KITSAP COUNTY DISTRICT COURT

NAME CHANGES

A Judge *Pro Tempore* Primer

January 29, 2018

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Executive Summary – What's In A Name?

William Shakespeare asked this very question. Shakespeare concluded that regardless of the name, a rose would smell as sweet.[1] While it is probably true that a person is the same person regardless of the name he or she was given or chooses to take, a person's name has great significance and importance to that person as well as those known to him or her.[2]

This Primer explores the history of names, the legal process for naming a child, and the more complicated legal questions which may arise when a change of a person's name is desired.

The Common Law and Names

Washington statutes and caselaw provide that the common law, or judge-made law, shall be the rule of decisions in all Washington courts so long as it is not inconsistent with the Constitution or federal or state laws. While the legislature has the power to supersede, abrogate or modify the common law, Washington courts are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. Recognition of the significance of the common law is so important in Washington that a statute in the derogation of the common law must be strictly construed and no intent to change the common law will be found, unless it appears with clarity.

Judicial recognition of names and name changes traces its roots back hundreds of years. At common law, a parent was free to give his or her child any name. If the child was born out of wedlock, the mother generally chose the child's name. Surnames have a later history, and were not considered of controlling importance until the reign of Queen Elizabeth.

At common law, an adult person could change his or her name so long as the change was not done for any fraudulent purposes, and did not infringe on the rights of others.

A minor child also had a common law right to change his or her name without parental permission or even knowledge, so long as the child was of sufficient age and maturity to make an intelligent choice.

A current example of a common law name change involves marriages. Historically, a newly married bride chose to take her husband's surname. In the 1970s, brides began hyphenating their surname to include the husband's surname. Sometimes, the husband also did so. While a married couple could choose to seek a name change pursuant to statute, the common law method generally worked well without the necessity of a court order. Of course, one's name on government documents such as social security and driver's license or identification has to be changed. In the married couple context, government agencies generally change the old name to the new married

[1] "What's in a name? That which we call a rose by any other name would smell as sweet." WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2; *In the Matter of Botany Unlimited Design and Supply, LLC*, 198 Wn.App. 90, ¶21, n.5, *review denied*, 188 Wn.2d 1021 (2017).

[2] In 2017, 369 name change petitions were filed in Kitsap County District Court. For each of those petitioners, the desired new name had enough significance such that the petitioner chose to come to court to change the name.

name upon presentation of a certified copy of the marriage document. A court order changing a new spouse's name is generally not necessary to change government documents.

RCW 4.24.130's Name Change Subject Matter Jurisdiction

Washington has had a name change statute since 1877. For the first 100 years of Washington's name change statute, only superior courts had statutory power to change a person's name. The statute is codified in RCW 4.24.130.

In 1991, the legislature transferred all RCW 4.24.130 name change subject matter jurisdiction from superior courts to district courts.

In 1995, the legislature again amended RCW 4.24.130 and transferred RCW 4.24.130 name change subject matter jurisdiction back to superior court in the rare circumstance where a domestic violence victim wants his or her court file sealed. Since 1995, in all other RCW 4.24.130 name change actions, only district courts have subject matter jurisdiction.[3]

Since 1991, RCW 4.24.130(1) has read as follows –

> (1) Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the district court of the judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.[4]

Except in the rare situation where a domestic violence victim wants a name change court file sealed, district courts have sole subject matter jurisdiction to hear a name change action under RCW 4.24.130.

RCW 4.24.130 Supplements the Common Law

RCW 4.24.130 creates three separate name change actions – (1) one for an adult person who wants to change his or her name; (2) one for a minor child who wants to change his or her name; and (3) one for a person who wants to change a minor child's or ward's name.

RCW 4.24.130 is not mandatory because the statute supplements the common law. RCW 4.24.130 does not supersede, abrogate or modify the common law. A person may choose to change his or her name by resorting to common law principles, or seek judicial (governmental) permission by a court order in accordance with the statutory provisions.

RCW 4.24.130 Requires the Exercise of Judicial "Discretion"

RCW 4.24.130 sets out the standard the legislature expects a court to use when deciding whether to grant a name change under the statute – judicial "discretion." Judicial discretion means a sound

[3] Superior courts have subject matter jurisdiction to change the name of a "party" in a dissolution action. RCW 26.09.150(3). Superior courts also have subject matter jurisdiction to change an adoptee's name in an adoption action. RCW 26.33.250(1)(d).

[4] Emphasis added.

judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of a trial court is a matter of discretion, an appellate court will not disturb the decision except on a showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Since RCW 4.24.130 supplements the common law, judicial discretion in a statutory name change action must include the common law requirements previously mentioned. A person's name change petition under the statute should be denied where the name change is done for any fraudulent purpose, or where the change would infringe upon the rights of others.

In addition to those common law requirements, a court in a minor child name change action where a minor wants to change his or her name must deny the petition unless the court finds that the minor is of sufficient age and maturity to make an intelligent choice to change the name.

But a district court is not limited to common law name change factors when exercising its judicial discretion under RCW 4.24.130. Depending upon the name sought, a court may also have to consider whether it should lend the Great Seal of the State of Washington to the proposed new name.[5]

"Best Interests of the Child" is Not the Proper District Court Judicial Standard for RCW 4.24.130 Minor Child Name Changes

Kitsap County District Court has experienced a recent trend where many individuals are petitioning to change their first and middle names to names generally associated with the opposite gender. For example, Jane Sally Smith submits a name change petition seeking to change the birth name to John David Smith because he identifies with the male gender.

Where the petitioner is an adult, and assuming the petitioner satisfies common law requirements which are typically stated in the petition, this Court grants the name change without a colloquy on the record concerning the underlying reasons why the petitioner identifies with a gender. Typically, the petition states a reason such as – "I want my name changed to my identity." Nothing more is required by this Court. The common law is satisfied. The petition is granted.

This Court follows the same process where the petitioner is under age 18, with the only additional common law requirement that the court determine whether the minor child is of sufficient age and maturity to make an intelligent choice. Petitioners of high school age routinely are able to demonstrate their maturity.

The gender name change process is the same for seventeen year old Mr. Smith as it would be if Mr. Smith was an adult petitioner. Seventeen year old Mr. Smith's name change petition is granted. His birth name of Jane Sally Smith is changed to his desired new name of John David Smith. No colloquy occurs with Mr. Smith on the record concerning why he identifies with the male gender, nor a discussion about whether the name change is in Mr. Smith's best interests.

[5] E.g. Obscene names, racial epithets and slurs, and fighting words.

Some Washington district courts believe, based upon dicta in two Washington appellate cases, that a district court is required to determine whether a proposed name change is in the "best interests of the child" before granting a request to change a minor child's name.

In the minor child seeking to change his or her name's gender situation, to satisfy the "best interests of the child" standard, a court by necessity has to delve into the reasons why the child seeking a gender change of a first and/or middle name wants to do so. Such a discussion in an open court includes why or if the child believes he or she is transgender, the wisdom of a gender name change, the impact of the gender name change on the petitioner, the family, and siblings, the parents' wishes, etc.

In the parent petitioning to change his or her child's name (typically the surname) situation, to satisfy the "best interests of the child" standard, an open court discussion must occur concerning many personal factors about the child, the child's family situation, and potentially the non-petitioning parent's involvement with the child.

This Court concludes that the dicta in these two appellate cases in support of a "best interest of the child" standard for an RCW 4.24.130 minor name change was abrogated in 1991 by changes the legislature made to RCW 4.24.130 when the legislature transferred name change jurisdiction from superior courts to district courts.

The proper RCW 4.24.130 standard when determining whether to grant a name change petition is judicial "discretion." This is the appropriate statutory standard for district courts regardless of the age of the person whose name will be changed. This Court will not use the "best interests of the child" standard when deciding RCW 4.24.130 name change actions.

Notice to Non-Parties of a Name Change Action

RCW 4.24.130(2) and (3) require petitioners to give notice at least 5 days prior to a name being changed in two limited circumstances – (1) to the Department of Corrections when the petitioner is under the jurisdiction of DOC; and (2) to the sheriff and Washington State Patrol when the petitioner is required to register as a sex offender.

No other notice is statutorily required to be given before a name may be changed in an RCW 4.24.130 name change action. Significantly, RCW 4.24.130 does not require a petitioner to give notice to the other parent when seeking to have their minor child's name changed.

What Is a Trial Court's Role When a Law May Violate the Constitution?

This Primer was initiated in response to a question concerning this Court's role when a parent petitions to have his or her child's name changed.[6] RCW 4.24.130 clearly provides only two circumstances wherein a petitioning person must provide advance notice of a possible name change – a person under Department of Corrections' jurisdiction, and a person required to register as a sex offender. Notice to a non-petitioning parent when his or her child's name may be changed is not one of those circumstances.

Does RCW 4.24.130's failure to require notice to a non-petitioning parent violate that person's Due Process rights? The answer is unclear.

A fundamental aspect of the Due Process Clauses of the federal and state constitutions is the notion that a person is entitled to notice and a meaningful opportunity to be heard where the person's life, liberty or property interest is at stake.

No Washington appellate court has addressed the constitutionality of RCW 4.24.130, making this issue one of first impression. Only a few states nationally have addressed this issue. A couple of states have held their statutes violated the non-petitioning parent's Due Process rights because the non-petitioning parent was entitled to notice. The sources for these holdings include the common law, a finding that the non-petitioning parent has a property interest in his or her child's name, or simply a general fairness perspective.

Other states have held that a non-petitioning parent was not required to be notified because a parent does not have a Due Process property interest in his or her child's name.

An ancient principle in the United States is that courts have a duty to apply the law in effect at the time of a decision. Washington's Code of Judicial Conduct includes a similar provision, and prohibits judicial action even where the judge disagrees with the law in question. A court's duty to apply the law in effect at the time of its decision also prohibits a court from amending statutes by judicial construction.

Even if RCW 4.24.130 violates Due Process because the statute does not require notice to the non-petitioning parent, the remedy is to declare the statute unconstitutional for all persons seeking a child name change action. The remedy is not for the court to require the petitioning parent to give notice to the non-petitioning parent. A court must leave to the legislature's capable discretion the decision whether to amend an unconstitutional statute and require notice to a non-petitioning parent.

An individual's constitutional rights are critical to the liberty every American enjoys. But enforcement of those rights must be sought by the individual who claims a violation of the Constitution. In this context, any constitutional issue should be raised by a non-petitioning parent

[6] The issue of a non-petitioning parent's right to notice and an opportunity to be heard in an RCW 4.24.130 child name change action was raised by an attorney who practices domestic law and frequently serves as a judge *pro tempore* for this Court. We are grateful for the time and effort made by this attorney, including her impressive briefing and legal analysis.

Although we disagree with her suggestion that we sua sponte impose upon a petitioning parent the requirement of providing notice to a non-petitioning parent before changing their child's name, our disagreement is one of the proper role of a trial court to resolve an issue rather than the underlying policy and perhaps Due Process concerns of the fairness to a non-petitioning parent to change his or her child's name without prior notice and an opportunity to be heard.

claiming a violation of his or her Due Process rights, not by this Court sua sponte in chambers with no opportunity for the petitioning parent to be heard.

Our system of justice requires the judicial branch, unlike the other two branches, to generally respond only after one brings a matter to the court's attention. Consistent with the role required of the judicial branch of government, this Court will not require a petitioner in an RCW 4.24.130 name change action to do any more or less than what is legislatively required by the statute.

Conclusion

A significant majority of RCW 4.24.130 name change requests are proper, and should be granted. Judges *pro tempore* are encouraged, though, to take a recess and discuss the issue with a judge before making a decision to deny a name change petition. The common law and RCW 4.24.130 strongly encourage granting a name change petition. While denial may be appropriate under the circumstances, a second opinion may be a wise option in those rare cases.

It is likely this Primer, the benchcard and/or forms will be updated in a few months as parties and other courts examine the name change issues discussed, and present additional information and analysis not considered herein.

Litigation is not precluded. The Kitsap District Court presents this primer to our judges *pro tempore* to assist them in making proper rulings in the statutory area known as name change actions.

The Common Law

The common law of England, including the English statutes in force at the time of the Declaration of Independence, continues to be the law of this state, unless modified by statute.[7] The legislature recognized the importance of the common law when Washington became a state. RCW 4.04.010 reads –

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

The legislature requires Washington courts to take judicial notice of the common law. RCW 5.24.010 reads –

> Every court of this state shall take judicial notice of the Constitution, common law, civil law, and statutes of every state, territory and other jurisdiction of the United States.

[7] *In re Hudson*, 13 Wn.2d 673, 685 (1942).

The common law, or judge-made law, is not static. It is consistent with reason and common sense. The common law "owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems."[8]

Washington's Supreme Court, early in its history, construed RCW 4.04.010 to mean that, in the absence of governing statutory provisions –

> [T]he courts will endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, but will not blindly follow the decisions of the English courts as to what is the common law without inquiry as to their reasoning and application to circumstances…
>
> The common law grew with society, not ahead of it. As society became more complex, and new demands were made upon the law by reason of new circumstances, the courts originally, in England, out of the store-house of reason and good sense, declared the "common law." But, since courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what is the common law, notwithstanding current English decisions, especially upon questions involving new conditions.
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> Therefore we have the common law as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each. And we understand by [RCW 4.04.010] that, where there are no governing provisions of the written laws, the courts of the late territory and of this state are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, but not that the decisions of English courts are to be taken blindly, and without inquiry as to their reasoning or application to the circumstances.[9]

The legislature has the power to supersede, abrogate, or modify the common law. But Washington courts are hesitant to recognize a statutory abrogation of the common law absent clear evidence the legislature intended to do so.

> In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. The legislature has the power to supersede, abrogate, or modify the common law. However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law.
>
> "It is a well-established principle of statutory construction that '[t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'"

[8] Senear v. Daily Journal-Am., a Div. of Longview Pub. Co., 97 Wn.2d 148, 152 (1982) (citations omitted).

