

ORIGINAL

IN THE SUPREME COURT OF OHIO

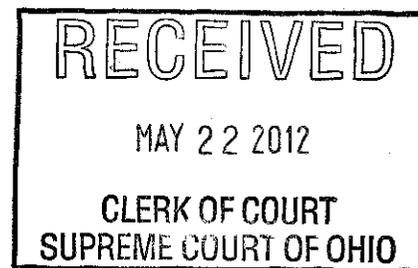
D.W.		Case No. 2011-1979
Appellee		
vs.		On Appeal from the Twelfth District Court of Appeals
		CA2011-03-04
T.L.		
Appellant		

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BRIEF OF APPELLEE

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**IT IS IMPROPER FOR A TRIAL COURT TO BASE A DECISION INVOLVING  
CHANGING A CHILD’S NAME ON DISCRIMINATORY TRADITION AND  
GENDER-BASED ASSUMPTIONS.**

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**TO DETERMINE WHETHER CHANGING A CHILD’S NAME IS IN THE CHILD’S BEST INTEREST, TRIAL COURTS MUST PROPERLY CONSIDER THE *BOBO V. JEWELL* AND *IN RE WILLHITE* FACTORS.**

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### III. STATEMENT OF THE CASE

#### A. Procedural Posture

Appellee initiated a paternity action for purposes of establishing a set parenting plan, child support and a myriad of other issues surrounding the private custody of a child of unwed parents. Among the issues for decision, Appellee moved the trial court to change the child's surname from that of the Appellant to Appellee's surname. The magistrate held an evidentiary hearing, a transcript of which is attached to Appellant's Supplement to the Merit Brief, Supp. 1-47. Upon conclusion of the trial, the magistrate issued a decision from the bench. The magistrate cited to the appropriate caselaw, applied the *Bobo* factors to the evidence and found a surname change was in the child's best interests.

The Appellant objected to the magistrate's decision, but failed to cite any specific findings of fact or conclusions of law upon which she objected. The trial judge rendered a separate opinion affirming the magistrate's decision. The trial judge listed out the requisite best interest factors and cited the evidence contained in the record to each corresponding factor. In the end, the trial judge found a surname change was in the child's best interests.

The Appellant appealed the decision to the Twelfth Appellate District Court of Ohio, which rendered a written decision upholding the trial judge's decision. Specifically, the Twelfth District stated, "the juvenile court applied the *Bobo* factors to the evidence presented by both parties in the hearing before the magistrate...[m]indful we are not free to substitute our judgment for that of the lower court, the record does not support a determination that the juvenile court's decision was arbitrary, capricious or so unreasonable to establish an abuse of discretion." *D.W. v. T.L.*, 12<sup>th</sup> Dist. No. CA2001-03-004, 2011-Ohio-5228. The Twelfth District affirmed, and Appellant exercised a discretionary appeal which the Ohio Supreme Court accepted.

## **B. Statement of Facts**

Appellant and Appellee are the biological parents of minor child, Logan. Trial Tr. pg. 14-15 (Aug. 31, 2010). At the time of his birth, Logan's full name was Logan David White Laug as indicated on the birth certificate. Id. at 24-25, Appellant's Supp. Br. 48. Appellant alleges the name indicated on the child's birth certificate was a sign of acquiescence or assent by Appellee. Trial Tr. pg. 29. Appellee disagrees. Appellant admits the birth certificate and name was the source of detailed conversations. Id. at 29-30. However, Appellee testified he argued with Appellant about the birth certificate and did not agree with the final name determination. Id. at 25, 1:6. Appellee admits he signed the birth certificate out of necessity knowing he ultimately did not have a choice over the given name. Id. at pg. 25, 11-12, 18.

Appellant and Appellee cohabitated for several years. Id. pg. 14, 16:17. During Appellant and Appellee's relationship, the family unit decided Appellee should join the military as a source of income and advancement for their child. Id. at 26, 19:22. While serving in the military, Appellee supported the family by paying the bills and general living needs. Id. at 27. In August 2009, Appellee was mobilized and deployed overseas. Id. at 14-15. During this deployment, Appellee attempted to contact his child, but Appellant threatened to press charges if he continued his efforts to maintain contact. Id. at 15, 1:7.

Appellee subsequently filed a paternity action on September 28, 2009. Appellant's Br. Appx. 10. During these proceedings, Appellant and Appellee agreed on all issues pertaining to the parenting plan, child support, custody and other matters. Trial Tr. pg. 1-12. The only remaining issue was father's motion to change the child's surname to include his surname. Id. at 12. The magistrate proceeded with the hearing and heard evidence on the issue of surname only.

Id. at 1-47.

During the trial, Appellee testified about his military career and the frequent military mobilization briefings experienced. Id. at 16, 7:13. Appellee is a non-commissioned officer in the United States Army National Guard, and he is in charge of soldiers in combat. Id. at 17, 5-11. Of particular note, Appellee is in charge of leading soldiers during hostility and providing for their safety. Id. These scenarios cause Appellee the very real concern he could lose his life in combat. Id. at 16, 18:21. Should this unspeakable tragedy occur, Appellee recognizes his son would be left with his mother, and he wanted to ensure his son carried his father's identity should he be gone. Id. Further, Appellant already prevented contact with the child during a prior deployment. Id. at 15, 1:7.

Appellee testified he has a close relationship with his son, and he exercises all available parenting time. Id. at 17, 6:25. Appellee supports his child, engages in extracurricular activities when his schedule permits, and wants to create a strong bond with the child, including an identity when the two are apart. Id. at 17-21. Appellee's reputation in the community is positive as he works for the Clinton County Sheriff Department and a member of the Ohio Army National Guard. Id.

Appellee testified a surname change would be in the child's best interests because it would help the child identify with Appellee while the two are apart, including times of overseas deployment when Appellee is not readily available, and will allow the child to remember Appellee should he not return from overseas combat. Id. Appellee did admit he grew up without a father and never knew his father. Id. at 23. And father believes the commonality of the surname would help solidify the father-child relationship. Appellant and Appellee agree, at the time of

trial, Logan had begun learning to spell his full name, but Appellee believed he had not been using his full name long. Id. at 17-18.

Upon closing of Appellee's testimony, Appellant testified. Appellant testified Logan was seeing a therapist for developmental delays. Id. at 30-31. Appellant testified to the contents of an Individualized Education Plan (hereinafter I.E.P.) aimed at preparing the child for kindergarten. Id. It should be noted that Appellant failed to introduce this I.E.P., therapist records or introduce testimony from the child's therapist.

Appellant offered her own opinions regarding the child's developmental delays and inability to cope with change. Id. at 30-33. When asked if the surname White would cause the child embarrassment, Appellant avoided the question and continued to hypothesize about the difficulty and trauma the child would experience with any change. Id. Appellant offered, "[i]f his therapist was here, she would probably agree with me," but failed to actually produce such opinion. Id. at 33. Appellant repeatedly offered her own exaggerated opinions about the detrimental effects on her son with absolutely no tangible evidence to substantiate her assertions.

Appellant does admit transition and change is inevitable and the child's transition to kindergarten is change. Appellant admits the child would eventually learn to spell other words. Id. at 36, 1:7. Though Logan is in daycare and known by Appellant's surname, his kindergarten is not in the same institution. Id. at 34.

Appellant continuously emphasized her role as residential parent and the existence of her daughter, who shares her surname. Id. at 36. Appellant points to her role as residential parent and the commonality of the name as strong justification for denying Appellee's motion, and it would be embarrassing for a child not to share a common last name with the residential parent. Id.

However, Appellant does acknowledge her daughter's original birth certificate had a different surname than Appellant's. *Id.* at 34-35. Appellant had the name changed because the biological father was not involved in this child's life. *Id.*

Appellant and Appellee both presented evidence at trial, and both had an opportunity to rebut and cross-examine the sincerity of the evidence presented. *Id.* Appellant was present at the hearing, represented by counsel and proceeded to defend her legal positions. *Id.* Appellant had full opportunity to present her case and provide any testimony to rebut Appellee's case-in-chief. *Id.* It should be noted that Appellant never objected to the court proceeding on the merits of father's motion or claimed to be prejudiced in any way. Further, Appellant never claimed that she was prejudiced in her ability to move forward with trial or claimed she could not procure the necessary evidence to defend her position. *See generally, Id.*

After a brief recess, the magistrate ruled from the bench. The court immediately cited to *Bobo (sic) vs. Jewell* and the enumerate factors articulated by this Supreme Court. Further, the magistrate recognized the *Willhite* decision and the need to analyze the evidence according to the neutral factors and best interests analysis. *Id.* at 41-47. Upon identifying the appropriate standard, the magistrate was careful to analyze the evidence according to all applicable *Bobo* factors. After considering all the relevant evidence, the court concluded the child would benefit from long-term identification with Appellee, and a surname change was in the child's best interests.

