VERMONT SUPERIOR COURT
Rutland Unit
83 Center St
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case Nos. 21-CV-01344
and 21-CV-1340

Joshua Mulholland v. Aimee Guillette

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment (Motion: 1)
Filer: Stacey A. Adamski
Filed Date: August 31, 2021

This is an appeal from the Probate Division, which granted Aimee Guillette's petitions to change the last name of the parties' two children, ages 6 and 8, from Mulholland to "Mulholland Guillette." Father, Joshua Mulholland, opposed the petitions and argues here that the Probate Division did not properly apply the law in granting the petitions.

Although the summary judgment motion is framed in terms of the lower court having erred, this court's review is de novo. *See* 14 V.S.A. § 3080 and V.R.C.P. 72, Reporter's Notes ("As in the past, the appeal is a trial de novo on those questions. See Whitton v. Scott, 120 Vt. 452, 144 A.2d 706 (1958)"). The parties have agreed that the court may rule based upon the evidence presented below rather than repeating it in this court—hence the idea of resolving this on summary judgment. The court will therefore make a de novo determination based upon the record, while also considering the issues Mulholland has raised.

Who May File for a Minor's Name Change

The name change statute allows only a person who "under 14 V.S.A. chapter 111, may act for" the child. 15 V.S.A. § 812. Mulholland says this chapter "limit[s] the identity of a person who can file a Petition on behalf of a minor child," and that "[a]s the joint legal custodian, Aimee should have been prohibited from proceeding on her Petitions." Motion at 5. However, she does not cite any particular provision of Chapter 111 for this point. The only provision the court can find that has any relevance states that if competent, "the father and mother of a legitimate minor child shall be joint guardians of such child." 14 V.S.A. § 2641. However, the parents here were never married. The statute does not define "legitimate," but the historical meaning is a child born during a marriage. *See, e.g.*, People ex rel. R.T.L., 780 P.2d 508, 515 n. 11 (Colo.1989)("the presumption that a child born during wedlock is the legitimate child of the marriage was one of the strongest presumptions known to the common law"), quoted in Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 58, 180 Vt. 441. Thus, this provision does not apply. Instead, "an unmarried woman who bears a child shall be guardian of such child until another is appointed." 14 V.S.A. § 2644; In re S.B.L., 150 Vt. 294, 300 (1988) (quoting prior version of this section, and noting that "[t]he limited position of the biological father of a child born out of wedlock appears elsewhere in our law.").[1] Although Guillette is now married to someone else, this provision clearly refers to her status at the time of the child's birth. The statute does not provide for any different

[1] A more recent case explains that in S.B.L., "[b]ecause he was not married to S.B.L.'s mother, the father was unable to take advantage of a statute, 14 V.S.A. § 2641, declaring the father and mother, if competent, the joint guardians of a 'legitimate minor child.'" Boisvert v. Harrington, 173 Vt. 285, 298 (2002).

result when a custody order exists. Thus, Guillette had the authority to initiate this action.

Facts

The transcript of the March 2021 hearing establishes the following facts by a preponderance of the evidence. The parties were never married. They gave the children, Jayden and Amaya, the last name of Mulholland when they were born. The parties split up when the children were ages one and three, respectively. The children were ages six and eight at the time of the hearing. Guillette has now been married to her wife Brandy for four years and they both use the same last name. The children are with them just under 75 % of the time and with Mulholland a bit more than 25% of the time.

When asked why she wished to change the girls' names, Guillette said it was because they send things like Christmas cards from "the Guillette Family," that mail for the family comes to "the Guillettes," and the children question why their names are not used. The girls have asked why they are not part of the Guillette family. When told they are, they have asked why their names are different.[2] They also write both parents' last names on school papers—"Mulholland Guillette." Guillette has also told Mulholland she wants the children to have her name because it is the last legacy she has of her father. She denies that she has instigated the use of both names by the girls, although

[2] Father's counsel apparently argues that these questions from the children are hearsay. Questions are generally not "statements offered for the truth of the matter" stated. State v. Leroux, 2008 VT 104, ¶ 24, 184 Vt. 396; United States v. Coplan, 703 F.3d 46, 84 (2d Cir. 2012)("questions are not 'assertions' within the meaning of Rule 801"). There can be certain questions that are offered to prove facts contained within them, such as "can you give me that pocket watch sitting on your desk?" Com. v. Parker, 104 A.3d 17, 23 (Pa. Super. 2014). However, there are no assertions of fact within the children's questions that are being offered here.

apparently she also did not correct them and tell them they should be using their legal name, Mulholland. She is the one who taught them how to spell Guillette.

