourne, Mr. Taylor, and Lolita all lived together in the District for the first few weeks of Lolita's life and also lived together for several months in Florida during the first few months of Lolita's life. Other than those times, Lolita has lived with Ms. Melbourne in the District, while Mr. Taylor has lived in Florida. Transcript (Sept. 4, 2014) at 30-35.

Custody and divorce proceedings were initiated soon after Lolita's birth. On May 6, 2013, the Superior Court issued a final judgment granting a divorce and awarding joint legal custody to both parents, primary physical custody and "final decision making authority" to Ms. Melbourne, and reasonable rights of visitation to Mr. Taylor. D.C. Super. Ct., No. 2012 DRB 2547, Docket Entries April 24, 2013 & May 6, 2013. Mr. Taylor was ordered to pay monthly child support and to maintain Lolita's health insurance. Docket Entry June 4, 2014.

During the pendency of these proceedings, Ms. Melbourne filed an administrative application to change the name of her daughter to Lolita-Rain Marion Melbourne. The Vital Records Division of the D.C. Department of Health rejected Ms. Melbourne's application in September 2013 because "the father is not available to sign a correction form." Department of Health Rejection Letter (September 20, 2013). On October 7, 2013, Ms. Melbourne filed an application in the D.C. Superior Court requesting the name change. Name Change Application, at 1. Mr. Taylor filed an opposition on October 23, 2013.

After a pre-trial hearing on May 20, 2014, the court held that the "the primary consideration and controlling standard is whether the name change is in the best interests of the child." *In re Melbourne*, No. 2013 FSP 688, at 1 (D.C. Super. Ct. June 11, 2014) (citing *Nellis v.*

Pressman, 282 A.2d 539 (D.C. 1971)). The court then identified the four factors it would address in making that determination:

> (1) Children ought not to have another name foisted upon them until they reach an age when they are capable of making an intelligent choice in the matter of a name; (2) The bond between a divorced father and his children is tenuous at best and if their name is changed the bond may be weakened if not destroyed; and the name under which a child is registered in school goes far to effect a name change; (3) When a father supports a child, manifests a continuing interest in him, is guilty of no serious misconduct and without unreasonable delay, objects to an attempted change of name, the court should decide the issue by determining what is for the child's best interest; (4) A change of name may not be in the child's best interest if the effect of such change is to contribute to a further estrangement of the child from a father who exhibits a desire to preserve the parental relationship.

Id. at 1 n.1 (citing *Nellis*, 282 A.2d at 539).[1]

2. At the trial on September 4, 2014, Ms. Melbourne testified that she sought the name change because of difficulties she had encountered by not sharing the same last name as Lolita. Transcript at 11 ("I've been having issues establishing . . . that I'm her parent."). On one occasion, Ms. Melbourne had difficulty removing Lolita from childcare, and on another occasion, a hospital employee mistakenly allowed a woman (named "Ms. Taylor") to see Lolita. *Id.* at 4. Ms. Melbourne testified that having a different last name than Lolita did not affect their relationship. *Id.* at 16 ("she knows by me being physically there that I am the mother . . . [a]nd we have a good relationship").

Ms. Melbourne testified that Mr. Taylor had not shown an interest in having a relationship with Lolita. *Id.* at 11-12. Indeed, Ms. Melbourne testified that Mr. Taylor once sent

[1] As explained in greater detail in Section II.A of the Argument below, the four factors quoted by the Superior Court were not actually used by this Court in *Nellis*. These were, instead, the four factors used by the Massachusetts Supreme Judicial Court some fifteen years earlier in *Mark v. Kahn*, 131 N.E.2d 758 (Mass. 1956), as summarized (but not followed) in *Nellis*.

her an email threatening to kill Lolita, *id.* at 15, but Mr. Taylor denied sending the threatening email, *id.* at 29.

Mr. Taylor emphasized as a reason for his opposition to the name change that he and Ms. Melbourne "made a[n] agreement that she picks out the first and the middle names … as long as our child has my last name." *Id.* at 21. Mr. Taylor also testified that he did not want Lolita's last name changed because he had cared for her when they had lived together, wanted to remain involved in her life, and had made continuing efforts to spend time with her. *Id.* at 21-25, 32-37, 42-43. He further testified that he had provided Lolita's health insurance since her birth and paid child support as required by the court. *Id.* at 31, 37-38.

Similarly to Ms. Melbourne, Mr. Taylor testified that he would "[d]efinitely not" treat Lolita differently if she had a different last name. *Id.* at 22. But Mr. Taylor added that a name change "would definitely diminish [his] relationship [with his daughter]," because having the same last name is "[t]he only reason why she know[s] . . . who I am." *Id.* at 21-22; *id.* at 25 ("she won't know who I am if she doesn't keep my last name").

3. The court denied the name change application on September 22, 2014. *In re Melbourne*, No. 2013 FSP 688 (D.C. Super. Ct. Sept. 22, 2104). Addressing each of the four factors previously noted, the court held: (1) Lolita is "not of an age where she is capable of making an intelligent choice as to the matter of her name;" (2) "a change in the minor child's name would weaken – and likely destroy – the bond between the Father and the minor child" because Mr. Taylor "has not been physically present in the child's life for more than a year;" (3) Mr. Taylor "is current on his child support obligations[,] has demonstrated a continuing interest in the minor child[,] has [not] engaged in any misconduct[, and] filed his opposition to [Ms. Melbourne's] Application within a reasonable time;" and, (4) "changing the name of the minor

child would further estrange the relationship between the Father and the minor child," because Mr. Taylor "lives in Florida and has not seen the minor child since" the divorce, "acrimony exists between" Ms. Melbourne and Mr. Taylor, and Mr. Taylor "desire[s] to preserve the parental relationship with the minor child." *Id.* at 3-5. Based on its analysis of these four factors, the court ultimately denied the petition as "not in the minor child's best interest." *Id.* at 5.

Ms. Melbourne filed a notice of appeal with this Court on October 8, 2014.

ARGUMENT[2]

I. THE NAME-CHANGE REQUEST MUST BE DECIDED BASED ON THE BEST INTERESTS OF THE CHILD.

We are aware of only a single opinion by this Court regarding a name change under similar circumstances, namely the decision cited below: *Nellis v. Pressman*, 282 A.2d 539 (D.C. 1971). In *Nellis*, two children had originally been given their father's last name (Pressman), but after the parents' divorce and the mother's remarriage (and name change), the mother had, as a practical (but not legal) matter changed the children's last name to her new last name (Nellis). *Id.* at 539-40. Years later, the father sought an injunction requiring that the children use his last name. *Id.* This Court considered the question before it to be "whether another change back to the father's name should now take place," *id.* at 542, which turned on "the true interests of the children," *id.* at 541.

The Superior Court properly articulated this "best interests of the child" standard repeatedly below. *See* Op. 1-3. This was proper based not only on *Nellis* but also on the more

[2] This *amicus* brief, like the proceedings up to this point, addresses only the request for a change in Lolita's last name. As noted on page 3 above, the petition also seeks a change in first name (from Lolita to Lolita-Rain).

general rule that "in all proceedings affecting the future of a minor, the decisive consideration is the best interests of the child." *In re S.C.M.*, 653 A.2d 398, 405 (D.C. 1995) (quoted in *Wilkins v. Ferguson*, 928 A.2d 655, 667 (D.C. 2007)); *accord In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011). This general rule has been applied in numerous contexts in District statutory and common law,[3] and there is no reason to deviate from this general rule here. A consensus of States also applies some form of a best-interests-of-the-child test when determining a child's last name. *See* "*We Are Family": Valuing Associationalism in Disputes over Children's Surnames*, 75 N.C. L. Rev. 1625, 1709-10 & n.365 (1997) (collecting cases); *In re Grimes*, 609 A.2d 158, 161 (Pa. 1992) ("The best interests of the child is the standard used by an overwhelming majority of our sister states when reviewing petitions for change of name on behalf of minor children.").

II. THE TRIAL COURT ERRED IN DETERMINING THE CHILD'S BEST INTERESTS BY LOOKING TO A SET OF FACTORS THAT HAS NOT BEEN ADOPTED BY THIS COURT, IS INCOMPLETE, AND REFLECTS INACCURATE AND SEXIST PRESUMPTIONS.

A. The Factors Addressed by the Trial Court Were not the Factors Relied upon by this Court in *Nellis*.

In *Nellis*, this Court did not attempt to list the factors that must be considered in determining all name-change applications. Instead, the Court listed the seven factors that it actually considered in reaching a decision in that case:

[3] Those contexts include adoption, *see* D.C. Code §§ 16-304(e) & 16-309(b)(3), third-party custody, *see* D.C. Code § 16-831.06(a)(2), parental custody, *see* D.C. Code § 16-914(a)(3), termination of parental rights, *see* D.C. Code § 16-2353(a), visitation, *see Wilkins*, 928 A.2d at 667, examination of child witnesses, *see In re N.D.*, 909 A.2d 165, 171 (D.C. 2006), child support, *see Sollars v. Cully*, 904 A.2d 373, 375, 376 (D.C. 2006), child neglect, *see In re De.S.*, 894 A.2d 448, 451 n.3 (D.C. 2006), correcting date of birth on a birth certificate, *see In re E.D.R.*, 772 A.2d 1156, 1158-59 (D.C. 2001), mental health treatment placement, *see In re Myrick*, 624 A.2d 1222, 1229 (D.C. 1993), school placement, *see* 5 DCMR § E2010, and TANF decisions, *see* 29 DCMR § 5801.6.

> (a) the children have been known in this community for more than five years as Nellis and had a good relationship with their father during those years, (b) their name and identity as Nellis have become imbedded in their own minds as well, (c) the likely impact on their lives of changing back again after all these years to the name Pressman, (d) the children's views are entitled to serious consideration because of their ages and level of intelligence, (e) the reality that the son is approaching the age (18) when he will be eligible to vote and serve in the armed forces and is therefore not far from the time when his wishes on his name would be difficult to deny, (f) the effect the injunction has already had in their lives and on the relationship with their father, and (g) the father's physical remoteness from the community where the children reside.

282 A.2d at 544-45.

The trial court below did not address these same factors. Instead, citing *Nellis*, the trial court assessed the four factors listed on page 4, above. Those four factors appear in *Nellis*, not as *this* Court's analysis, but rather as this Court's summary of the factors considered in the now-59-year-old Massachusetts case of *Mark v. Kahn*, 131 N.E.2d 758 (Mass. 1956). *See Nellis*, 282 A.2d at 542-43 (summarizing *Mark*). These four factors are thus properly referred to as the *Mark* factors, and they have never been adopted by this Court.

This Court only mentioned the *Mark* factors in *Nellis* because the court below had "relied upon *Mark*." *Id.* at 542. Importantly, this Court's comments with regard to the *Mark* factors were equivocal at best. After reciting the *Mark* factors, this Court stated that "[w]e have no problem with those general guidelines." *Id.* at 543. But later, this Court stated that "[w]e do not consider *Mark* and [another foreign decision] as being worthy of the weight apparently given them by the trial court." *Id.* at 544. This latter comment is a clear indication that this Court did not adopt the *Mark* factors and did not believe that they were a proper and complete articulation of the correct legal standard.

Moreover, this Court expressly stated in *Nellis* that it relied upon the seven factors quoted above, and those factors differ from the four *Mark* factors in important respects. For example, the first two *Nellis* factors are the length of time the child has been known by the current name in the community and the extent to which the current name has become embedded in the child's mind as part of his or her identity. *Id.* at 544-45. Those two factors strongly suggest that the longer a child has had a name, the less likely a name change will be in that child's interests. The *Mark* factors point in the opposite direction, expressly stating that until a child is older and "capable of making an intelligent choice in the matter of a name," name changes should be disfavored, if not forbidden. *See id.* at 542-543 (summarizing the first *Mark* factor).

The Superior Court erred as a matter of law in following *Mark* – a 59-year-old foreign decision – instead of *Nellis*, a binding precedential decision of this Court.

B. The *Mark* Factors are an Inappropriate Mechanism for Determining the Best Interests of the Child.

Although this Court stated in dictum that it had "no problem" with the *Mark* factors 44 years ago, *Nellis*, 282 A.2d at 543, today the *Mark* factors are not only problematic, but impermissible, because they are based on sexist and otherwise outdated and unsupportable notions, and because they do not truly reflect the ultimate standard, which is the best interests of the child.

The *Mark* factors are overtly sexist. They refer to "[t]he bond between a divorced father and his children," *id.*, but are silent with respect to the bond between a divorced mother and her children. They provide for court action "[w]hen a father supports a child, manifests a continuing interest in him, is guilty of no serious misconduct and [objects to the name change] without unreasonable delay," *id.* (emphasis removed), but are silent with respect to how to proceed when a mother does those very same things. They are expressly designed to avoid "further

estrangement of the child from a father," *id.*, but say nothing about possible estrangement of the child from a mother. Thus, the *Mark* factors presume the once-prevalent scenario in which the mother has custody after divorce and the father pays child support and has limited visitation.

But much has changed since *Mark* (1956) and *Nellis* (1971). Just one month after *Nellis*, the Supreme Court applied the Equal Protection Clause to gender discrimination. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971). D.C. law now presumes that the parents will share joint custody, *see* D.C. Code § 16-914(a)(2), and that child support will be gender neutral, *see W.M. v. D.S.C.*, 591 A.2d 837, 843 (D.C. 1991) ("The fortuity of gender cannot determine the extent of a parent's obligation to his or her child.").[4] Thus, the legal foundation for *Mark* in the laws regarding child custody and child support no longer exists.

The factual assumptions underlying the *Mark* factors are also highly suspect. For example, the express premise that "[t]he bond between a divorced father and his children is tenuous at best," *Nellis*, 282 A.2d at 543, is unfounded, *see Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979) (rejecting assumption "that a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does") (internal quotations omitted). The *Mark* factors also assume that changing a child's last name will necessarily weaken the father-child bond, and, indeed, "contribute to a further estrangement of the child from a father." *Id.* at 543. That assumption is not supported. *See* "*We Are Family": Valuing Associationalism in Disputes over Children's Surnames*, 75 N.C. L. Rev. 1625, 1699-1709 (1997).

[4] These changes were part of a larger rejection by this Court and the D.C. Council of gender-based stereotypes with respect to a broad range of family-related issues, including post-divorce name change, *see* D.C. Code § 16-915, alimony, *see McClintic v. McClintic*, 39 A.3d 1274, 1279 (D.C. 2012), marriage, *see Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 118 (D.C. 2010), *cert. denied*, 562 U.S. 1178 (2011), intrafamily offenses, *see Robinson v. United States*, 769 A.2d 747, 757 (D.C. 2001), and inheritance, *see In re Estate of Glover*, 470 A.2d 743, 745-46 (D.C. 1983).

Finally, the *Mark* factors appear poorly correlated with the best interests of the child. Only two of the four *Mark* factors mention the best interests of the child, *Nellis*, 282 A.2d. at 542-43, and their overall tenor suggests that they were intended to protect a paternal naming prerogative. This is evident from the *Mark* factors' exclusive focus on the father-child relationship, when the best interests of the child generally involve both parental relationships.

The Superior Court's application of the *Mark* factors here highlights these concerns. The court strongly focused on the father-child relationship, largely ignoring the mother-daughter relationship. *See* Op. 3-5 ("Conclusions of Law," referring to the "father" 22 times while referring to the "mother" only 7). The court concluded that "a change in the minor child's name would weaken – and likely destroy – the bond between the Father and the minor child," and "further estrange" their relationship, based solely on the fact that "the Father has not been physically present in the child's life for more than a year." Op. 4, 5. But the trial court never explained how the name-change would worsen their already tenuous relationship or why it apparently discounted Mr. Taylor's testimony that he would not treat Lolita differently based on her last name. Transcript 22.[5]

III. COURTS SHOULD CONSIDER ALL RELEVANT FACTORS IN DETERMINING THE CHILD'S BEST INTERESTS WITH RESPECT TO LAST NAME, SPECIFICALLY INCLUDING THREE FACTORS IN EVERY CASE.

A. Three Basic Factors Apply in All Contested Name-Change Cases.

The requirement to consider the child's best interests is not always easy to implement because different factors may be relevant in different situations. Indeed, "[e]ach case concerning the best interests of a child must be decided on its own terms," *In re T.J.L.*, 998 A.2d 853, 861

[5] Mr. Taylor's suggestion that his daughter knew who he was because (and only because) they shared the same last name, *see* Transcript 21-22, 25, is implausible. At the time, Lolita was two years old, had not seen Mr. Taylor in over one year, and had a very common last name.

(D.C. 2010), and, under District law, different factors are considered depending on the context in which a child's best interests are being evaluated. *Compare* D.C. Code § 16-914(a)(3) (listing 17 specific factors that a court must consider in evaluating the best interests of a child with respect to parental custody), *with* D.C. Code § 16-2353(b) (listing only six factors a court must consider in evaluating the best interests of a child with respect to the termination of parental rights, only some of which overlap with the factors listed in § 16-914), *and* D.C. Code § 16-831.08 (after determining that the presumption in favor of parental custody has been rebutted, a court must consider only five factors in evaluating the best interests of a child with respect to third-party custody, again with only partial overlap with the factors listed in the other two statutes).

These statutory factors are mandatory in cases to which they apply, but not exclusive. *See* D.C. Code § 16-914(a)(3) ("To determine the best interest of the child, the court shall consider all relevant factors, including, but not limited to [the statutorily enumerated factors]."); *see also In re T.J.L.*, 998 A.2d at 861; *In re J.D.W.*, 711 A.2d 826, 834 (D.C. 1998); *Prost v. Greene*, 652 A.2d 621, 626 (D.C. 1995). Courts are, however, prohibited from considering certain factors including gender stereotypes, *see In re R.M.G.*, 454 A.2d 776, 795 n.2 (D.C. 1982) (Mack, J., concurring) ("The best interest of a child must be determined without resort to inflexible gender-based distinctions which do not bear a substantial relation to some important state interest.") (citing *Caban*, 441 U.S. at 380), and racial stereotypes, *id.* at 787, 794 (consideration of race in adoption case permissible only if it is "tailored to the best interest of the child" and made neither "automatically [n]or presumptively," but rather only with "regard to evidence").

No statute or judicial decision sets forth the factors that must generally be considered in determining the best interests of a child in the context of a proposed name change. The

following three factors, derived as specified from *Nellis* or from other best-interests-of-the-child standards, are relevant in the context of any contested name change request:

1. How long and how widely the child has been known by the current name in the community. *See Nellis*, 282 A.2d at 544-45.
2. The extent to which the child's current name and identity has become embedded in the child's own mind. *See Nellis* A.2d at 545.
3. The view of the child (to the extent feasible). *See* D.C. Code §§ 16-831.08(a)(4), 16-914(a)(3)(A), 16-2353(b)(4); *Nellis*, 282 A.2d at 543, 545.

Other "impact" on the life of the child may be relevant, *see Nellis*, 282 A.2d at 545, most notably if a child would be traumatized by having a last name given by and in common with someone who has committed an intrafamily offense, *see* D.C. Code §§ 16-831.08(b), 16-914(a)(3)(F).

The importance of the first factor (length of time child has been known by name in the community) is apparent. Changing a person's last name creates practical difficulties and may cause confusion or questioning within the community directly relating to the identity of the child. These problems are likely to be more substantial the longer the child has had the name for which a change is sought. Changing an infant's name is likely to have far less impact on the child's identity and standing within the community than a change later in childhood.

The importance of the second factor (child's identification with current last name) is similar. A person's identity and sense of self can be closely tied to that person's name, and, the closer the tie, the greater the potential impact of changing the name on the child's sense of self and mental health. This concern is not present (or is far less substantial) with an infant or very young child but is likely to grow stronger as the child ages and identifies more significantly with his or her own last name. *See Nellis*, 282 A.2d at 540-41 (recounting psychiatrist's testimony

that attempt to change teenage child's last name would be a detrimental attempt to "break him" but that it might be otherwise if the child were younger).

The third factor – the child's own view, where feasible – is a matter of common sense and is almost universally considered whenever a court is called upon to determine a child's best interest. *See* D.C. Code §§ 16-831.08(a)(4), 16-914(a)(3)(A), 16-2353(b)(4). An older child, capable of having and voicing an opinion on this issue, may well have insights into his or her own best interests greater than anyone else. There is no reason to believe that this factor is less appropriate with respect to a child's name than with respect to custody and other similar issues. Indeed, this Court appeared to consider this factor particularly significant in *Nellis* (which involved teenage children). *See* 282 A.2d at 540, 541, 543, 545. And this factor seems particularly salient, as also noted in *Nellis*, in light of the common-law right of "any adult or emancipated person" to "change his or her name at will," *Brown v. Brown*, 384 A.2d 632, 632 (D.C. 1977).

The burden of persuasion with respect to these factors should rest with the party seeking a name change, as it generally does with any party seeking judicial intervention to change the status quo, to prove by preponderance of the evidence that the change is in the child's best interests. *See In re E.D.R.*, 772 A.2d 1156, 1159 (D.C. 2001) (most civil cases involve burden of proof by preponderance of the evidence, and that standard should apply to parents seeking to amend date of birth on birth certificate). Some States apply a different burden to a petitioner seeking to change the last name of a child, either by applying a presumption against such a change, *see, e.g.*, *Dorsey v. Tarpley*, 847 A.2d 445, 448 (Md. 2004) (noting that, in proceedings to change a child's name other than in adoption, "there is a presumption against granting such a change except under 'extreme circumstances'") (quoting *West v. Wright*, 283 A.2d 401, 402

(Md. 1971)), or by applying a burden of proof higher than a preponderance of the evidence, *see* 735 Ill. Comp. Stat. Ann. 5/21-101 (2015) ("clear and convincing evidence"); *In re Name Change of Jenna A.J.*, 765 S.E.2d 160, 161 (W. Va. 2014) ("clear, cogent, and convincing evidence"); *Russo v. Gardner*, 956 P.2d 98, 103 (Nev. 1998) ("clear and compelling evidence"); *In re Application of Saxton*, 309 N.W.2d 298, 301 (Minn. 1981) ("clear and compelling" evidence).

Such a presumption or heightened burden of proof appears to stem from an understandable concern that frequent name changes are typically not in a child's best interests but could result from the application of a preponderance standard to frequently changing circumstances. That concern is, however, best addressed, not by a presumption against name change or a heightened burden of proof, which would operate even when a parent seeks to change the name of an infant for the first time, but rather by simply allowing courts to consider, as one factor in determining the child's best interests, any previous name changes and the resulting problems that would be caused by any subsequent name change. *See Nellis*, 282 A.2d at 541 (question for court with respect to children who had already experienced one name change was "whether *another* change back to the father's name" would be in "the true interests of the children"). A number of courts appear to have followed this course. *See In re Name Change of J.P.H.*, 2015 S.D. Lexis 78, at *8-9 (S.D. June 10, 2015) (refusing to require proof by "clear and compelling evidence"); *Emma v. Evans*, 71 A.3d 862, 875 (N.J. 2013) (rejecting presumptions); *Spero v. Heath*, 593 S.E.2d 239, 240 (Va. 2004) (no heightened burden of proof).

B. Other Factors May be Relevant Based on Evidence in Individual Cases But Should not be Considered Based on Improper Presumptions.

1. Effect of Change on Relationships with Parents. The best interests of a child typically favor having good relationships with both parents. Presumably for this reason, a number of

jurisdictions list the effect of a name change on the child's parental relationship as one of the mandatory factors to consider. *E.g., State ex rel. Connor H. v. Blake G.,* 856 N.W.2d 295, 301 (Neb. 2014); *Dorsey,* 847 A.2d at 449. The effect of a name change on those relationships should not, however, be included in the list of mandatory factors to be considered in a name-change case because doing so implicitly suggests that a name change is likely to affect the relationship, *cf. In re Marriage of Gulsvig,* 498 N.W.2d 725, 729 (Iowa 1993) (stating, without support, that father's "parental relationship" with child "could be weakened if the child did not bear his surname"), and we are unaware of support for that proposition. *See* "*We Are Family": Valuing Associationalism in Disputes over Children's Surnames,* 75 N.C. L. Rev. 1625, 1699-1709 (1997) (surveying social science research and suggesting that "the perception that a link exists between a child's surname and the strength of the father-child relationship" is unfounded).

Indeed, District law expressly permits a parent to revert to a previous name upon divorce, regardless of whether that will result in the parent having a different last name from the child, *Brown,* 384 A.2d at 633 & n.1 (reversing trial court's refusal to allow adult name change on the basis that "Momma" should have the same last name as her children), which suggests that the District does not assume that this situation is inherently harmful to the parent-child relationship. Anecdotally, we are aware of numerous situations in which it appears irrelevant to the parent-child relationship whether the parent and child share a last name. This Court noted that the father-children relationships in *Nellis* were not harmed by their having different last names, 282 A.2d at 542, 544-45. And both parents here testified that a name change would have no effect on their feelings or actions toward their child. Transcript 15-16, 22. Accordingly, while a court should consider case-specific evidence regarding how a name change would affect one or both parent-child relationships, it should not presume any such effect in the absence of evidence, and,

in particular, should neither presume that having the same last name is beneficial to the parent-child relationship nor accept at face value a parent's self-serving testimony that having a common last name is necessary to preserve or enhance the relationship.

2. Parental Misconduct or Reputation. Some States consider a parent's misconduct and/or community reputation or respect as a mandatory factor in name-change cases. *E.g. State ex rel. Connor H.*, 856 N.W.2d at 301; *Dorsey*, 847 A.2d at 448-50. As noted above, to the extent a parent has engaged in an intrafamily offense that impacts the child, consideration of that fact is a valid means of determining the best interest of a child. District law validates such a consideration, *see* D.C. Code § 16-914(a)(3)(F), and a criminal act directed at the child or the child's immediate family raises unique issues that should be evaluated in determining the child's best interests.

But a more general inquiry regarding a parent's alleged "misconduct," "reputation," or level of community "respect" is ill-advised. These terms are broad and subjective, making them difficult for courts to apply. Especially in the context of divorced parents, allegations regarding misconduct, reputation, or respect are commonplace and might include, for example, claims of infidelity, poor parenting, use of alcohol, and the like, which would appear to have little relevance to the best interests of a child in having a particular last name. Moreover, consideration of these factors would threaten to turn every hearing on a child's name change into an opportunity for divorced parents to attack each other's characters. *See Huffman v. Fisher*, 38 S.W.3d 327, 333-34 (Ark. 2001) (child name change case in which the mother accused the father of misconduct because he "encouraged [the mother] repeatedly to have an abortion, urged her to hide the pregnancy, and ridiculed her appearance," while the father accused the mother of

misconduct because she "continued to play competitive sports [while pregnant], kept the pregnancy hidden from her parents, and failed to obtain prenatal care").

One specific example of parental misconduct that some States consider in this context is the failure to pay child support. *E.g. State ex rel. Connor H.*, 856 N.W.2d at 301; *Dorsey*, 847 A.2d at 449-50. But there does not appear to be sufficient basis for the assumption that a child is harmed by having a last name in common with a parent who failed to pay child support. Instead, the consideration of this factor appears to treat the child's last name as a commodity paid for by child support. *See In re Carter*, 640 S.E.2d 96, 99 (W. Va. 2006) (paternal right to have the child bear the father's last name is a "quid pro quo" for child support). This notion – that the naming rights to a child are bought and paid for through child support payments – is offensive, contrary to the primacy of the child's best interests, and contrary to the conception of child support in the District. *See Sampson v. Johnson*, 846 A.2d 278, 287-88 (D.C. 2004) (visitation should only be denied based on the best interests of the child and not for unrelated reasons, including the failure to pay child support); *see also D.W. v. T.L.*, 983 N.E.2d 1273, 1276 (Ohio 2012) (noting that use of "the father's surname as 'a sort of quid pro quo for the father's financial support' is improper because this preference ignores the mother's parallel duty to support the child and focuses too narrowly on the father") (quoting *In re Willhite*, 706 N.E.2d 778, 781 (Ohio 1999)); *In re Wilson*, 648 A.2d 648, 651 (Vt. 1994).

3. Minor Embarrassment, Confusion, Difficulties, and Harassment. Some States appear to presume that a child having a different last name than the residential/custodial parent will cause subjective harms including embarrassment, confusion, difficulties, and/or harassment. *E.g. State ex rel. Connor H.*, 856 N.W.2d at 301; *Dorsey*, 847 A.2d at 449. *But cf. In re A.C.S.*, 171 P.3d 1148, 1153 (Alaska 2007) (refusing to require consideration of "any embarrassment,

discomfort, or inconvenience that may result if the child's surname differs from that of the custodial parent"); *Spero v. Heath*, 593 S.E.2d 239, 241 (Va. 2004) (name change not warranted based on "a catalogue of minor inconveniences and embarrassment"). This type of presumption does not appear rooted in modern reality, in which some parents choose to have a last name different from one or more of their children. There is no valid basis for presuming that any harm will come from a difference in last names, absent child-specific evidence of such harm.

Moreover, minor inconveniences (like the fact that the child – or the parent – is sometimes referred to by the wrong last name or that the child is sometimes called upon to explain his or her last name or teased) should not justify a name change. Indeed, it would be ill-advised as a matter of public policy for judicial decisions regarding a child's last name to be based on the vagaries of the playground. *Cf. Huffman*, 38 S.W.3d at 333-34 (affirming name-change decision based in part on primary school principal's "expert" opinion that child might suffer "ridicule of his peers" in the form of "teasing" if his last name differed from that of his father).

4. Integration into Household. A number of courts appear to presume that it is in a child's interest to have the same last name as other members of the household in which the child lives. *See, e.g., D.W.*, 983 N.E.2d at 1277 (general presumption that it is not in a child's best interest to have a surname "different from that of the others in the residential household"); *In re Marriage of Schiffman*, 620 P.2d 579, 583 (Cal. 1980) (courts should consider "the identification of the child as part of a family unit"). But it is unclear whether there is a valid basis for this general presumption. Indeed, no harm is presumed when a parent seeks to change last names to differ from that of a child. *See, e.g., Neal v. Neal*, 941 S.W.2d 501, 502 (Mo. 1997) ("[N]o law presumes that it is detrimental for a child to have a name that is different from the parent.");

Moskowitz v. Moskowitz, 385 A.2d 120, 123 (N.H. 1978) ("Mere speculation as to possible embarrassment to, confusion or harassment of, or harmful effect on, the child or children due to the mother's having a different name has been held not to be sufficient reason" for refusing to allow a divorcing mother to change her name, despite the paramount factor being the welfare of the children); *see also Brown*, 384 A.2d at 633 & n.1 (reversing trial court's refusal to allow adult name change based on alleged interests of her children).

Accordingly, while the evidence in an individual case may demonstrate that it is in a child's best interest to share a last name with other members of the child's household, there is no need for a generalized presumption that this will invariably be true. Indeed, the application of such a generalized presumption would necessarily be inaccurate in certain cases and should be eschewed. *See In re Slingsby*, 752 N.W.2d 564, 568 (Neb. 2008) ("no evidence presented that [child] would be more or less likely to identify himself with a family unit with or without a change in his surname"); *Branch v. Quattrocchi*, 793 A.2d 203, 205 (R.I. 2002); *Grad v. Jepson*, 652 N.W.2d 324, 325 (N.D. 2002) (noting possible future change in the family unit).

C. Courts Should not Consider Factors that are Irrelevant or Flow from Unsupported or Gender-Based Presumptions.

1. Preference for Father's Last Name. This Court should explicitly reject the *dictum* in *Nellis* stating that, "generally speaking, children should carry the name of their natural father unless there are countervailing considerations which outweigh this." 282 A.2d at 545. Since *Nellis* was penned 44 years ago, society, families, and the law have changed dramatically. More recently, this Court and the District Council have repeatedly rejected gender-based presumptions in family law generally and when determining the best interests of a child in particular. In rejecting the presumption that a mother should have custody of a child of tender years, this Court stated that "[s]urely, it is not asking too much to demand that a court, in making a determination

as to the best interest of a child, make the determination upon specific evidence relating to that child alone," rather than on "the assumption that female parents are the best parents." *Bazemore v. Davis*, 394 A.2d 1377, 1381, 1383 (D.C. 1978) (en banc). As this Court noted, "a rule of law providing that a mother has the strongest claim to the custody of her child obscures, and indeed may be inconsistent with the basic tenet, overriding all others, that the best interest of the child should control." *Id.* at 1382. This same reasoning precludes any presumption in favor of a paternal last name: a rule of law preferencing a father's last name obscures, and indeed may be inconsistent with the basic tenet, overriding all others, that the best interests of the child should control.

For similar reasons courts in other jurisdictions largely reject a preference for paternal last names. *See, e.g.*, *In re Marriage of Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993) (collecting cases and "agree[ing] with the holdings of other jurisdictions that the presumption that a child bear the surname of his father is outdated and therefore rejected"); *In re Marriage of Schiffman*, 620 P.2d at 581 (noting that, even by 1980, the "bases for patrimonial control of surnames have virtually disappeared").[6]

2. Parental Interests. The preferences of the parents, by themselves, are not a relevant factor here because they reflect the interests of the parents, rather than the interests of the child. *See Workman v. Olszewski*, 993 P.2d 667, 670 (Mont. 1999) (court properly "focus[ed] on the concerns of the child as opposed to a concern with the wishes of either parent"); *In re Wilson*, 648 A.2d at 650 (name-change decision should be based on "the best interests of the child"

[6] *But see In re Carter*, 640 S.E.2d at 99-100 (father is entitled to have his children bear his surname unless termination of father's parental rights is warranted); *Likins v. Logsdon*, 793 S.W.2d 118, 120 (Ky. 1990) (recognizing "a natural father's protectable right to have his children bear his name") (citation and internal quotation marks omitted).

rather than "the custodial parent's preference"); *Hamman v. County Court of County of Jefferson*, 753 P.2d 743, 749 (Colo. 1988) (noting that "the motive and interests of the custodial parent" is a factor considered by some courts but does not go to the child's best interests).

However, custodial parents' opinions are not necessarily irrelevant. As this Court noted in *Nellis*, the parental views are entitled to consideration to the extent that they are evidence of the child's best interest. 282 A.2d at 541, 548 & n.5. Particularly in situations involving a very young child, the custodial parent or parents may provide a court with valuable insight regarding the child's best interests.[7]

IV. THIS CASE SHOULD BE REMANDED FOR A NEW HEARING.

A. The Hearing was Held Under the Premise of the Wrong Legal Standard.

Before the trial below, the Superior Court informed the parties that it would apply the *Mark* factors in ruling on the name-change petition. *See* Pretrial & Scheduling Order 1 n.1 (July 16, 2014). Not surprisingly, the parties appear to have tailored their presentations at trial to those factors, emphasizing issues that should be irrelevant, such as child support payments Mr. Taylor's alleged attempts to visit Lolita, and Ms. Melbourne's alleged failure to allow such visitation. The parties also failed to address important issues including Lolita's identification with her current name both in the community and within herself. In this context, Lolita's best interests would be served by a new hearing, conducted after this Court outlines the proper factors to be considered. Such a hearing would provide both parents with the opportunity to present relevant evidence and would therefore most likely result in the outcome that truly benefits Lolita.

[7] The complex relationship between a parent's preferences and what is best for the child presumably explains why some statutory lists of factors to be considered in determining the best interests of a child include "the wishes of the child's parent or parents," D.C. Code § 16-914(a)(3)(B), while other such lists include no such factor, *see* D.C. Code §§ 16-831.08 & 16-2353.

See BLT Burger DC, LLC v. Norvin 1301 CT, LLC, 86 A.3d 1139, 1148, 1149 (D.C. 2014) (new hearing to avoid "manifest miscarriage of justice").

B. The Merits are Unclear from the Current Record.

Remand for a new hearing is also appropriate because this Court is poorly positioned to weigh Lolita's best interests in the first instance, and the evidence presented below is equivocal.

Ms. Melbourne presented a single reason for requesting the name change: her difficulties in establishing that she was Lolita's mother. Transcript at 11 ("I've been having issues establishing . . . that I'm her parent."). She provided two examples: (1) an instance in which the wrong last name was put on a form for a childcare center that was not Lolita's usual center, causing difficulty and delay during the pick-up process, and (2) an instance in which a woman apparently named Ms. Taylor was taken to see Lolita in the hospital. Transcript 4. It is unclear whether these two instances are directly relevant, as they appear to be instances in which the fact that Lolita's last name is not Melbourne had an impact on Ms. Melbourne, rather than an impact on Lolita. *See* Melbourne Brief 10 (referring to the childcare issue as "an inconvenience for the Plaintiff and "confusion for the daycare staff," but not mentioning any direct effect on Lolita). While it is possible that these events directly impacted Lolita, it is also possible that any such impact was insufficiently significant to justify a name change. *See McMahon v. Wirick*, 762 S.E.2d 781, 784 (Va. 2014) (characterizing similar problems at school and with health insurance as minor, noting that they affected the parent, rather than the child, and deciding that they did not justify a name change).

In her brief, Ms. Melbourne asserts that "a name change would allow the child to identify with a family unit," consisting of Ms. Melbourne herself, and that the change would result in Lolita sharing a last name with her biological sister and grandparents as well. Melbourne Brief

11-12. But this argument is not factually supported by evidence from the hearing and appears to be based on the presumption that having the same name as other household members is beneficial, rather than on any evidence that this presumption would be true here. Indeed, Ms. Melbourne asserts that Lolita "has identified with the family unit and has a strong bond with the Plaintiff," Melbourne Brief 12; *accord id.* ("[T]he child has a strong family unit with the Plaintiff"), despite so far in life *not* sharing last names with the only other member of her household – her mother.

At the same time, Mr. Taylor's reasons for opposing the name change do not appear to be valid. One reason that he cites is that he and Ms. Melbourne had an agreement that he would choose Lolita's last name and Ms. Melbourne would choose the other names. Transcript 21. That reason has nothing to do with Lolita's best interests and should be ignored. Mr. Taylor also testified that he wanted to remain in Lolita's life, *id.*, but failed to explain how his desire in that regard meant that it would be in Lolita's best interests to retain his last name especially given his statement that he would not treat Lolita differently if she had a different last name, *id.* at 22. Mr. Taylor noted that he paid child support and had cared for Lolita at times, *id.* at 22-25, 31, 35-38, 42-43, but similarly failed to connect these actions with Lolita's interests in retaining his last name. Finally, Mr. Taylor stated that if Lolita's last name were changed "she won't know who I am," *id.* at 25, but failed to explain how having a common last name would enable her to identify him as her father.

It is not surprising that the evidence presented by the parties makes a decision here difficult. That evidence was presented based on the predicate that the Superior Court would apply the *Mark* factors. Should this Court reject the *Mark* factors, as proposed above, a new

hearing should be held to provide the court with clearer and more relevant evidence upon which to base this important decision in the first instance pursuant to the proper legal standard.

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be vacated and the matter should be remanded for a new hearing and application of the proper best-interests-of-the-child standard as articulated by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* to be delivered by first-class mail, postage prepaid, the 30th day of June, 2015, to

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