[9] *Sayward v. Carlson*, 1 Wash. 29, 40-41 (1890) (citations omitted) (paragraphs added for ease of reading).

> A law abrogates the common law when "the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force."
>
> A statute in derogation of the common law "must be strictly construed and no intent to change that law will be found, unless it appears with clarity."[10]

The Common Law And Names

Today, a person's legal name consists of a given name,[11] usually chosen by the parents[12] at or near the time of birth, and a surname[13] derived from the common name of one or both of the child's parents.

Surnames have not always existed, and today are not universal in all cultures. This tradition arose separately in different cultures. In Europe, surnames became popular in the Roman Empire and expanded throughout Europe. During the Middle Ages, this practice died out but gradually re-emerged with the use of names indicating a person's occupation or area of residence.[14]

In England, surnames were unknown until the time of William the Conqueror (1066-1087), and did not come into general usage for centuries. Surnames were not considered of importance until the reign of Queen Elizabeth (1558-1603).[15]

> The surname, in its origin, was not, as a rule, inherited from the father, but was either voluntarily adopted by the son or conferred upon him by his neighbors. In consequence, father and son did not always bear the same surname, which circumstance was not deemed of importance, as each not uncommonly had more than one. But a person could have but one Christian name. In modern times the surname has become the principal name, instead of the given name.[16]

Fundamentally, names were not inherited. They were something people chose for themselves. "There [was] no such thing as the 'legal name' of a person in the sense that he may not lawfully adopt or acquire another. By the common law a man may name himself, or change his name at

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[10] *Potter v. Washington State Patrol*, 165 Wn.2d 67, ¶11 (2008) (citations omitted) (paragraphs added for ease of reading); *State v. Kurtz*, 178 Wn.2d 466, ¶11 (2013).

[11] Also known as a first name or forename.

[12] Parents have a common law right to give their child any name they wish. *Jech v. Burch*, 466 F.Supp. 714, 719 (D.Hi. 1979).

[13] Also known as last name or family name. While in the English-speaking world a surname is commonly placed at the end of a person's full name, in many parts of Asia as well as elsewhere the family name is placed before a person's given name. In most Spanish-speaking and Portuguese-speaking countries, two or more surnames must be used.

[14] **Wikipedia**: The Free Encyclopedia, Surname, http://en.wikipedia.org/wiki/Surname (last visited Jan. 9, 2018).

[15] Note, *What's in a Name?*, 2 N.Y.L.Rev. 1, 1-2 (1924) (citations omitted); *Henne v. Wright*, 904 F.2d 1208, 1217-18 (8th Cir. 1990), *review denied*, 498 U.S. 1032, 111 S.Ct. 692, 112 L.Ed.2d 689 (1991) (Arnold, C.J., concurring in part and dissenting in part) (citations omitted).

[16] *Id.*

will, and this without solemnity or formality of any kind; or he may acquire a name by reputation, general use or habit."[17]

This early name tradition did not restrict one's own choice of a surname. A person could freely select any name, whether or not it was a parents' surname. "The ancient custom was for the son to adopt a surname at will, regardless of that borne by his father." Even after that custom fell into disuse, and people began to automatically assume their father's surname, "there [was] nothing in law prohibiting a man from taking another name if he chooses."[18]

> Names were people's own business, not the government's. One's name did not have to be that of a legally recognized parent.[19]

The Common Law And Changing One's Name

At common law, a person had a right to change his or her name without legal formality or governmental intervention. [20] A "person is free to adopt and use, absent a statute to the contrary, any name that he or she sees fit so long as it is not done for any fraudulent purposes and does not infringe upon the rights of others."[21]

Even today, a frequent use is made of the common law to change a name following the historical practice of a wife choosing to take her husband's surname after marriage.[22]

A minor child also had a common law right to change his or her name without legal formality. Under the common law, a minor child may change his or her name, without parental permission or notice, so long as the child is of sufficient age and maturity to make an intelligent choice to change his or her name.[23]

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[17] *Id.*

[18] *Henne*, 904 F.2d at 1218 (citations omitted).

[19] *Id.*

[20] *Lee v. Ventura County Superior Court*, 9 Cal.App.4th 510, 514 (1992).

[21] *Doe v. Dunning*, 87 Wn.2d 50, 53 (1976); AGO 1928 at 507-8.

[22] To change a name on one's social security card, the person must prove a legal name change. Documents the Social Security Administration will accept include – marriage document, divorce decree, Certificate of Naturalization showing a new name, or a court order for a name change. *Your Social Security Number and Card* pamphlet, Social Security Administration Publication No. 05-10002, at 7.

To change a name on one's Washington's driver's license or ID card, the person may prove name change by a certified marriage license, court order, divorce decree, original birth certificate or other court or legal action. RCW 46.08.195, RCW 46.20.035 and DOL website at "Change your name: Driver licenses and ID cards."

In both situations, consistent with the common law, a court-approved name change order is not required.

[23] *Laks v. Laks*, 540 P.2d 1277, 1279 (Ariz.Ct.App. 1975), *cited with approval by Hunta v. Hunta*, 25 Wn.App. 95, 96 (1979).

Even after statutes were enacted to provide a procedure for changing one's name, the statutes were treated as merely supplementary to the common law. One could use the statute if desired, "but the old do-it-yourself right simply to assume a new name still existed." [24]

While most statutory name change petitions are granted, even if a court denies a name change petition, "the disappointed petitioner could, nevertheless, forthwith, by resort to the common law method, assume the very name in question. He would, in such event, merely be minus a public record of the change and its resultant advantages."[25]

Additionally, the common law did not recognize a property right in a family name. A person was free to adopt another's surname without permission.

> Not only may a person, in the absence of restrictive legislation, change his name at will, but he may also, as a general rule, adopt any name that may please his fancy. The law does not recognize an absolute property in a family name, in the sense that one of the name may prevent its assumption by a stranger to the name. The proudest patronymic in the land is available to the lowliest individual, and this without so much as, "by your leave."[26]

Registering The Name Of A Child Born In Washington

The right of a parent to name his or her child is rooted in our Nation's history and tradition. In early America, all birth records were maintained by churches. In the late nineteenth and early twentieth centuries, state governments became involved in the child naming business with the introduction of birth certificates.[27]

Washington's birth registration process began in 1907.[28] RCW 70.58.070 requires the immediate registration of all births occurring in the state.

Washington's statutory scheme states that an unmarried mother may "give any surname she so desires to her child." The birth certificate shall designate "None Named" in the space designated

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[24] *Henne v. Wright*, 904 F.2d 1208, 1218 (8th Cir. 1990), *review denied*, 498 U.S. 1032, 111 S.Ct. 692, 112 L.Ed.2d 689 (1991) (Arnold, C.J., concurring in part and dissenting in part) (citations omitted).

[25] *Id.*

[26] Note, *What's in a Name?*, 2 N.Y.L.Rev. 1, 4-5 (1924) (citations omitted).

[27] Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 George Washington L.Rev. 159 (2011).

[28] Laws of 1907, ch. 83, §§11-13.

for the father's name.[29] There is no similar statutory language concerning the surname of a child born to married parents, or concerning the first name to be given to a newborn child.

RCW 70.58.080(1) provides for the completion of a birth certificate within ten days after the birth of any child. An attending physician, midwife, or his or her agent, shall fill out and file a certificate of birth which shall include the mother's name and date of birth, and the father's name and date of birth if married at the time of birth, or an acknowledgement of paternity if provided.[30]

A Washington birth certificate shall include the information included in the United States standard form for live births.[31]

A birth certificate includes two portions. The first includes the child's name, date of birth and parent information. This portion of the certificate contains public, non-confidential information which constitutes a conventional birth certificate.[32] The second portion contains confidential information.[33] This portion is not available to the public absent a court order.[34]

The local registrar shall forward the birth certificate and any acknowledgment of paternity to the state office of vital statistics.[35]

Upon the birth of a child to an unmarried woman, the attending physician, midwife or his or her agent shall provide an opportunity for the mother and father to complete an acknowledgment of paternity.[36]

When an infant is found without a birth certificate on file, a birth certificate shall be filed within 10 days.[37]

Whenever a certificate of birth does not include the child's name, the local registrar shall deliver to the parents a supplemental report which shall be filled out with the child's name and returned to the registrar as soon as the child is named.[38]

In 1928, an issue arose concerning the issuance of a birth certificate where an illegitimate child was born to a married woman and the mother wanted the child to bear her husband's surname. Washington's Attorney General, responding to a request for a legal opinion from King County's Director of Health, stated –

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[29] RCW 70.58.080(8).

[30] If there is no attending physician or midwife, the father, mother, householder or owner of the premises, manager or superintendent of a public or private institution where the birth occurred shall notify the local registrar within 10 days of the birth. The local registrar shall then secure the required information to make a proper certificate of birth. RCW 70.58.080(6).

[31] WAC 246-491-149. See Table 3.

[32] RCW 70.58.104, .107.

[33] RCW 70.58.055(2)(a).

[34] RCW 70.58.055(2)(b).

[35] RCW 70.58.080(2).

[36] RCW 70.58.080(4). This section also requires providing the couple with written and oral information furnished by DSHS regarding the benefits of establishing paternity and the availability of support services.

[37] RCW 70.58.080(7).

[38] RCW 7.58.100.

> DEAR SIR: We have your letter of recent date in which you request our opinion on a state of facts wherein an illegitimate child was born to a married woman who is separated but not divorced from her husband and an attempt was made to confer upon the child the married name of the mother.
>
> There can be no doubt but that a married woman has a right to use her husband's name even though she is not living with him.
>
> It is customary for an illegitimate child to take the name of its mother and, therefore, we are of the opinion that the mother's married name may legally be used by the child in question.
>
> In the matter of the choice of a name for a person, it is fundamental law that any person may use any name he sees fit, provided that the use thereof is not with the intent to defraud. The custom of persons taking names from their male parent is merely a custom and is not binding upon anyone, and the same may be said of the custom of a woman taking her husband's name. In the matter of the choice of a name the individual has absolute liberty provided that a name is not assumed for the purpose of committing a fraud.[39]

In 1976, our Supreme Court was asked to decide whether an unmarried mother could be denied issuance of a conventional birth certificate for her child where the mother's surname was given to the child with the concurrence of the father.

The registrar had an unwritten policy to not issue a conventional birth certificate for an illegitimate child who bore the mother's surname. In such situations, a birth registration card was issued rather than a birth certificate in an attempt to comply with a state statute prohibiting the disclosure of illegitimacy. Illegitimate children bearing the surname of the father were issued a birth certificate under the policy.

Citing to the above-referenced almost fifty year old Attorney General's opinion, the Supreme Court reasoned that the custom of a woman to take her husband's surname was just that – a custom.

> [I]t is common knowledge that in today's society more women are interested in retaining their surnames upon marriage and that they have a legal right to do so…
>
> As more women exercise their right to retain their own surname after marriage, the likelihood that children will be given a surname other that the paternal surname increases. There are generally no statutes requiring married parents to give their child the father's surname; although customarily parents do, they have a choice and can freely exercise it…
>
> In summary, we know of no legal impediment which would prevent married parents from giving the child the mother's surname.[40]

The Court explained that many reasons and functions exist by the use of surnames.

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[39] AGO 1927-28, pp. 507-8.

[40] *Doe v. Dunning*, 87 Wn.2d 50, 53-54 (1976) (citations omitted).

> One function of the 'family' name is to identify those persons who live in an economic and social unit. This purpose is not served if the father's surname is given to a child who does not live with him.
>
> Property and inheritance are also factors which may lead to the use of the mother's surname. Historically, it was not uncommon for children to take the mother's surname where she owned the most property or had the largest estate.
>
> Cultural heritage may also be a relevant consideration, for example, persons of Spanish ancestry often use both parents' surnames as the surname of the child.[41]

The Supreme Court concluded that issuance of a birth certificate for a child having the mother's surname did not disclose illegitimacy, and ordered issuance of the child's birth certificate bearing the mother's surname.[42]

Although a birth certificate is required to be filed with the government, Washington's statutes and caselaw delegate the choice of the name to be given to the child to the parents without governmental input or interference. When the mother is not married and chooses to not disclose the name of the father, the child's name on a birth certificate is determined solely by the mother.

Washington's Name Change Statutes

Washington has had a name change statute in effect since 1877, 12 years before statehood. The 1877 statute, now codified in RCW 4.24.130, created an action for change of name which authorizes "[a]ny person" desiring a change of his or her name or that of his or her child or ward to petition a court for a name change order.

RCW 4.24.130, however, is not the sole statutory method of changing a person's name.

A party whose marriage or domestic partnership is dissolved may obtain a superior court order restoring a party's former name, or an order changing the name to another name.[43]

In an adoption, a superior court may order a new name for the person adopted, and include the full new name in a decree of adoption.[44]

A person has five options in Washington for changing a name, as follows –

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[41] *Id.*, at 54 (paragraphs added for ease of reading).

[42] The legislature subsequently repealed the statute prohibiting disclosure of a child's illegitimacy, and required all birth certificates to include a child's full name including a child bearing the mother's surname. *Id.*, at 55, n.2.

[43] RCW 26.09.150(3).

[44] RCW 26.33.250(1)(d).

(1) Common Law. A person may resort to the common law to change a name, and completely avoid governmental action;

(2) Name Change Action. A person may seek a name change by petitioning a district court pursuant to RCW 4.24.130(1);

(3) Domestic Violence. A domestic violence victim may seek a name change by petitioning a superior court pursuant to RCW 4.24.130(5), where the person wants the name change court file sealed due to safety concerns;

(4) Dissolution. A "party" in a dissolution action may seek a name change by petitioning a superior court pursuant to RCW 26.09.150(3); or

(5) Adoption. An adoptee may have his or her name changed by a superior court in an adoption action pursuant to RCW 26.33.250(1)(d).

RCW 4.24.130 Creates Three Separate Name Change Actions

RCW 4.24.130 creates a statutory method for formally changing a name through issuance of a court order.

RCW 4.24.130 is permissive, and not mandatory, because the statute is not contrary to nor does it repeal the common law. Since the statute supplements the common law, a person may petition a court for an order changing one's name under the statute, but is not required to do so.[45]

RCW 4.24.130(1) reads as follows –

> (1) Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the district court of the judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.[46]

RCW 4.24.130(1) creates three separate name change actions depending on the category of the petitioner –

[45] AGO 1985 No. 10.

[46] Emphasis added.

(1) Adult. An adult who wants to change his or her own name;

(2) Minor. A minor child[47] who wants to change his or her own name; and

(3) Parent or Guardian. "Any person" who wants to change a child's or ward's name.[48]

Since RCW 4.24.130 supplements the common law, for an adult to successfully change his or her name under the statute, the petitioner must satisfy the common law requirements that the name change – (1) is not done for any fraudulent purposes; and (2) does not infringe on the rights of others. Given the common law that a person can name himself or herself any name, most name change actions brought pursuant to RCW 4.24.130 will be granted.[49]

The legislature did not choose to limit RCW 4.24.130 to only adult persons desiring to change their name. "Any person," absent a limitation such as "any adult person," is clear language the legislature intended RCW 4.24.130's name change action to be available to a minor child since a minor child is "[a]ny person."

Importantly, a minor child is not required by RCW 4.24.130 to provide notice to a parent or guardian before the child's name may be changed by a court. Nor is a minor child required to obtain parental permission before obtaining an RCW 4.24.130 order changing his or her name.

Since RCW 4.24.130 supplements the common law, for a minor child to successfully change his or her name under the statute, the minor child must satisfy the common law requirements that – (1) the name change is not done for any fraudulent purposes; (2) the name change does not infringe on the rights of others; and (3) the child is of sufficient age and maturity to make an intelligent choice to change his or her name.[50]

[47] The legislature has authorized persons under age 18 to be treated as an adult in a variety of situations. E.g. –

- Marriage. A 17 year old may marry with permission of a parent or guardian. RCW 26.04.210(1). A child under age 17 may marry with superior court permission. RCW 26.04.010(2);
- Driving, boating and fish/wildlife offenses. Courts of limited jurisdiction have jurisdiction over juveniles aged 16 and 17 when the offense is a misdemeanor or gross misdemeanor, or infraction, which is a traffic, fish, boating, or game offense, or traffic or civil infraction. RCW 13.04.030(1)(e)(iii); and
- Abortion. Minors of any age may consent or refuse abortion and abortion-related services without parental knowledge or permission. RCW 9.02.100(2) and *State v. Koome*, 84 Wn.2d 901 (1975).

[48] RCW 4.24.130(1) does not require both parents to petition to change their child's name. The phrase "[a]ny person" is clearly intended to mean one person. Extensive discussion follows below concerning notice to a non-petitioning parent, and Due Process concerns for failure to require notice to a non-petitioning parent.

[49] See below for more discussion on a court's judicial discretion when deciding whether to grant an RCW 4.24.130 name change petition.

[50] If a parent under age 18 wanted to change his or her child's name, clearly the statute authorizes the minor parent, as "[a]ny person," to petition a district court to change his or her child's name since the statute does not limit its accessibility to only adult parents.

Only District Courts Have RCW 4.24.130 Name Change Jurisdiction (With One Rare Exception)

Washington has had a name change statute since territorial days.[51] Superior courts[52] were initially granted subject matter jurisdiction for name change actions.[53] The 1877 name change statutory language remained the same until 1991, when the legislature amended RCW 4.24.130, and transferred all name change subject matter jurisdiction from superior courts to district courts. The 1991 legislative changes to RCW 4.24.130 are as follows –

> Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the ((~~superior~~)) district court of the ((~~county~~)) judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.[54]

In 1995, the legislature transferred some of district court's statutory name change subject matter jurisdiction back to superior court, but only where the name change petition alleges domestic violence had occurred and the person seeks to have the name change court file sealed because of safety concerns.[55]

Since 1991, only district courts have had subject matter jurisdiction to handle RCW 4.24.130 name change actions except in the rare case when the petitioner is a domestic violence victim and wants the name change court file sealed.

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[51] Laws of 1877, ch. 50, §638, pps. 132-33; Code of 1881, ch. LIII, §635, p. 139.

[52] In 1853, the Organic Act established the Washington Territorial Government. Judicial power was vested in a supreme court, district courts, probate courts, and justices of the peace. District courts were granted general trial court powers. Organic Act of 1853, §9. At Washington's constitutional convention, one delegate proposed changing the name of superior courts back to the territorial name of "district courts." The amendment was soundly defeated. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION (Oxford University Press 2011), at 105.

[53] The 1877 and 1881 name change statutes read –

> Any person desiring a change of his name or that of his child or ward may apply therefor to the district court of the county in which he resides by petition setting forth the reasons for such change thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.

(Emphasis added). After statehood in 1889, the legislature amended name change statute jurisdiction from "district" to "superior" since, under the new Washington Constitution, territorial "district" courts no longer existed. Rem. Rev. Stat. §998, vol. III, p. 187.

[54] Laws of 1991, ch. 33, §5.

[55] Laws of 1995, ch. 246, §34. See RCW 4.24.130(5).

RCW 4.24.130 Requires Courts To Exercise Judicial Discretion

Since the legislature enacted Washington's name change statute in 1877, the standard trial courts have been legislatively directed to use when deciding whether to grant an RCW 4.24.130 name change petition is judicial discretion. RCW 4.24.130 reads –

> (1) Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the district court of the judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.[56]

What is judicial discretion?

In the often cited case of *State ex rel. Carroll v. Junker*,[57] our Supreme Court defined judicial discretion as follows –

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.
>
> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
>
> Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.[58]

In an RCW 4.24.130 name change context, the common law name change standards also apply because RCW 4.24.130 supplements the common law. Accordingly, when a district court judge decides whether to grant a name change petition, the judge in the exercise of his or her statutory discretion must consider common law name change factors previously discussed.[59]

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[56] Emphasis added.

[57] State ex rel. Carroll v. Junker, 79 Wn.2d 12 (1971).

[58] *Id.*, at 26 (citations omitted) (paragraph added for ease of reading).

[59] E.g. Is the name change done for any fraudulent purposes? Does the name change infringe upon the rights of others? Additionally, if the petitioner is a minor, is the child of sufficient age and maturity to make an intelligent choice?

But a district court is not statutorily limited to common law name change factors when exercising its judicial discretion in an RCW 4.24.130 name change action. Other name change factors should also be considered under certain circumstances, which will be discussed next.

Judicial Discretion – Should A Court Lend The Great Seal Of The State Of Washington To A Proposed Name?

Must a district court grant a name change when the proposed new name includes a racial epithet, fighting words, a social experiment or web domain? What should a court decide where the new name is obscene, offensive, or possibly a political statement not comporting with common decency?

Judicial discretion in granting or denying a name change petition under RCW 4.24.130 includes factors in addition to those required by the common law. While a person is free under the common law to pick any name so long as the common law minimal standards are met, a court in an RCW 4.24.130 name change action does not have to grant the name change petition just because a party meets the common law standards.

An RCW 4.24.130 name change order may properly be used for the issuance of government identification, other public purposes, and public communication. A person seeking an RCW 4.24.130 name change is asking governmental (in this case the judicial branch) permission to change the name in addition to his or her common law right to do so.

Washington has strong public policies to prevent, for example, the utterance of racial epithets, fighting words, and obscene or offensive words. As one appellate court noted, the "judiciary should not lend the Great Seal of the State of California" to aid the petitioner in his social experiment by granting his requested name change to "Misteri Nigger."[60] Another appellate court, for similar reasons, denied a name change to "Fuck Censorship!"[61]

Washington has little appellate name change caselaw. But examples from other states may be helpful where a district court is called upon to exercise judicial discretion in an atypical name change situation.

[60] *Lee v. Ventura County Superior Court*, 9 Cal.App.4th 510, 513 (1992).
[61] *In re Petition of Variable v. Nash*, 190 P.3d 354 (N.M.Ct. App. 2008).

Obscene or Offensive – "Fuck Censorship!" Denied

Petitioner requested to change his name from "Variable" to "Fuck Censorship!" *In re Petition of Variable v. Nash.*[62] The trial court denied the request stating that the "proposed name change would be obscene, offensive and would not comport with common decency." The New Mexico Court of Appeals noted a trial court's responsibility when considering a name change petition.

> We do not believe that the district court's action infringes on Petitioner's right to free speech. Petitioner has a right under the common law to assume any name that he wants so long as no fraud or misrepresentation is involved. He may do so without making any application to the state. Thus, under the common law, Petitioner may exercise his right to free speech and use any name at all.
>
> However, once Petitioner files an application for a name change pursuant to [statute] … and seeks the approval of the courts for a name, it becomes the responsibility of the courts to ensure that there are no lawful objections to the name change.
>
> Petitioner may make a political statement by changing his name, but once he seeks the state's imprimatur he is subject to the court's discretion in granting the government's approval of the name. [63]

The appellate court noted the constitutional right of free speech is not absolute at all times and under all circumstances. First Amendment free speech constitutional protection has not been granted to speech which is lewd, obscene, profane, libelous, or fighting words.

> A name-change request made pursuant to statute gives the state the authority to place certain limits on the name by permitting the court to refuse the name when the applicant has an improper motive, when there is the possibility of fraud on the public, and when the choice of name is bizarre, unduly lengthy, ridiculous, or offensive to common decency and good taste.
>
> We conclude that the district court did not abuse its discretion in finding that Petitioner's proposed name change "would be obscene, offensive and would not comport with common decency." Petitioner is entitled to assume whatever name he desires, absent fraud or misrepresentation, but any statutory name change will be subject to the district court's scrutiny. Here, as in *Lee* [see below], "[s]ince [Petitioner's] common law right to use the []name has not been abrogated ..., none of his First Amendment rights have been prejudiced.[64]

[62] *Id.*

[63] *Id.*, at 635 (citations omitted) (emphasis added) (paragraph added for ease of reading).

[64] *Id.*

Racial Epithet, Fighting Words, Social Experiment – "Misteri Nigger" Denied

Russell Lawrence Lee, a 60 year old African-American educator, wanted to change his name to "Misteri Nigger," pronounced "Mister Nigger" because the "i" is silent. Lee asserted that the new name was intended to achieve social justice by stealing the stinging degradation from the word, which could help to conquer racial hatred. *Lee v. Ventura County Superior Court*.[65]

In affirming the trial court's denial of the name change petition, the appellate court summarized the judicial branch's role when exercising its judicial discretion.

> Approximately 10 years ago, the California Supreme Court publicly censured a superior court judge for his use of racial epithets, including the word "nigger." Ironically, today, we are compelled to rule upon an African-American's request for court authorization to change his name to "Misteri Nigger."
>
> As we shall explain, the judiciary should not lend the Great Seal of the State of California to aid appellant in his social experiment. The proposed surname is commonly considered to be a racial epithet and has the potential to be a "fighting word."
>
> Appellant has the common law right to use whatever name he chooses. He may conduct whatever social experiment he chooses. However, he has no statutory right to require the State of California to participate therein.[66]

The appellate court discussed at length the offensive nature of the word petitioner sought to be named.

> Appellant has no statutory right to court approval of a name that by his own theory is a racial epithet which provokes violence. The trial court, in the broad exercise of its discretion, determined that the proposed surname was vulgar, offensive, and a racial slur…
>
> The word "nigger" is commonly used and understood as a demeaning and offensive racial slur. The trial court's finding is also consistent with the views of the California Supreme Court: "Although the slang epithet 'nigger' may once have been in common usage, along with other racial characterization as 'wop,' 'chink,' 'jap,' 'bohunk,' or 'shanty Irish,' the former expression has become particularly abusive and insulting in light of recent developments in the civil rights' movement as it pertains to the American Negro."
>
> Appellant claims that by taking the surname "Nigger" he will take the sting out of the word. We do not question appellant's sincerity in seeking the official name change. However, appellant's premise is, at the very least, suspect. His quest for social justice should not be viewed in a vacuum. "One feature of strong insults and epithets is that they tend to shock those at whom they are directed and others who hear." We presume that at

[65] *Lee v. Ventura County Superior Court*, 9 Cal.App.4th 510 (1992).

[66] *Id.*, at 513 (citation omitted) (emphasis added) (paragraphs added for ease of reading).

> least some African-Americans would not be in agreement with appellant's methods and might suffer embarrassment and shock by his use of the epithet as his official name…
>
> "The use of the term 'nigger' has no place in the civil treatment of a citizen by a public official." This rule is broad enough to preclude judicial approval of appellant's use of the name "Misteri Nigger," even at his own request. We stress that we are aware of appellant's stated motive that the name change will lessen racial bias and tension. As indicated, we question the accuracy of appellant's appraisal. At the same time, we unequivocally wish the word would simply fall out of use in the English language.
>
> "American society remains deeply afflicted by racism. Long before slavery became the mainstay of the plantation society of the antebellum South, Anglo-Saxon attitudes of racial superiority left their stamp on the developing culture of colonial America. Today, over a century after the abolition of slavery, many citizens suffer from discriminatory attitudes and practices, infecting our economic system, our cultural and political institutions, and the daily interactions of individuals. The idea that color is a badge of inferiority and a justification for the denial of opportunity and equal treatment is deeply ingrained. The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations."[67]

The appellate court also noted the potential of the name being a fighting word leading to violence.

> Here, the surname has the potential to be in the "fighting words" category. At oral argument, appellant pointed out that use of this epithet by a motorist involved in a recent minor Los Angeles traffic accident caused a homicide. Appellant concedes the epithet is a "fighting word" even though he seeks to remove it from that category by taking the name…
>
> We should not sanction a "fighting word" as appellant's official surname. It matters not that appellant's motives may be rooted in a sincere and honest attempt to remove the sting from the word "nigger" or that it may only be uttered in the context of a name. It is the reaction thereto that may cause a breach of the peace. We opine that men and women "... of common intelligence would understand ... [the word, "nigger"] likely to cause an average addressee to fight. ...." "Most people today know that certain words are offensive and only calculated to wound. No other use remains for such words as 'nigger,' 'wop,' 'spick,' or 'kike.'" Needless to say, there is a strong public policy in the State of California to prevent the utterance of "fighting words" which tend to incite an immediate breach of the peace.
>
> While appellant would not address another person as a "nigger," simple use of the word, as appellant concedes, has the potential for violence. In fact, if a man asks appellant his name and he answers "Mister Nigger," the man might think appellant was calling him "Mister Nigger." Moreover, third persons, including children hearing the epithet, may be embarrassed,

[67] *Id.*, at 515-17 (citations omitted) (footnotes omitted).

> shocked or offended by simply hearing the word. This example illustrates how use of the name may be "confusing" with the potential for violence. [68]

Affirming the common law principle allowing a person to generally choose whatever name he or she wishes, the court concluded –

> Since appellant's common law right to use the surname has not been abrogated, none of his First Amendment rights have been prejudiced. We cannot say, as a matter of law, that the trial court abused its discretion by denying court approval of a surname that will shock, disparage, or emotionally harm members of a racial group. The order only precludes the filing of the name with the Secretary of State. Nothing more, nothing less. "[Appellant] is still free to call himself what he will."[69]

Santa Claus/Clause – Denied and Granted

Ohio and Utah disagree on a name change to Santa Claus.

An Ohio petition to change a name to "Santa Robert Clause" was denied because the public has a propriety interest in the identity of Santa Claus, both in name and persona. *In re Name Change of Handley*.[70] The court explained –

> The court finds that there is an economic value to the name of Santa Claus. The court finds no fraudulent intent of the petitioner to take advantage of the economic value for the use of the name. However, the court finds public policy reasons to deny the petitioner's request, particularly the interference with the rights of others. The petitioner is seeking more than a name change, he is seeking the identity of an individual that this culture has recognized throughout the world, for well over one hundred years. Thus, the public has a proprietary interest, a proprietary right in the identity of Santa Claus, both in the name and the persona. Santa Claus is really an icon of our culture; he exists in the minds of millions of children as well as adults.
>
> The history of Santa Claus – the North Pole, the elves, Mrs. Claus, reindeer – is a treasure that society passes on from generation to generation, and the petitioner seeks to take not only the name of Santa Claus, but also to take on the identity of Santa Claus. Although thousands of people every year do take on the identity of Santa Claus around Christmas, the court believes it would be very misleading to the children in the community, particularly the children in the area that the petitioner lives, to approve the applicant's name change petition.[71]

A Utah petition to change a name to "Santa Claus," however, was granted. David Lee Porter petitioned to change his name to "Santa Claus." He wanted to do so for business and charity

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[68] *Id.*, at 517-18 (citations omitted) (footnotes omitted).

[69] *Id.*, at 519 (citations omitted).

[70] *In re Name Change of Handley*, 736 N.E.2d 125 (Ohio.Prob.Ct. 2000).

[71] *Id.*, at 126-27.

work. Porter looked like Santa Claus and told others he was Santa. *In re Porter*.[72] In reversing the trial court's denial of the name change petition, the Utah Supreme Court majority held –

> On the record before us, we simply disagree with the district court that the likelihood of confusion, misunderstanding, or substantial mischief is sufficient to deny the petition, nor is the concern that some may be unwilling to sue a person named Santa Claus sufficient. The record does not contain any evidence to support these concerns. Porter's proposed name may be thought by some to be unwise, and it may very well be more difficult for him to conduct his business and his normal everyday affairs as a result. However, Porter has the right to select the name by which he is known, within very broad limits. Significantly, Porter already tells others that he is Santa Claus. Allowing him to legally change his name to reflect his practice of doing so is more likely to avoid greater confusion than to create it by making Porter legally responsible for his actions in the name Santa Claus.
>
> Because the district court did not find any wrongful or fraudulent purpose for seeking the name change, nor any "improper purpose" or "inappropriate intention" on the part of the petitioner, and because the district court concluded that no "legal reason" existed to deny the petition, we conclude that the district court exceeded the permitted scope of discretion afforded it in denying Porter's petition.[73]

The dissent, relying on Ohio's *Handley* case, would have affirmed the trial court's denial of the name change to Santa Claus.

A One Word Name – "Variable" Granted

Snaphappy Fishsuit Mikiligon previously petitioned for 7 name changes in a year.[74] All were denied. Here, he wanted his name changed to the one word name "Variable." *In re Mokiligon*.[75] The New Mexico appellate court noted the name change standard for trial courts –

> We stated in our notice of proposed disposition that although it has been held that a court has discretion to deny a name change under statutes similar to ours, it is generally held that denial is limited to a showing of an "unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste."[76]

In reversing the trial court's denial of Mikiligon's name change petition, the court focused on the trial court's lack of a record in support of denying the requested name.

> In this case, the district court's order found that "[t]he proposed change of name is offensive to even the broadest accepted notions of common decency and good sense, and

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[72] *In re Porter*, 31 P.3d 519 (Utah 2001).

[73] *Id.*, at ¶¶11-12.

[74] See below his subsequent request to change his name from Variable to "Fuck Censorship!" *In re Petition of Variable v. Nash*.

[75] *In re Mokiligon*, 106 P.3d 584 (N.M.Ct.App. 2004).

[76] *Id.*, at 586 (citation omitted).

> is otherwise contrary to the public good." The court also found that "Petitioner has previously applied for, and the same has previously been denied, a change of name as requested in the present action."
>
> However, the court summarily denied Petitioner's request without providing sufficient factual support for the denial. The district court record is only nine pages long, containing the petition, in which Petitioner requested a hearing, the order denying the petition, Petitioner's notice of appeal, and Petitioner's docketing statement. The docketing statement represented that Petitioner did not receive a hearing, but was informed by mail that his request was denied. Thus, there appears to have been no showing of wrongful or fraudulent purpose, and the name "Variable" does not appear obviously offensive.[77]

The State appeared and argued the doctrine of res judicata applied because a number of previous name change requests were denied. In rejecting the argument, the appellate court held –

> We note, first of all, that a petition for a name change does not ask the court to resolve a dispute between parties and, therefore, is not, in the strictest sense, litigation. In addition, it is quite possible that a person could change his or her name several times in the course of subsequent marriages and could petition for the same name on more than one occasion. Section 40-8-1 does not limit the number of times a person can petition to change his or her name, but requires the court to order the name change "if no sufficient cause is shown to the contrary."[78]

The appellate court clarified two other matters. While the one word name "Variable" was approved, the petitioner was not granted authority to vary his name at will. Additionally, the trial court could limit the petitioner's access to the courts upon determining that the petitioner's actions were vexatious.

> We clarify, however, that Petitioner is restricted to using the word 'variable' as his legal name. The court is not granting him the power to actually vary his legal name at will and he is limited to using 'variable,' unless or until he changes his name again through a recognized legal process.
>
> Moreover, if the court views Petitioner's actions as vexatious and tying up the court's resources, there is nothing to prevent the court, in the exercise of controlling its docket, from requiring Petitioner to have his pleadings reviewed before he is allowed to file them to determine whether they have merit.[79]

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[77] *Id.* (paragraph added for ease of reading).

[78] *Id.*, at 587 (citation omitted).

[79] *Id.* (citation omitted) (paragraph added for ease of reading).

Internet Domain Name, Comity With Another Court's Name Change Ruling – "NJweedman.com" Denied

In 2001, Robert Edward Forchion, Jr. petitioned a New Jersey court to change his name to his internet domain name of "NJweedman.com." The petition was denied. In 2010, Forchion petitioned a California court to change his name to "NJweedman.com."

Forchion managed a Rastafarian temple in Los Angeles, and a medical marijuana dispensary that he claimed was lawful. He had devoted his adult life to the legalization of marijuana, and ten years earlier had been convicted of marijuana offenses in New Jersey. He had a national reputation as a marijuana advocate, and was popularly known as NJweedman, which included his website "NJweedman.com." At the time of his California name change petition, he was out on bail pending trial on marijuana charges in New Jersey. *In re Forchion*.[80]

The appellate court noted the somewhat transitory nature of domain names, as well as their complexity.

> We conclude that, regardless of the nature of Forchion's proprietary interest in the Web site, he could lose that interest by failing to pay periodic registration fees or by breaching the registration agreement. If the trial court had granted his petition, he would still be able to use his new personal name, NJweedman.com, and someone else might acquire the identical Web site name. If both parties then used NJweedman.com in commercial transactions – one as a personal name, the other as a Web site name – the dual use by different parties might cause confusion.
>
> Even if Forchion properly maintained the Web site name, such that he could use NJweedman.com as his *personal* name and his *Web site* name, NJweedman.com might be so similar to another Web site name or a trademark that its multiple use would create confusion.
>
> Alternatively, granting the name change would associate Forchion's new *personal* name with the Web site's advice that individuals violate the law in several respects. A name change should not be permitted when it would have that effect.[81]

After an extensive discussion about internet domain names, the appellate court determined that a person should not be treated as part of a domain.

> In ruling on a name change petition, the trial court should not have to determine the likelihood that there is a domain name or a trademark so similar to the requested name that confusion may result. We should not create a situation where an individual's new name may – now or eventually – be so similar to a domain name or a trademark as to cause confusion. It follows that individuals and domains, respectively, should not share the same names.

[80] *In re Forchion*, 198 Cal.App.4th 1284 (2011).

[81] *Id.*, at 1304-5 (italics in original).

> In sum, personal names and domain names should not overlap; they belong in distinct realms. Domain names were created for use on the Internet and should be limited to assisting a user in finding a desired Web site. By the same token, we should not treat a person as part of a domain.[82]

While not specifically relying on the doctrine of res judicata, the court upheld the trial court's denial of the name change on comity grounds.

> We do not go so far as to say that res judicata applies to the New Jersey decision denying Forchion's prior attempt to change his name to NJWeedman.com. Courts are divided over whether res judicata applies to name changes. But the principles that underlie the application of that doctrine are present here.
>
> As a matter of comity, it is not the role of a California court to permit an individual to change his name if the courts of his current home state have previously denied his application for the same name change, and the first two letters of the requested name – NJ – are not only the home state's abbreviation but are intended to refer to that state. As Forchion put it, "'I am NJWeedman, not the California Weedman or the Los Angeles Weedman – the New Jersey Weedman.'" The issues raised by the present name change petition were or could have been litigated in the New Jersey proceedings, which were adversarial. The law division's denial of the name change was affirmed on appeal. Material circumstances have not changed in a way that would warrant a reexamination of the prior New Jersey decision. Indeed, Forchion is facing trial in New Jersey on marijuana charges that arose after the New Jersey courts denied his 2001 name change application.[83]

Finally, the appellate court rejected the trial court's dicta that it might approve the name change if the ".com" was spelled out.

> In closing, we note that the trial court commented it might approve a name change if Forchion did not end his requested name with ".com" but instead spelled it out – "NJweedman Dot Com." To us, this exalts form over substance. Many of the same problems we have already identified would still exist.[84]

[82] *Id.*, at 1312.

[83] *Id.*, at 1314 (citations omitted).

[84] *Id.*, at 1315.

Due Process Does Not Compel A Court To Accept A Common Law Name Change

The previous section focused on a trial court's exercise of judicial discretion when deciding whether to grant a name change petition. As discussed, a court exercising its judicial discretion is not required in an RCW 4.24.130 name change action to lend the Great Seal of the State of Washington to a common law name in certain circumstances.

Whether a trial court's denial of a common law name under a state's statutory name change process violates the Due Process clause of the federal constitution has received little attention.

In *Brown v. Cooke*,[85] the petitioner was given the name "Wesley Ray Brown" at birth. Since age 17, he identified himself as "Wesley R. Brown" and obtained a variety of identification and other documents bearing his chosen name over the years. Brown was denied an identification card by the Colorado Division of Motor Vehicles, however, under his common law name absent a court order because his birth certificate included "Ray" as his middle name. Brown was prohibited from changing his name under Colorado's name change statute because the statute did not authorize a court to grant a name change if the person had been convicted of a felony. Brown had been convicted of at least two felonies. Brown filed federal suit to compel issuance of the identification card under his chosen common law name.

The federal district court began by stating the issue as follows –

> For purposes of the Due Process claim, the more difficult question presented here is whether a person possesses a constitutional right to compel the state to acknowledge and accept a name change effected by resort to the common law. In order to state a Due Process claim, Mr. Brown must first show that he was deprived of a liberty or property interest protected by the Constitution. Thus, the first issue is whether the Division's refusal to issue an identification card in Mr. Brown's chosen name implicates a liberty or property interest of constitutional dimensions.[86]

Accepting that a person has a "liberty" interest in the common law right to change one's name, the issue before the court was more complex. Does a person have a Due Process constitutional right to compel a state to acknowledge his or her chosen common law name?

> Put simply, a "liberty" interest is one that, when its contours are carefully defined, is found "deeply rooted in this Nation's history and tradition." As discussed above, it may be fair to say that the common-law right to change one's name is so widely and historically recognized that it may fit that description. But Mr. Brown is not challenging any abrogation of the common-law right to change one's name. "Carefully described,"

[85] *Brown v. Cooke*, 2009 WL 641301 (D.Colo. Mar. 9, 2009).

[86] *Id.*, at 4 (citations omitted).

> the right Mr. Brown invokes here is the right to compel the Government to officially acknowledge and abide by any common-law name change an individual chooses.[87]

Rejecting Brown's arguments, the federal court held that Brown failed to show a Due Process liberty interest that government must accept a common law name. In addition, a person does not have a Due Process "property" interest in the issuance of government identification.

> This argument fails for the same reason that Mr. Brown's Due Process argument fails: the right to have the government recognize a name change effected at common law is not a fundamental right conferred by the U.S. Constitution, and thus, may be infringed upon by laws having a rational basis (such as the REAL ID Act).[88]

The court discussed two reported cases somewhat on point, but rejected both because their holdings were premised on an individual's fundamental rights as they relate to reproduction and child rearing. Those issues were not present in Brown's common law name change situation.

> Perhaps the closest cases on this point are *Jech v. Burch*, 466 F.Supp. 714, 719 (D.Hi. 1979) and *Henne v. Wright*, 904 F.2d 1208, 1213-14 (8th Cir.1990).
>
> In both cases, the plaintiffs were parents who wanted to give their child a unique surname, belonging to neither parent, in violation of state laws that required all children to be named (and birth certificates to be issued) under either or both parents' surnames.
>
> (*Jech* acknowledged the possibility of the parents unilaterally and temporarily changing their own surname by operation of common law; *Henne* makes no mention of the possibility of a common-law name change.)
>
> The parents sued, claiming the state laws violated fundamental rights protected by the U.S. Constitution.
>
> Drawing largely on U.S. Supreme Court precedent recognizing a right to "privacy" in various, albeit unrelated, situations, the court in *Jech* found that the parents had a constitutionally-protected liberty interest in "giv[ing] their child any name they wish."
>
> By contrast, the court in *Henne*, reached the opposite conclusion, finding that, to the extent there was any "deeply rooted" tradition regarding the naming of children, that tradition was one in which the child received one of the parents' surnames, not whatever unique name the parents chose for the child.[89]

[87] *Id.*, at 5 (citations omitted).

[88] *Id.*, at 10, n.10.

[89] *Id.*, at 4 (citations omitted) (paragraphs added for ease of reading).

The "Best Interests Of The Child" Statutory Standard Required Of Superior Courts In Dissolution, Paternity, And Adoption Actions Does Not Apply To District Courts In RCW 4.24.130 Name Change Actions

The RCW 4.24.130(1) statutory standard district courts are required to use when deciding whether to grant any name change petition under the statute is clearly judicial discretion. This legislative standard includes name change actions brought to change a minor child's name. The statute reads –

> (1) Any person desiring a change of his or her name or that of his or her child or ward, may apply therefor to the district court of the judicial district in which he or she resides, by petition setting forth the reasons for such change; thereupon such court in its discretion may order a change of the name and thenceforth the new name shall be in place of the former.[90]

Kitsap County District Court has experienced a recent trend where many individuals are petitioning to change their first and middle names to names generally associated with the opposite gender. For example, Jane Sally Smith submits a name change petition seeking to change the birth name to John David Smith because he identifies with the male gender.

Where the petitioner is an adult, and assuming the petitioner satisfies common law requirements which are typically stated in the petition, this Court grants the name change without a colloquy on the record concerning the underlying reasons why the petitioner identifies with a gender. Typically, the petition states a reason such as – "I want my name changed to my identity." Nothing more is required by this Court. The common law is satisfied. The petition is granted.

This Court follows the same process where the petitioner is under age 18, with the only additional common law requirement that the court determine whether the minor child is of sufficient age and maturity to make an intelligent choice. Petitioners of high school age routinely are able to demonstrate their maturity.

The gender name change process is the same for seventeen year old Mr. Smith as it would be if Mr. Smith was an adult petitioner. Seventeen year old Mr. Smith's name change petition is granted. His

[90] Emphasis added.

birth name of Jane Sally Smith is changed to his desired new name of John David Smith. No colloquy occurs with Mr. Smith on the record concerning why he identifies with the male gender.

Some Washington district courts believe they are required to determine the "best interests of the child" when presented with a request to change a minor child's name.

In the minor child seeking to change his or her name's gender situation, to satisfy the "best interests of the child" standard, a court by necessity has to delve into the reasons why the child seeking a gender change of a first and/or middle name wants to do so. Such a discussion in an open court includes why or if the child believes he or she is transgender, the wisdom of a gender name change, the impact of the gender name change on the petitioner, the family, and siblings, the parents' wishes, etc.

In the parent petitioning to change his or her child's name (typically the surname) situation, to satisfy the "best interests of the child" standard, an open court discussion must occur concerning many personal factors about the child, the child's family situation, and potentially the non-petitioning parent's involvement with the child.

Why do some district courts use the "best interests of the child" standard rather than the RCW 4.24.130 statutory standard of judicial "discretion when handling minor child name changes?

Some confusion has occurred due to a misapplication of the holdings in two Washington appellate cases, which discuss in dicta the dissolution and paternity superior court "best interests of the child" statutory standard in a child name change context.

In Washington, the first reported RCW 4.24.130 minor child name change case discussing the "best interests of the child" standard is *Hurta v. Hurta*.[91] There, the parties obtained a divorce decree while the mother was pregnant. While provision was made for the unborn child in the decree, no name was given. When the child was born, the mother chose her surname for the child on the birth certificate. The father thereafter filed a petition to modify the divorce degree to show the child as having the father's surname.

The Court of Appeals found that the dissolution statutes had no provision to change a minor child's name, and held that a child name change action could only be heard pursuant to an RCW 4.24.130 name change action.

In dicta, the court mentioned that even if the father's dissolution petition had properly included an RCW 4.24.130 child name change action, the petition would have had to be dismissed because no showing was made that the name change would be in the child's best interests as statutorily required in an RCW 26.09 action.[92]

Six years later, the Supreme Court dealt with the same minor child name change issue in a paternity case. In *Daves v. Nastos*,[93] after the father's paternity was established, he successfully

[91] *Hurta v. Hurta*, 25 Wn.App. 95 (1979).
[92] See RCW 26.09.002.
[93] *Daves v. Nastos*, 105 Wn.2d 24 (1985).

requested his surname be given to the child pursuant to the best interests of the child statutory standard required in paternity actions pursuant to RCW 26.26.130(3). The mother appealed.

Similar to the holding in *Hurta*, *Daves* held that the paternity statutes had no provision to change a minor child's name, and that any child name change action must be instituted pursuant to an RCW 4.24.130 name change action.

The Supreme Court in dicta posited that an RCW 4.24.130 name change action could be instituted within a paternity action, whereupon a change of the minor child's name could occur when found to be in the child's best interests as statutorily required by RCW 26.26.130(3).

Significant to the holdings in both *Hurta* and *Daves*, at that time RCW 4.24.130 granted jurisdiction only to superior courts to change names under the statute.[94] Logically, it made sense then to allow parties in a superior court dissolution or paternity action to amend their pleadings and consolidate a superior court RCW 4.24.130 minor child name change action with a dissolution or paternity action rather than bifurcating the matters and requiring separate superior court filings.

In a dissolution action, the legislature's intent is that "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities."[95]

In a paternity action, the legislature's intent is that a paternity judgment and order shall contain "any other matter in the best interest of the child."[96]

Similarly in an adoption action, the legislature's intent is that the "guiding principle must be determining what is in the best interest of the child."[97]

In 1991, when the legislature transferred RCW 4.24.130 name change jurisdiction from superior courts to district courts,[98] it abrogated the "best interests of the child" dicta in *Hurta* and *Daves* because district courts lack jurisdiction to hear dissolution or paternity actions. Dissolution, paternity and adoption statutes do not apply to district courts.

The legislature could easily have added the "best interests of the child" language to RCW 4.24.130 in 1991 when it transferred name change jurisdiction from superior courts to district courts, or any time since. Instead, it chose not to do so and left the judicial "discretion" statutory standard in place for RCW 4.24.130 district court name change actions.

There is no statutory, constitutional or common law authority in support of a district court rewriting RCW 4.24.130's name change judicial "discretion" standard to the "best interests of the child" standard when a minor's name is sought to be changed.

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[94] See the discussion in the section "Only District Courts Have RCW 4.24.130 Name Change Jurisdiction (With One Rare Exception," *supra*.

[95] RCW 26.09.002.

[96] RCW 26.26.130(3)

[97] RCW 26.33.010.

[98] See the RCW 4.24.130 jurisdiction discussion, supra.

The proper RCW 4.24.130 standard when determining whether to grant any name change petition is judicial "discretion." This is the appropriate statutory standard for district courts regardless of the age of the person whose name will be changed.

Kitsap County District Court will not use the "best interests of the child" standard when deciding RCW 4.24.130 name change actions.

A Petitioner Is Statutorily Required To Give Notice Of A Name Change Where Petitioner Is – (1) Under DOC Jurisdiction, Or (2) Required To Register As A Sex Offender

Prior to 1995, RCW 4.24.130 did not require a petitioner to give notice to anyone when seeking a name change under the statute. Since then, the legislature has amended RCW 4.24.130 to require a petitioner to give notice of a proposed RCW 4.24.130 name change in two situations – (1) the petitioner must give 5 days' notice to the Department of Corrections when petitioner is under DOC jurisdiction; and (2) the petitioner must give 5 days' notice to the Sheriff and Washington State Patrol when the petitioner is required to register as a sex offender.

RCW 4.24.130 has no other statutory notice provisions required of a petitioner.

Petitioner Under DOC Jurisdiction

In 1995, the legislature amended RCW 4.24.130 to require a petitioner to give at least 5 days' advance notice to the Department of Corrections when the petitioner is under the jurisdiction of DOC.[99] A name may not be changed by a court unless proof of the notice to DOC is provided to the court. A petitioner's failure to provide notice to DOC is a misdemeanor.

The statute prohibits a court from granting the name change if it finds that doing so will interfere with legitimate penological interests.

But, a court shall not deny a name change where the request is for religious or legitimate cultural reasons, or in recognition of a marriage or dissolution.

[99] Laws of 1995, ch. 19, §14.

RCW 4.24.130(2) reads –

> (2) An offender under the jurisdiction of the department of corrections who applies to change his or her name under subsection (1) of this section shall submit a copy of the application to the department of corrections not fewer than five days before the entry of an order granting the name change.
>
> No offender under the jurisdiction of the department of corrections at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate penological interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage.
>
> An offender under the jurisdiction of the department of corrections who receives an order changing his or her name shall submit a copy of the order to the department of corrections within five days of the entry of the order. Violation of this subsection is a misdemeanor.[100]

Petitioner Required to Register as a Sex Offender

In 1998, the legislature again amended RCW 4.24.130 to require a petitioner to give at least 5 days' advance notice to the Sheriff and the Washington State Patrol when the petitioner is required to register as a sex offender.[101] A name may not be changed by a court unless proof of the notice to the Sheriff and the WSO is provided to the court. A petitioner's failure to provide notice to the Sheriff and the WSP commits the crime of failure to register.[102]

The statute prohibits a court from granting the name change if it finds that doing so will interfere with legitimate law enforcement interests.

But, a court shall not deny a name change where the request is for religious or legitimate cultural reasons, or in recognition of a marriage or dissolution.

RCW 4.24.130(3) reads –

> (3) A sex offender subject to registration under RCW 9A.44.130 who applies to change his or her name under subsection (1) of this section shall follow the procedures set forth in RCW 9A.44.130(6).[103]

RCW 9A.44.130(7) reads –

> (7) A sex offender subject to registration requirements under this section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the

[100] Paragraphs added for ease of reading.
[101] Laws of 1995, ch. 220, §5.
[102] RCW 9A.44.132(1).
[103] Now RCW 9A.44.130(7).

application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five days before the entry of an order granting the name change.

No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage.

A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within three business days of the entry of the order.

A Non-Petitioning Parent In An RCW 4.24.130 Minor Child Name Change Action Is Not A Statutory Party Nor Statutorily Entitled To Notice

Kitsap County District Court does not require a petitioning parent desiring to change his or her minor child's name in an RCW 4.24.130 name change action to provide notice to the non-petitioning parent. This decision is based upon RCW 4.24.130's clear language which does not place such burden on a petitioning parent.

Should this Court change its practice, and require a petitioning parent to attempt to notify the non-petitioning parent before changing their child's name?

Analyzing a statute involves an issue of statutory interpretation. A court's fundamental objective when interpreting a statute is "to discern and implement the intent of the legislature."[104] "Statutory interpretation begins with the statute's plain meaning."[105]

Courts discern plain meaning from the "'ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'"[106] "If a statute is clear on its face, its meaning is to be derived from the plain language

[104] *State v. J.P.*, 149 Wn.2d 444, 450 (2003).

[105] *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526 (2010).

[106] *Lake*, 169 Wn.2d at 526 (*quoting State v. Engel*, 166 Wn.2d 572, 578 (2009)).

of the statute alone."[107] If the statute is unambiguous after a review of the plain meaning, a court's inquiry is at an end.[108]

When the words in a statute are clear and unequivocal, courts are "'required to assume the Legislature meant exactly what it said and apply the statute as written.'"[109]

> Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them.[110]

From territorial days in 1877 through 1995, Washington's name change statute did not require a person seeking to change his or her name, or that of his or her child, to give notice to anyone. RCW 4.24.130 simply required that a person file a petition for name change with a court, and then appear in court at the scheduled name change hearing.

Notice was not required to be given to anyone other than the court because RCW 4.24.130 was supplemental to, and not in derogation of, the common law. Under the common law, a person simply began using the new name the person chose without governmental involvement.

In 1995, and again in 1998, the legislature chose to amend RCW 4.24.130 by requiring notice be sent by a petitioner in two very specific situations discussed previously before a court could grant the person's name change.[111]

RCW 4.24.130 clearly does not require a non-petitioning parent to be a party in the minor child name change action brought by the other parent. The statute provides – "Any person desiring a change of … his or her child or ward , may apply therefor to the district court…" By the statute's explicit terms, both parents are not required to be parties when one parent wants to change his or her minor child's name.

Similarly, RCW 4.24.130 does not require notice be provided to a non-petitioning parent. Statutory notice is required in only two specific circumstances – where the petitioner is under DOC supervision and where the petition is required to register as a sex offender.

In many types of actions, the legislature has statutorily established the identity of necessary parties, and service of process notice requirements.[112] If the legislature wanted notice to be provided to the non-petitioning parent in an RCW 4.24.130 name change action brought by the other parent, or wanted the non-petitioning parent to be a necessary party to the action, it certainly understands how to do so.

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[107] *State v. Watson*, 146 Wn.2d 947, 954 (2002).

[108] *Lake*, 169 Wn.2d at 526.

[109] *In re Smith*, 137 Wn.2d 1, 8 (1998) (*quoting Duke v. Boyd*, 133 Wn.2d 80, 87 (1997)), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

[110] *Millay v. Cam*, 135 Wn.2d 193, 203 (1998) (citations omitted).

[111] See the discussion in the previous section.

[112] E.g. In a dissolution action, both spouses are necessary parties with statutory service or publication of a summons required. RCW 26.09.030. In a paternity action, RCW 26.26.510 lists the parties who must be joined, and RCW 26.26.615 sets out the statutory service of process requirements. In an adoption action, various entities are statutorily entitled to notice of the proceedings. RCW 26.33.240.

While prior notice to a non-petitioning parent that his or her child's name may be changed might be the fair and right thing to do from the non-petitioning parent's and/or child's perspective, the decision whether to amend or rewrite RCW 4.24.130 to require notice to the non-petitioning parent is not one for a trial court to make. That decision has already been made by the legislature, and can only be changed by it.

Which raises the following question.

Does RCW 4.24.130's Failure To Require Notice To A Non-Petitioning Parent Before Changing A Child's Name Violate Due Process?

This Primer was initiated in response to a question concerning this Court's role when a parent petitions to have his or her child's name changed.[113] RCW 4.24.130 clearly provides only two circumstances wherein a petitioner must provide notice of a possible name change. Notice to the non-petitioning parent when the other parent wants to change their child's name is not one of those statutory circumstances.

A fundamental aspect of the Due Process clauses of the United States and Washington constitutions is the notion that a person is entitled to notice and a meaningful opportunity to be heard where the person's life, liberty or property interest is at stake. Before delving into a Due Process discussion, though, a court's role concerning a statute's constitutionality must be considered.

A Court's Role Concerning a Statute's Constitutionality

Since our country's infancy, the judiciary has been tasked with the function of determining, as a matter of law, whether a given statute is within the legislative branch's power to enact or whether it violates a constitutional mandate. *Marbury v. Madison*.[114]

[113] The issue of a non-petitioning parent's right to notice and an opportunity to be heard in an RCW 4.24.130 child name change action was raised by an attorney who practices domestic law and frequently serves as a judge pro tempore for this Court. We are grateful for the time and effort made by this attorney, including her impressive briefing and legal analysis on this topic.

Although we disagree with her suggestion that we sua sponte impose upon a petitioning parent the requirement of providing notice to the non-petitioning parent before changing their child's name, our disagreement is one of the proper role of a trial court to sua sponte resolve a potential constitutional issue rather than the underlying policy and perhaps Due Process concerns of the fairness to the non-petitioning parent to change his or her child's name without prior notice and an opportunity to be heard.

[114] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80, 2 L.Ed. 60 (1803).

Determining that a statute violates a constitutional provision is not made lightly. To the contrary, the law's heaviest burden is placed upon a party challenging the constitutionality of a statute – beyond a reasonable doubt.

> Our traditional articulation of the standard of review in a case where the constitutionality of a statute is challenged is that a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.
>
> While we adhere to this standard, we take this opportunity to explain the rationale of such a standard. The "reasonable doubt" standard, when used in the context of a criminal proceeding as the standard necessary to convict an accused of a crime, is an evidentiary standard and refers to "'the necessity of reaching a subjective state of certitude of the facts in issue.'"
>
> In contrast, the "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.
>
> The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment.
>
> Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.
>
> Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate.[115]

[115] *Island County v. State*, 135 Wn.2d 141, 146-47 (1998) (emphasis added) (citations omitted) (paragraphs added for ease of reading). *Contra* Justice Sanders' concurring opinion at pp. 155-56 (citation omitted) –

> Although the majority reaches the right result, it does so in spite of the erroneous, yet oft-repeated, claim that "a statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt."
>
> I posit it is high-time, if not past time, to challenge this bald assertion for exactly what it is: A statement of ideological preference which favors the legislative branch at the expense of the executive, the judicial, and, most importantly, the individual citizen.
>
> Read the constitution, and read it once again, I find no textual support for the proposition that a usurping legislature may impose an unconstitutional, yet "doubtful," legislative act beyond the remedy of judicial review.

Due Process Clauses of the United States Constitution

The Fifth Amendment reads –

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[116]

Section 1 of the Fourteenth Amendment reads –

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[117]

The United States Supreme Court has interpreted the Due Process clauses in the Fifth and Fourteenth Amendment identically. As Justice Frankfurter once explained in a concurring opinion –

> To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.[118]

Due Process Clause of the Washington Constitution

Const. art. I, §3 reads –

> SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.[119]

Washington's Due Process clause is coextensive with that of the Fourteenth Amendment, and does not provide greater protection.[120]

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[116] Emphasis added.

[117] Emphasis added.

[118] *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 788, 89 L.Ed. 1029 (1945) (Frankfurter, J., concurring).

[119] Emphasis added.

[120] *State v. Morgan*, 163 Wn.App. 341, ¶22 (2011), *review denied*, 175 Wn.2d 1013 (2012).

Procedural Due Process Requires a Two-Step Analysis

Procedural Due Process under the Fourteenth Amendment of the United States Constitution is implicated where an individual is deprived of life, liberty, or property, without due process of law. [121]

The United States Supreme Court has adopted a two-step analysis to examine whether an individual's procedural Due Process rights have been violated.

> We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.[122]

When implicated, Due Process requires prior notice and an opportunity for a hearing appropriate to the nature of the case.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.
>
> But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'
>
> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[123]

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[121] *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010).

[122] *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989) (citations omitted).

[123] *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 657-58, 94 L. Ed. 865 (1950) (citations omitted) (paragraphs added for ease of reading).

Does a Parent Have a "Life, Liberty, or Property" Interest in a Child's Name?

For RCW 4.24.130 to violate Due Process by statutorily failing to require notice and an opportunity to be heard, the non-petitioning parent must prove beyond a reasonable doubt that constitutional protections are triggered because he or she has been deprived of a Due Process "life, liberty or property" interest.

The question becomes – Does a parent have a "life, liberty, or property" interest in his or her minor child's name?

No Washington appellate court has addressed this issue, making it one of first impression. Although not directly on point, one appellate court addressed a parent's constitutional right to name his or her child in an unpublished case – *In re H.R.H.*[124]

There, the unmarried parents were unable to agree to their child's first name prior to his birth. The mother listed her chosen first name on the child's birth certificate. The father at all times objected to the first name. The parents did agree to the child's middle and last name.

The mother filed a petition for a parenting plan and for child support. The father acknowledged paternity, but raised the child's objectionable first name in the parenting plan proceedings. The father asked the trial court to order the parties to engage in "good faith" mediation concerning the first name. The trial court denied the motion for mediation.

The father appealed, asserting he had a Due Process right as a parent to name his child. The court rejected his argument, holding that there is no constitutional right to name one's child.

> The Due Process Clause of the Fourteenth Amendment protects a parent's right to "autonomous decision making" in child rearing. Parents have the fundamental right "to make decisions concerning the care, custody, and control of their children." When the State restricts the exercise of a fundamental right, strict scrutiny applies to our review of State action.
>
> Heath cites *Troxel* to assert that he has the fundamental right to name his child. But Heath fails to cite any authority that encompasses a parent's choice of his or her child's first name within a parent's fundamental right to the care, custody, and control of his or her child. No Washington case has held that a parent has a constitutional right to name one's child. Thus, Heath fails to adequately support his argument with controlling case law and his claim of error fails.[125]

The trial court's decision denying mediation was affirmed. The child's first name remained as it was listed by the mother on the child's birth certificate.[126]

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[124] *In re H.R.H.*, 191 Wn.App. 1044 (2015) (unpublished).

[125] *In re H.R.H.*, 191 Wn.App. at 2 (citations omitted) (emphasis added).

[126] *Id.*, at 4.

Although *H.R.H.'s* unpublished broad language could be construed to conclude herein that a non-petitioning parent does not have a Due Process right to prior notice before his or her child's name is changed because a parent does not have a constitutional right to name a child, the issue of notice was not before the appellate court. The father had notice of the paternity action, and an opportunity to be heard on the issue of his right to name his child.

For these reasons, *H.R.H's* holding does not resolve the issue whether a non-petitioning parent has a Due Process right to notice before his or her child's name is changed pursuant to RCW 4.24.130.

Resorting to caselaw from other states on this issue may be helpful.

Only a few states' appellate courts have directly dealt with whether a parent has a Due Process right to notice before his or her child's name is changed. Each state also has different statutory notice requirements making an analysis of RCW 4.24.130 more difficult.

A few of the states which have dealt with this notice issue have recognized a right or interest of the non-petitioning parent to actual notice before his or her child's name may be changed.

- *Eschrich v. Williamson*, 475 S.W.2d 380 (Tex.Ct.App. 1972) (Texas child name change statute had no notice requirement to the non-petitioning parent. The court held that a father has an interest in his or her child's name change proceeding under the Due Process clauses of the federal and state constitutions.).

- *Roe v. Conn*, 417 F.Supp. 769 (M.D.Ala. 1976) (Alabama child neglect statute allowed man in ex parte proceeding to legitimize an illegitimate child by declaring himself the father, have the child seized from the mother where neglect is alleged, and in the same proceeding change the child's name. Putative father alleged white mother was unemployed, and she and his child were living in a black neighborhood with an unmarried black man. Trial court, with no notice to mother, held petitioner was father, ordered seizure of the child due to neglect, and changed the child's name to the father's surname. Federal court held that a parent's liberty interest in her child under the Due Process clause, absent an emergency situation, required notice and an opportunity to be heard before severing the parent-child relationship. Citing to the Texas *Eschrich* case [above], the federal court also held that the mother had a Due Process liberty interest in her child's surname, which was violated by the ex parte name change sought by the father.).[127]

- *In re Tubbs*, 620 P.2d 384 (Okla. 1980) (Held that a decree changing a minor's surname without first affording the noncustodial father actual notice runs afoul of the Due Process clause. The court reasoned that a surname, in addition to furnishing a means of identifying a child, signifies a special relationship between the child and his father. The court further reasoned that the father-child relationship is often times tenuous following a

[127] Our Supreme Court cited to *Roe* when it determined that Washington's alternative residential placement statute did not violate a parent's Due Process liberty rights. "Thus, a parent's constitutional rights to care, custody and companionship of the child can only be terminated if the evidence shows that the child has suffered or is likely to suffer physical, mental or emotional harm as a result of the parents" conduct." See *Roe v. Conn* [at 779-80]." *In re Sumey*, 94 Wn.2d 757, 763 (1980). *Sumey* did not discuss *Roe's* decision concerning whether a parent had Due Process rights in his or her child's name.

divorce where the mother is awarded custody. It posited that a change of a child's surname could weaken, if not sever, the bond between the noncustodial father and child. Finally, the court reasoned that a father has a protectable interest in maintaining a relationship with his child. The court concluded that a father has a protectable interest in his child's surname, as the surname directly affects the father-child relationship.).

- *Hamman v. County Court*, 753 P.2d 743 (Colo. 1988) (In a case of first impression concerning changing a child's name, a divided Colorado Supreme Court held that a non-custodial parent has a constitutionally protected interest in his or her child's surname where the child was originally given the non-custodial parent's surname. Since Colorado's name change statute only required notice by publication and not actual service, the statute violated the constitution. Two justices dissented, and would have held that the non-petitioning parent did not have a "life, liberty or property" Due Process interest in his child's name. While a child's name is certainly important to a non-petitioning parent, it is not of constitutional magnitude according to the dissent. Since the name change statute's publication requirement was met, the dissenters would have affirmed the name change and left the wisdom of any notice requirements to the legislature.).

- *In re Sanjuan-Moeller ex rel. Moeller*, 796 N.E.2d 736, 740 (Ill.Ct.App. 2003) (Illinois child name change statute required service by publication on the non-petitioning parent and not actual service. In a matter of first impression, an Illinois court of appeals held that a non-custodial parent who was exercising his visitation rights and paying child support must be afforded Due Process notice and an opportunity to be heard before a trial court may change the child's name. The court found persuasive the reasoning in the Oklahoma *Tubbs* case [above].).

A couple of states reject that a parent has a Due Process life, liberty, or property interest in his or her child's name, leaving the issue of notice when a child's name may be changed to their legislative branches to resolve.

- *Fulghum v. Paul*, 192 S.E.2d 376 (Ga. 1972) (Mother successfully sought an order changing her child's surname from the father to the child's stepfather. Publication notice was provided as required by Georgia's name change statute. The Supreme Court affirmed the name change, holding that no one has a Due Process property right in another's name including a parent of a minor child. While it might seem appropriate that a non-petitioning parent should receive personal notice, that policy decision is one for the legislative branch to decide.).

- *Laks v. Laks*, 540 P.2d 1277 (Ariz.Ct.App. 1975) (Court agreed with Georgia *Fulghum* case [above] that a parent does not have a property interest in his or her child's name which entitles the parent to constitutional protection. But when a child's name is changed, a father has a protectable interest in the child bearing the parental surname given at birth in accordance with the usual custom. Here, the mother without the father's consent changed their three children's surnames to that of the mother for school and other purposes. Father brought action to order mother to change name back to father's surname with all records. Father successful at trial, and affirmed on appeal.).

Washington has no caselaw analyzing the constitutionality of RCW 4.24.130. Other state courts do not agree whether a parent has a life, liberty or property interest in his or her child's name meriting constitutional protection.

Should this Court sua sponte require a petitioning parent in an RCW 4.24.130 child name change action to provide notice to the non-petitioning parent despite statutory language to the contrary?

Additional items must be considered before answering this question.

A Court Has a Constitutional and Ethical Duty to Apply the Law in Effect at the Time of a Decision

The principle that a court has a duty to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary, has ancient roots in this country.[128]

The origin and the justification for this rule are found in the words of Chief Justice Marshall's 1801 opinion in *United States v. Schooner Peggy* –[129]

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional … I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns … the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Washington has also adopted this principle based upon the *Schooner Peggy* case. In the case of *In re Dependency of A.M.M.*,[130] the Department of Social and Health Services proposed that a trial court was not required to apply the law of an amended statute. The Court of Appeals was unimpressed.

> In support of this dubious and altogether unsupported proposition, the Department notes that the trial commenced ten days before the amendments became effective and that the presentation of evidence closed three days before the effective date.
>
> Controlling authority contravenes the Department's position: "'a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" *Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal*, 39

[128] *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974).

[129] *United States v. Schooner Peggy*, 1 Cranch 103, 110, 2 L.Ed. 49 (1801) (emphasis added).

[130] *In re Dependency of A.M.M.*, 182 Wn.App. 776 (2014).

> Wn.App. 609, 621 (1985) (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974)); *cf. Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 304 (2007) (concluding that the legislature is not "prohibited from 'pass[ing] a law that directly impacts a case pending in Washington courts'" (alteration in original) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 625 (2004))).[131]

A judge's ethical duty to uphold and apply the law includes a requirement that a judge do so impartially. Washington's Code of Judicial Conduct Rule 2.2 reads –

> **Rule 2.2. Impartiality and Fairness**. A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.

Impartially means that a judge shall have the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[132]

A judge's duty to apply the law also includes a requirement that a judge do so even where a judge disagrees with the law in question.

> [2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.[133]

RCW 4.24.130 does not require a petitioning parent to provide notice to the other parent as part of the statutory process to change the petitioning parent's minor child's name.

Should this Court, sua sponte, raise and resolve this Due Process notice issue on behalf of the non-petitioning parent?

A Court Should Not Sua Sponte Invent Arguments for Litigants

A judge's duty to apply the law at the time of its decision mandates that it is not proper for a judge to sua sponte invent arguments for parties.

> Justice González's concurring heartfelt opinion argues for immediate abolition of the peremptory challenge. We do not disagree with his call for the need for a departure from the *Batson* framework, but we believe that such a major change in trial procedure should be tested in the furnace of advocacy at the trial and appellate levels, with the opportunity for input from a broad range of interests, before we abandon a procedure that was adopted by Washington's first territorial legislature over 150 years ago.

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[131] *Id.*, at ¶29 (paragraph added for ease of reading). *Bradley*, cited herein, recognized the origin of the duty to follow the law principle stated in *Schooner Peggy*.

[132] Definition of "impartially" in the Terminology section of Washington's Code of Judicial Conduct.

[133] Comment [2] to Rule 2.2 of Washington's Code of Judicial Conduct.

> "'[W]e are not in the business of inventing unbriefed arguments for parties sua sponte....'" *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 138 (2011) (quoting *State v. Studd*, 137 Wn.2d 533, 547 (1999)).
>
> Alternatively, as both we and Justice González's concurring opinion note, it might be more appropriate to consider whether to abolish peremptory challenges through the rule-making process instead of in the context of a specific case.[134]

Although the Supreme Court has inherent authority to consider issues not raised by the parties if necessary to reach a proper decision, it is not proper for even our Supreme Court to do so when there is a dispute about the law.[135]

The issue of whether RCW 4.24.130's failure to require notice to a non-petitioning parent before his or her minor child's name is changed is one of first impression in Washington. Other states are split on whether a parent has a Due Process life, liberty, or property interest in a child's name. Absent such an interest, a non-petitioning parent's Due Process challenge to RCW 4.24.130 must fail.

The constitutionality of RCW 4.24.130 should be "tested in the furnace of advocacy" where a non-petitioning parent raises, and briefs, the issue. This court should not sua sponte invent a Due Process argument on behalf of the non-petitioning parent.

The Remedy for a Statute Held to Violate Due Process is Not for the Court to Rewrite the Statute

Even if RCW 4.24.130 violates Due Process by its failure to require notice to the non-petitioning parent before his or her child's name is changed, a proposition which is entirely unclear in Washington, the remedy is to declare the statute unconstitutional concerning minor child name change actions. The result would be to deny all proposed RCW 4.24.130 minor child name change actions brought by a parent.

The decision whether to amend RCW 4.24.130 by requiring notice to a non-petitioning parent before his or her minor child's name may be changed is one for the legislative branch of government because courts do not amend or rewrite statutes by judicial construction.

A court's duty to apply the law in effect at the time of its decision also prohibits a court from amending statutes by judicial construction.

> "Courts do not amend statutes by judicial construction, nor rewrite statutes 'to avoid difficulties in construing and applying them.'" *Millay v. Cam*, 135 Wn.2d 193, 203 (1998) (citations omitted). "[T]here is a difference between adopting a saving construction and rewriting legislation altogether." LAURENCE H. TRIBE, *American*

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[134] *State v. Saintcalle*, 178 Wn.2d 34, 52 (2013) (emphasis added). The Supreme Court recently again refused to abolish peremptory challenges. *City of Seattle v. Erickson*, 188 Wn.2d 721 (2017) (trial court must recognize prima facie case of discriminatory purpose when a sole member of a racially cognizable group has been struck from a jury).

[135] *Alverado v. WPPSS*, 111 Wn.2d 424, 429-30 (1988).

> *Constitutional Law* §12-30, at 1032 (2d ed.1988). We show greater respect for the legislature by preserving the legislature's fundamental role to rewrite the statute rather than undertaking that legislative task ourselves.[136]

In *Doe v. Dunning*,[137] the Supreme Court held an unmarried mother was entitled to have a birth certificate issued for her child where the child was given the mother's surname. While the Court understood the county registrar's concern that issuance of a birth certificate for a child having the mother's surname might convey the child's illegitimacy in violation of another statute, the Court refused to rewrite the birth certificate statute.

> It may be that a better method could be devised to protect the interests of the child. That is, after all, the purpose of the statute. The problem, however, is not one for the court, it is a matter for the Department of Social and Health Services and the legislature to solve.[138]

In *State v. White*,[139] our Supreme Court found Washington's obstructing a public servant statute, RCW 9A.76.020, unconstitutionally vague because the statute made it a misdemeanor to obstruct a public servant by failing, "without lawful excuse," to provide true information "lawfully required" of an individual by a public servant. The court invalidated two sections of the statute.

> We recognize an obligation to construe legislation so as to uphold its constitutionality whenever possible. The standardless sweep of this statute, however, cannot be sufficiently narrowed by any limiting construction we might place upon it. We conclude, therefore, that RCW 9A.76.020 is invalid as to sections 1 and 2.

In response to the *White* decision, the legislature amended RCW 9A.76.020 in 1994 to correct the unconstitutional portions of the statute.[140]

If this Court sua sponte held that RCW 4.24.130 violates Due Process because of its failure to require notice to the non-petitioning parent that his or her minor child's name may be changed. the remedy is not to rewrite the statute and require notice be sent to the non-petitioning parent. That task would be for the legislature to tackle.

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[136] *In re Parentage of C.A.M.A.*, 154 Wn. 2d 52, 69 (2005).

[137] *Doe v. Dunning*, 87 Wn.2d 50 (1976).

[138] *Id.*, at 55 (footnote omitted).

[139] *State v. White*, 97 Wn.2d 92 (1982).

[140] Laws of 1994, ch. 196, §1.

This Court Will Take No Sua Sponte Action Concerning RCW 4.24.130's Failure To Require Notice To A Non-Petitioning Parent

RCW 4.24.130 requires a petitioning parent to satisfy only the following four prerequisites to successfully change his or her child's name – (1) file a petition in the district court where the petitioner resides; (2) set forth the reasons for the name change; (3) persuade the trial court that changing the child's name is not being done for any fraudulent purpose nor will interfere with the rights of others; and (4) pay filing and recording fees.

Washington's name change statute is clear. A petitioning parent is not required to provide notice to the other parent before successfully changing their child's name.

Statutes are presumed constitutional. A party challenging the constitutionality of a statute must prove the statute violates a constitutional provision beyond a reasonable doubt. This rule exists because the legislative branch speaks for the people, and courts are hesitant to strike a duly enacted statute unless fully convinced after a searching legal analysis that the statue violates the constitution.

Whether RCW 4.24.130 violates the Due Process clauses of our federal and state constitutions by its failure to require prior notice to and an opportunity to be heard by the non-petitioning parent is undecided in Washington.

For a litigant to successfully challenge a statute based upon the Due Process clause, the party must prove that he or she has been deprived of a life, liberty or property interest without due process of law.

Does a non-petitioning parent have a life, liberty or property interest in his or her child's name?

If yes, RCW 4.24.130 would violate the Due Process clause. A court would have to hold that the statute was unconstitutional beyond a reasonable doubt. The result would be that no child's name could be changed by a parent until the legislature rewrote RCW 4.24.130 to require some type of notice to the non-petitioning parent. Court's do not rewrite unconstitutional statutes. That task is a legislative function.

If a parent does not have a life, liberty or property interest in his or her child's name, RCW 4.24.130 is constitutional. The decision whether it is fair and right to allow only one parent to change a child's name with no notice to the other parent is up to the wisdom of the legislature to decide. The policy is not one for this Court to make.

Only one Washington case could be found somewhat on this issue. In an unpublished Court of Appeals case, the court held that a parent does not have a Due Process constitutional right to name one's child. But that case did not deal with notice because both parents were aware of the paternity matter. Additionally, the case is unpublished and of no precedential value.

Only a few states have addressed the issue whether a non-petitioning parent is entitled to notice of a possible change of his or her child's name. The states are split.

Some states find under these circumstances that actual notice to the non-petitioning parent of a possible change of a child's name is required despite statutory language to the contrary.

Other states find that a parent lacks a life, liberty or property interest in his or her child's name, and hold that the non-petitioning parent is not entitled to notice because the non-petitioning parent in the child name change context lacks protection by the Due Process clause.

So what should this Court do? The statutory language in RCW 4.24.130 is clear. A petitioning parent is not required to give notice to the non-petitioning parent before their child's name can be changed. But there may be fairness and policy reasons for requiring a petitioning parent to provide notice so the non-petitioning parent can be heard concerning his or her child's name.

This Due Process question can only be resolved by examining the role of trial courts within our country's tripartite system of government.

A trial court's constitutional duty is to apply the law in effect at the time of a decision because the law must be obeyed. This principle also prohibits a court from amending statutes by judicial construction, or rewriting statutes to avoid difficulties in construing and applying them.

Washington's judicial ethics rules echo that constitutional principle. A judge shall uphold and apply the law fairly and impartially, absent of any bias or prejudice in favor of or against particular parties or classes of parties. This duty to apply the law includes a requirement that a judge do so even where a judge disagrees with the law in question.

For these reasons, it is improper for trial courts to sua sponte invent arguments for litigants. This is an especially important principle when there is a dispute about the law a judge may desire to explore.

The constitutionality of the legislature's decision since 1877 to not require notice to the non-petitioning parent in an RCW 4.24.130 minor child name change action is one of first impression in Washington. Other states are split on the question.

For the reasons discussed, it would be improper for Kitsap County District Court to sua sponte find RCW 4.24.130 unconstitutional in a minor child name change action brought by a parent. Even if this Court were to find the statute unconstitutional, it would be improper for this Court to amend or rewrite RCW 4.24.130 to require a petitioning parent to provide notice to the non-petitioning parent. An unconstitutional statute is for the legislative branch to correct, not the judicial branch.

Finally, the non-petitioning parent is not without a remedy upon learning his or her child's name was changed.

CRLJ 60 authorizes a non-petitioning parent to apply to the court for relief from judgment or order to either correct clerical mistakes or for a variety of other reasons. It is also possible for a non-petitioning parent to apply to a superior court for a writ of review.[141]

Should these remedies prove inadequate, the non-petitioning parent could institute his or her own RCW 4.24.130 minor child name change action.[142]

Kitsap County District Court will not sua sponte disturb a petitioning parent's legislatively-granted statutory right to seek to change his or her minor child's name without notice to the other parent.[143]

Perhaps RCW 4.24.130 is unconstitutional. Perhaps not. Kitsap County District Court will make that determination when presented with the question by litigants, after full and complete briefing. It will not do so sua sponte.

When Parents Disagree – Contested Minor Child Name Change Factors

A situation may arise where both parents appear in court in an RCW 4.24.130 minor child name change action, and disagree about a proposed change of their minor child's name. Although RCW 4.24.130 requires the exercise of judicial "discretion" and not the "best interests of the child" standard, "best interest of the child" factors used in child custody cases may be of assistance when a district court is presented with a contested minor child name change petition.

Our Supreme Court in *Daves v. Nastos*[144] provided guidance on factors courts should consider when deciding whether to change a minor child's name in a paternity action. While *Daves'* "best interests of the child" dicta has been abrogated by the legislature's subsequent amendment of RCW 4.24.130 transferring name change jurisdiction from superior courts to district courts, the

[141] *Burman v. State*, 50 Wn.App. 433, 442-44 (1988); *Blomstrom v. Tripp*, 189 Wn.2d 379, ¶38 (2017).

[142] CRLJ 60(c) ("This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.").

[143] Some Washington district courts require notice to the non-petitioning parent because of their concern about the veracity of the petitioning parent. Some courts are also concerned about parentage and require the petitioning parent to provide identification and the child's birth certificate.

None of these court-imposed burdens on the petitioning parent are required by statute. Requiring a petitioning parent to sign a child name change petition under oath offers sufficient indicia of reliability and veracity. Courts routinely rely upon sworn statements of litigants. Making false statements under penalty of perjury can result in significant consequences, including jail.

This Court has not required notice to the non-petitioning parent, or any of the other above requirements imposed by other district courts, for many years. Anecdotally, this Court has yet to have a non-petitioning parent seek to address the court concerning his or her child's changed name. This Court remains open to such litigation, however.

[144] *Daves v. Nastos*, 105 Wn.2d 24 (1985).

Daves factors may be useful where both parents appear in an RCW 4.24.130 minor child name change action, but disagree concerning their child's name.

> In a paternity proceeding neither parent of a nonmarital child has a right superior to the other to determine the surname of the child. The real issue before the court is whether the child's best interests will be served by an order directing that her name be changed to that of her father, or whether her interests will be better served by retaining her mother's maiden name.
>
> In determining the child's best interests, the trial court may consider, but its consideration is not limited to, the following factors:
>
> (1) the child's preference;
> (2) the effect of the change of the child's surname on the preservation and the 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 the proposed surname; and
> (5) the difficulties, harassment or embarrassment that the child may experience from bearing the present or the proposed surname.
>
> In weighing these factors to reach a decision, the trial court must set out its reasons for granting or denying the application to change the minor's surname.[145]

Other "best interests of the child" factors may also be helpful in a contested child name change action. A discussion from an ALR5th article follows –

Introduction[146]

"What's in a name?" asked Shakespeare.[147] Apparently, quite a lot, as divorce and custody cases and paternity proceedings often deal with the surname of a child or children. Although it is practically a universal custom in the American tradition that the child bears the paternal surname, this may not be in the best interest of the child in all cases, which is the standard in determining all child custody-related issues.

Nevertheless, this is often a bitterly contested issue in custody cases, since the noncustodial parent thinks to himself or herself that "it is bad enough that I don't have custody, at least let my child keep my family name." Thus, what should be done where a parent petitions the court to change the child's name, and the other parent resists? Numerous courts have reached varying conclusions, under the specific facts of the cases involved, as the following annotation illustrates.

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[145] *Daves*, at 31 (citations omitted) (paragraphs added for ease of reading) (numbers added for ease of reading).

[146] This section quotes extensive from the introductory paragraph and cumulative supplement to §2[a] from Jay M. Zitter, J.D., *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 40 A.L.R.5th 697. For ease of reading, quotation marks are not included. Citations to authorities are omitted. Some editing has also occurred.

[147] "What's in a name? That which we call a rose by any other name would smell as sweet." WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2; *In the Matter of Botany Unlimited Design and Supply, LLC*, 198 Wn.App. 90, ¶21, n.5, *review denied*, 188 Wn.2d 1021 (2017).

The Common Law, Marriage and Child Paternal Surname Tradition

Parents, acting in common, have a common law right to give their child any name they wish, and the Fourteenth Amendment protects this right from arbitrary state action. The traditional British and American view is that the child of a marriage bears the surname of his or her father, and although this is only a tradition, and is not mandated by law, it is adhered to by the vast majority of parents, even where the mother herself retains her pre-marital surname or uses a hyphenated surname.

This is all well and good when the parents agree. But when one parent wants to change the child's surname, what are the rights of the other parent who objects to this change? Moreover, as in other areas involving children, the paramount concern of the court is that the change be in the best interest of the child, but this begs the question, as there are many factors to be considered in determining what are the best interest of a child.

Thus, as the parents both have interests in having their child bear their surnames, a large number of courts have considered a wide variety of factors in determining whether a proposed name change is appropriate in light of the objection, or without the consent, of one of the parents, and such decision is ordinarily a matter for the trial court's discretion.

Courts Struggle When Only One Parent Wants to Change a Child's Name

The aforementioned custom of giving a child the father's surname has been rejected by many courts, which reason that the best interest of the child is the only standard and the father's interest in giving the child his surname is no greater than the mother's interest in the use of her surname.

However, other courts, occasionally skirting the line between the father's mere interest in having the child bear his name on the one hand, and his asserted right to the name as per the usual and traditional custom on the other, have held that the father, who is ordinarily the objecting party to a name change, has a significant interest or at least a protectable interest in having his child bear the paternal surname, even though the mother may have been awarded custody of the child.

Courts Consider Many Factors for the Best Interests of the Child

Regardless of a court's consideration of the paternal surname preference issue, what usually carries the day are a host of other factors dealing with the best interest of the child.

Avoid Embarrassment. For instance, some courts have indicated that one of the factors in considering the merits of a proposal to have a child's name changed, over the objection of the other parent, is whether it is the changed name, or the present name, which would best avoid the custodial parent and the child embarrassment.

Makes Things Easier. Other courts have considered a similar factor, namely, whether it was the changed name, or the present name, which was the same or different from that of the custodial

parent, as it is clear that to an extent, a minor child having the same name as the custodial parent generally "makes things easier" for the child.

Not a Good Role Model. If the noncustodial parent is not a good role model, or has otherwise distanced himself or herself from the minor child, it would seem clear that it might not be in the child's best interests to bear this parent's name. To an extent, this is because this parent does not "deserve" to have his or her minor child bear the surname, but, more so, it is because use of the surname will tend to push the child toward this parent, which is not desirable.

Not Further Distance Child from Noncustodial Parent. On the other hand, proper conduct by a noncustodial parent, especially in the often tense atmosphere of a divorce, can show that this parent should not be further distanced from the minor child by a name change contrary to this parent's wishes.

Misconduct by Noncustodial Parent. Accordingly, many courts have held or recognized that the proper conduct, or the misconduct, generally, of a noncustodial parent, whether to the other parent, to the minor child, or in general, is a factor to be considered in determining whether the child's proposed or present surnames accorded with the child's best interests.

Nonsupport or No Personal Relationship. Similarly, many courts have ruled that the support of the minor child, or conversely the nonsupport of said child, or maintaining or not maintaining personal contact with the child, by a noncustodial parent, were among the factors to be considered in determining whether proposed or present surnames championed by the parents accorded with the child's best interests.

Community Respect. And as to a somewhat related consideration, some courts have held or recognized that a factor in determining whether a name change petition brought by one parent should be granted on behalf of a minor where the proposal is opposed by the other parent is the degree of community respect associated with the child's present surname and the proposed surname, such as where a parent comes from a respected family, or conversely where a parent is a criminal.

Name Change Effect on Parental Bond. It is widely accepted that a parent will feel closer to a child bearing the same surname as himself or herself. On the other hand, the other spouse might feel the same way about his or her surname. This is an especially strong factor as to the noncustodial parent, who may feel that he or she is completely losing touch with the child. Thus, many courts have held or recognized that a factor in determining whether a name change petition brought by one parent should be granted on behalf of a minor where the proposal is opposed by the other parent is whether the change will positively or negatively affect the bond between the child and either parent or their families.

Help Child Identify with Siblings, Stepsiblings and Stepparent. Similarly, other courts have indicated that one of the factors in considering the merits of a proposal to have a child's surname changed, over the objection of the other parent, is whether the changed name, or the present name, would help the child identify as part of the family unit, including siblings, stepparents, and other relatives.

Length of Current Name and Confusion. Even where it is clear from other factors that a name change might be in the minor child's best interests, many courts have recognized that the length of time that the present name has been used, if lengthy, may support a finding that the problems of confusion for all parties that the name change would cause would outweigh the benefits resulting therefrom and that conversely, the use of the name for a short time may support a showing that the change would not be very disruptive and thus should be approved.

Delay in Proposing or Opposing Change. Similarly, a number of courts have ruled that a delay in proposing or objecting to a name change is a factor to be considered by the court in determining whether the best interest of the child supported the requested change of name.

Child's Wishes. Of course, especially where the child is old enough or mature enough for his or her desires to be credible, some courts have taken the position that the preference and wishes of the child were to be considered in determining whether the child's name should be changed as requested by a parent but opposed by the other parent. In this context it has been noted that the age of the child is a factor to be considered.

Serial Marriage or Relationships. Especially in these times of "serial marriages," where the minor child's mother may be married and divorced a fair number of times and may change or not change her surname accordingly, even if the child's name is changed to the mother's maiden name or to a stepfather's surname at some point, there would be no guaranty of the child having the same surname as the mother for any length of time. Thus, in a number of cases, where there was a dispute between divorced or never married parents as to a proposed name change for their child, some courts have noted that a factor militating in favor of the child bearing the mother's choice of surname, such as a maiden name or a stepfather's surname, is the assurance by the mother to the court that she would not change her name if she married or remarried.

Parental Motives. And it has also been held that a factor to be considered by the court in determining the best interest of the child as to a proposed name change is the motives of the parent or child in bringing the petition, such as a desire to alienate the child from the other parent.

Thus, the courts have considered particular proceedings involving a proposed change of, or determination as to, the name of a minor child, taking into account the foregoing general principles, and the factors unique to each case.

Some Examples

Where the parents were married when the child was born and originally given the surname of the mother, although the parents were estranged by the time the name change proceeding was brought, and where the father, who did not have custody of the child, sought a change of the child's surname from the mother's surname to his, some courts have held that the best interests consideration resulted in a finding that the change was proper, although other courts have reached the opposite conclusion.

Similarly, where it is the custodial mother who is seeking a formal legal name change for the child from the father's surname to her own or one of her choosing, some courts have found that

the name change was proper and appropriate as being in the child's best interests, although the courts in other cases have disagreed, based on different facts.

Name changes need not be legally binding in order to be almost completely effective, an informal change of the child's surname by a custodial parent registering the minor child in school under the changed name, or otherwise employing the changed name in common usage, can result in the legal name being a "dead letter" for all but the most strictly legal purposes, since the surname will be what everyone calls the child.

Accordingly, a careful noncustodial parent may seek to bar the custodial parent from trying to make these changes without having first brought a change of name action. So, in a number of cases the courts have held that no injunctive relief was warranted where a father wanted to restrain a divorced custodial mother from changing the surnames of her children to their stepfather's surname and to require her to use the natural father's surname for them.

However, other courts have ruled that a divorced custodial mother was not entitled, or could be found not to be entitled, to informally change a minor's surname to that of her own or to a name of her choosing, from the father's name, where the parents were married when the child was born, considering a number of factors that would affect the best interest of the child.

And a court has held that where a mother was living apart from her husband at the time of her daughter's birth, and where she gave her daughter a hyphenated last name consisting of her husband's name and the mother's maiden name, the father had no right to modify the daughter's name so as to use his surname.

Especially when there are marriages which last but a short time, and where the child is born after the parties have separated, there may be no initial agreement on any surname, and the trial court may have to decide between the parents' surnames in order to name the child. For instance, in a proceeding brought by a divorced noncustodial father to determine the surname of a child who was born after the separation of the parents, the court held that the best interest of the child supported a finding that the child's name should be the father's surname.

On the other hand, it has also been held that it was in the best interest of an infant child of parents who were married only one month to use the mother's surname because the child resided with her, and that the birth certificate should bear both parents' surnames.

Children Born Out of Wedlock

Essentially the same factors are considered by the courts in determining the propriety of proposed name changes of children who are born out of wedlock, with a few caveats.

It is clear that the bond between the noncustodial parent, invariably the father, and the child is weaker than where the child was a product of a legal marriage. Thus, it can be argued that the court has to be especially careful not to further sunder the bonds between father and child by changing the surname from the father's choice, but instead it should further the noncustodial parent-child relationship by allowing this parent's surname to be used.

In addition, it can be argued that the stigma of illegitimacy will be all the more apparent if the child uses the noncustodial father's surname. With this introduction, it can be noted that while some courts have held that where a baby who was born out of wedlock was given the mother's surname, it was appropriate for a court to change the name to the father's surname, based on the best interest of the child, other courts have disagreed, under the particular facts involved.

Conversely, some courts have ruled that where a baby who was born out of wedlock was given the father's surname, it was appropriate for a court to change the name to the mother's surname per her request, based on the best interest of the child, with other courts finding it to be inappropriate.

In other proceedings involving name changes for out-of-wedlock children, a court has denied an ex-husband's petition to change the name of a child from his surname, notwithstanding that he had proved through a blood test that he was not the father of the child, where the child was born out of wedlock but where the parties had subsequently married and he had raised the child as his own for 5 years.

Another court has approved of a mother's petition to change the name of a child born out of wedlock from a combination of both her and her husband's names to just her surname.

And where the out-of-wedlock child's initial surname was a matter of dispute between the parents, a court has held that the child should bear the custodial mother's surname, which was that of her former husband, rather than the father's surname, and that the child's middle name could include the father's surname if he so desired.

Hyphenated Surname

A more recent phenomenon is the use of hyphenated surnames for adults and children, usually a combination of the father and mother's surnames. What of the situation where a child already bears one parent's surname – is it proper and in the best interest of the child to turn his or her surname into a hyphenated combination of both parents' names?

Some courts have found this to be appropriate in the context of particular formal name-change proceedings, although other courts have held differently under the specific facts involved.

On the other hand, the insertion of a hyphen in an existing name, in an informal manner, would appear to be a subtle and not very important name change. Nevertheless, this can alter a middle name and bring it into relative prominence as part of the surname. Accordingly, a court has held that the trial court erred in denying a father's motion for an injunction compelling the mother to rescind an informal change of their son's name by inserting a hyphen between the son's middle and last names.

First and Middle Names

All the foregoing discussions have dealt with the minor child's surname. However, some cases involve questions of changes of other names. For example, it has been held that it was proper to order the addition of a first name chosen by the mother to a name given by the father on the child's birth certificate, in harmony with the best interest of the child.

As to a middle name, some courts have held that where there was a dispute between parents as to the name of their child or as to a change in this name, the middle name of the child should or could be amended to add the father's surname.

In a case involving unmarried parents, a court has ruled that there was no abuse of discretion by the lower court in denying the custodial mother's petition to dispense with the paternal grandfather's name as her child's middle name, in consideration of the best interest of the child.

And another court has held that the trial court erred in denying a father's motion for an injunction compelling the mother to rescind an informal change of their son's name by inserting a hyphen between the son's middle and last names.