There is nothing about the Mulholland name that has bad associations for the children. They see several relatives with the Mulholland name on a regular basis—their paternal grandparents and great-grandmother. Father has not discussed the issue of the name change with the children. The only reason he gave for opposing the change was that he did not want to burden them with always having to write such a long name. He also foresees that they will start dropping Mulholland and use only Guillette. He does see that they use both names on schoolwork. He agreed it was their choice to do so. He testified that even if the children did want to change their names, he would not agree.

When she filed the petition in the Probate Division, Guillette explained the basis for her request as follows:

> The child's father and myself are no longer together. The child lives mainly with myself as the custodial parent, and I would like the child to share my name as well. The child has also requested both names be added.

Petitions, Dockets 21-PR-793 and 21-PR-798.

Discussion

The statute at issue is 15 V.S.A. § 812. It provides that a person with authority under 14 V.S.A. Chapter 111 may petition the Probate Division to change a minor's last name. Although it fails to set forth any standards to apply, caselaw does so. The test is whether the change is in the best interests of the child. In re Wilson, 162 Vt. 281, 284 (1994). Wilson also sets forth a number of factors that may be considered, but notes that the court "has broad discretion" in determining which matters are appropriate to consider in a particular case. Id. at 285-86.

The best interests analysis "starts with the name the parents have given the child, whether that surname be maternal, paternal, a combination of the both parents' surnames, or of some other origin, and provides that a change in the child's surname should be granted only when the change promotes the child's best interests." Wilson, 162 Vt. at 285. The case sets forth a non-exclusive list of potential issues a court may consider when determining the best interests of the child, including:

> the child's age and maturity; the length of time the child has used the surname; the effect of a surname change on the preservation and development of the child's relationship with each parent; whether the child might feel embarrassment or discomfort bearing a surname different from the rest of the family; whether any negative association or social stigma has attached to either the current or proposed name; the motives of the moving parent; and any other factor relevant to the child's best interest.

Id. Other courts have added factors such as "the extent to which a child identifies with and uses a particular surname." In re Eberhardt, 920 N.Y.S.2d 216, 221 (N.Y. App. Div. 2011).

The children have had the name Mulholland from birth, although the parties could have chosen Guillette-Mulholland or Mulholland-Guillette. The fact that parents are no longer together—the first reason Mother put on her petitions—is certainly not a reason to change the names. There is no evidence that the children are embarrassed by the name Mulholland, there are no negative associations with the name, and in fact they have good relationships with other Mulholland family members whom they see regularly.

The real question here is the significance of the children's questions about their names and their choices to use both names at school. They have chosen to write both names on school papers. Mulholland agreed that it was a choice by the girls. His counsel

argues that the children are too young to consider their preferences, and if we were talking about having them testify about what they wanted, the court would agree. However, we are talking about their conduct. Father's counsel suggests that because there is a history of custody litigation here, Mother may have put the children up to this, but that is pure speculation unsupported by any evidence. Moreover, Father's only reason for saying the change would not be in the girls' best interests is that it is a long name to write—yet they are already writing it, apparently without any problem.

Mother could perhaps have avoided the issue by better explaining the matter to the girls when they raised questions about the difference between their names and those of their mothers. She could also have made a point of signing Christmas cards "from the Guillettes and Mulhollands." However, where we are now is that the children are using the two names, apparently value them both, and as far as the evidence shows have chosen to do so on their own. They have asked why they are not part of the Guillette family. The court concludes that the children "identif[y] with and use[] a particular surname"—Eberhardt, 920 N.Y.S.2d at 221—one that combines both parents' names. They also appear to have discomfort about the fact their last names bear only the name of Father's family unit and not Mother's family unit. Wilson, 162 Vt. at 285. This is not a request to eliminate Father's surname, but to add Mother's so that the children bear both families' names.

The court concludes, as did the Probate Division, that it is in the children's best interests to legally change their names to match the names they have already chosen to use, which combine both parents' surnames.

Order

The appeals are denied. The Probate Division's orders are affirmed.

Electronically signed February 3, 2022 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge