The Use of Hyphenated Names for Children in Broken Marriages: *Mahoney v Mckenzie*

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Introduction

In *Mahony* v *McKenzie*,[1] Warnick J considered the use of a hyphenated surname to be an appropriate remedy in relation to a dispute as to which surname was to be used by a child of a failed marriage. Although a hyphenated name is not the panacea for every dispute, it is appropriate where one parent has the everyday care and control of the child and the other continues to play a prominent parental role in the child's life. It was held that in determining whether to use such names, the 'best interest of the child' is pivotal.

The Facts

When the husband, Mr Mahony, and the wife, Ms McKenzie, were married on 14 May 1988 the wife commenced using her husband's surname. On 11 October 1988, the Mahonys had a child (Jake) whose surname was duly registered as Mahony. When Jake was about nine months old, the parties separated — Jake staying with his mother who, for most of the time of separation, resided with her parents and brother at Noosa, in Queensland. Pursuant to consent orders made on 7 July 1992 in the Family Court Brisbane, the wife was to have sole custody of Jake, the husband having access on alternate weekends. There was also to be joint guardianship.

In the interim, the wife had stopped using the name 'Mahony' reverting to her maiden name upon separation, and eventually began using the name 'McKenzie' with regard to Jake. His mother said that one of the reasons for changing Jake's surname was that he strongly identified with her family and the name 'McKenzie'. The husband claimed that, notwithstanding his position as a joint guardian, he had not been consulted by the wife about the change of Jake's surname which he believed was a further attempt to limit his involvement in his son's life. Although both parties claimed Jake closely identified with their individual surnames, neither party produced any evidence to support such claims. The wife stated the reason she enrolled Jake at the pre-school under the surname 'McKenzie' was because she believed confusion would be minimised if Jake and she shared the same surname. When she became aware of her husband's objections she reconsidered the situation and proposed to use the surname 'McKenzie-Mahony' for Jake.

The husband instituted proceedings seeking orders concerning access, as well as orders ensuring the use of the surname 'Mahony' for Jake. The question of access was resolved by agreement which left the issue of the surname to be determined. This problem was addressed by Warnick J who considered the following issues:

1. The significance of registration;
2. The question of discrimination in the choice of a family name for the child; and
3. The use of combined surnames.

1 Unreported, Family Law Court of Australia, No Br 9351 of 1989, Warnick J, 18 August 1993.

The Decision

The significance of registration

At the time of Jake's birth, in practice, a child would be given the surname of the person registered as the child's father pursuant to s 27A of the *Registration of Births, Deaths and Marriages Act* 1962 (Qld) (hereafter the 'Registration Act'). Warnick J found that *merely* (his Honour's emphasis) because the wife had herself adopted the husband's surname whilst cohabitating with him, this did not mean she was a party to the registration of the child under that surname. His Honour also opined that, whether or not such a decision was compelled by law during the cohabitation of the parties, once the cohabitation broke down, such decision was not 'binding' upon the parties as this form of registration is of little or no significance. Warnick J found that:

> The real questions are as to the degree of identification of the child with the registered surname, and as to any difficulties or embarrassment for the child, if using a surname other than that by which he or she is registered.[2]

His Honour turned his attention to the 1991 amendments to the *Registration Act.* The amendments to s 27A and insertions of ss 27C and 27D provide the opportunity for parents in certain circumstances to alter or cause the registration of the surname of a child to 'a surname formed by combining the surnames of the mother and the person registered as the father of that child in any separation order and whether or not joined by a hyphen'. Warnick J relied on these provisions and ordered the register be altered to record the hyphenated surname of 'McKenzie-Mahony'. However, his Honour expressed the view that: 'The degree of identification in a child of Jakes's age with any particular name is less likely to be problematical if there is a change, than if he were somewhat older. Moreover, both surnames of his parents have been used in respect of him'.[3]

The question of discrimination in the choice of a family name

Counsel for the wife referred the court to the *Sex Discrimination Act* 1984 (Cth) and to Article 16 paragraph 1(g) of the *Convention on the Elimination of all Forms of Discrimination Against Women* (hereafter the 'Convention') in support of her case. However, it was held that no arguments were developed to show how such provisions might impact upon the court's decision. Warnick J found the provisions and Article referred to demonstrate the federal legislature's commitment to equal rights of husbands and wives in the choice of a family name. However, his Honour failed to see how the *Sex Discrimination Act* 1984 affected the discharge of the Family Court's judicial responsibilities. Warnick J said:

> I cannot see that it would impinge upon my decision-making process, which must be to weigh those factors bearing upon the best interests of the child, except insofar as the Act might require me not to give preference to the position of one party as against the other, on the basis that one party has an exclusive or more significant parental right in relation to choice of the child's surname, than does the other party.[4]

Warnick J then turned to Article 16(d) of the *Convention* which provides measures to ensure 'in all cases the interests of the children shall be paramount'. His Honour referred to *Chapman* v *Palmer*[5] as an authority which put aside 'any suggestion that "prima facie" a legitimate child should continue to bear the surname of the father as a matter of principle'.

2 *Id* 5.
3 *Id* 5.
4 *Id* 7.
5 [1978] FLC 90-510.

The use of combined surnames

Warnick J listed a number of benefits which may arise from the use of a hyphenated surname for the child in question:

1. In the present case, the wife was happy to use the hyphenated name. This, the learned judge found, would avoid any resentment by the wife (should the court order that only the husband's surname be used) which could lead to tension perceived by, or communicated to, the child.
2. Similarly, the husband would be less dissatisfied than if only the wife's surname were used for the child.
3. Where a child identifies with each parent's surname, a hyphenated name would allow the child to retain a connection with each parent.
4. The use of the hyphenated surname is in accord with the reality of the child's life as it may facilitate the recognition and acceptance by others of the child's circumstances.
5. It offers the child 'a middle road in times of rapidly changing social attitudes...[and] provides him with a non-contentious platform from which he may choose to move in one direction or another, or to maintain the compromise'.

Warnick J considered *Skrabl* v *Leach*[6] which involved a six year old child who, until the time of her mother's remarriage, used and was registered in her father's name. Upon the subsequent re-marriage, the wife changed both her name and the child's name to that of her new husband. Warnick J found that case quite different to the one before him and made no comment other than to the significance of custom. His Honour felt quite satisfied that, since the legislation now provides for combined surnames, their use would not be a source of embarrassment for the child even though its use may not conform with the custom which favours the use of only one parent's name. Some reservations were expressed, however, about the general use and adoption of hyphenated names, for example, in the situation where two people, both with hyphenated names, decide to marry. Nevertheless, his Honour concluded that where there is no particular attachment to one surname to the exclusion of the other, the use of the hyphenated surname is in the child's best interest.

Conclusion

By adopting a middle of the road approach in resolving the issues which would have been unheard of one or two generations ago, Warnick J has recognised one of the problems faced by parents in today's society of equal opportunity. As a result of 'competing, unresolved assertions, sparse evidence and the child's tender years', Warnick J considered it was a question of general principle when determining which surname is best used in the child's interest. It seems the Family Court will be the proper forum in which to argue questions of appropriateness of hyphenated names relating to children of broken marriages. The criteria as to when it is appropriate to use hyphenated names have also been addressed and the ability to use this simple and equitable remedy is to be applauded.

6 [1989] FLC 92-016.