Appellant filed an objection to the magistrate's decision citing only the ultimate conclusion as basis for the objection. In a separate written opinion, the trial judge reiterated the appropriate statutory and common law factors for consideration. The trial judge analyzed each applicable factor and the evidence supporting its decision. *See generally, Appellant's Br. Appx.*

10-14. The trial judge further articulates all other relevant factors used to persuade the court to its ultimate decision, and the judge found in favor of the Appellee. *Id.*

Appellant filed her notice of appeal to the Twelfth Appellate District of Ohio. The Twelfth District Court rendered a written opinion finding the Clinton County Juvenile Court did not abuse its discretion in rendering judgment in favor of Appellee. Appellant filed for discretionary appeal to the Ohio Supreme Court, which was granted.

#### IV. ARGUMENT

**Appellant's Proposition of Law No. 1: It is improper for a trial court to base a decision involving changing a child's name on discriminatory tradition and gender-based assumptions.**

The Revised Code §3111.13(C) allows a court of common pleas to “determine the surname by which the child shall be known after establishment of the existence of the parent and child relationship and a showing that the name determination is in the best interests of the child.” *Bobo v. Jewell*, 38 Ohio St.3d 330, paragraph one of the syllabus (1988). The Ohio Supreme Court delineated the factors upon which a court should consider when deciding whether a name change is in the child's best interests. *Id.* at 335. Among these factors, a trial court should consider the length of time the child has used a surname, the effect of a name change on the parental relationships, the identification of the child as part of a family unit, the embarrassment, discomfort or inconvenience that may result if the child shares a surname different from the custodial parent, the child's preference and other relevant factors. *Id.* Appellant's proposition is true that a trial court cannot give “primary or greater weight to the father's interest in having the child bear the paternal surname, and a mother has at least an equal interest in having the child bear the maternal surname. *Id.* at 334.”

This equality in interests creates an even playing field among both parents. Just as it is impermissible to award custody to a mother solely because she is the mother, the court is not permitted to change a child's name based on the antiquated principle that children usually bear the father's surname. *See generally, Id.* Given the fact neither parent has priority based on custom, the moving party must show a name change is in the best interest of the child upon consideration of the above enumerated factors, when applicable.

In the case *sub judice*, the magistrate offered both Appellant and Appellee the opportunity to present all evidence, rebut and defend his/her position and provide all legal theories upon which the court could render a decision in each party's favor. After recess, the court issued its ruling from the bench. The magistrate cited the appropriate authority under consideration for the decision. The magistrate recounts factor by factor the evidence supporting each party's position. Trial Tr. pg. 41-46 (Aug. 31, 2010).

The magistrate analyzed the length of time the child has used the surname. The magistrate recognizes the child's age, but decided the child had not entered kindergarten and is still young. *Id.* at 41, 15:19.

The magistrate analyzed the impact the name change would have on both parent's relationships. *Id.* at 41-42. The magistrate concluded that both parents have a strong commitment to the child and how a name change would not adversely impact either parent's relationship. *Id.* at 42, 3:7.

The magistrate next considered the varying parental relationships with the child. *Id.* at 42, 8:18. The magistrate recognized mother's role as residential parent; yet, the magistrate also found that father was active in his parenting time, current in his support and caring of his son's needs.

*Id.* The magistrate found the child was too young to express a meaningful preference. *Id.*

The magistrate considered the issue of embarrassment, discomfort or inconvenience that may result if the child's surname was different than the residential parent. *Id.* at 42-43. The magistrate believed this issue would be more prominent had the child already advanced further in school. However, the court reasoned the child was only in daycare and not yet entered the school district. *Id.* The magistrate placed emphasis on the long-range and long-term effects on the parents and families, and he concluded there would be no long term effect on Logan. *Id.* at 43, 8-12. Upon conclusion, the magistrate ordered the name be changed to Appellee's surname. *Id.* at 44.

Appellant timely filed her objections to the magistrate's decision for *de novo* review by the judge. Ohio Civ. R. 53, and its parallel Ohio Juv. R. 40, governs the role of magistrates. A magistrate may hear a case, determine findings of facts and conclusions of law and issue a decision based on the facts of the case. *See generally Id.* Usually a magistrate's decision is not a final order without further action from a judge. In reviewing a magistrate's decision, a judge has the discretion to adopt, modify, or completely reject the magistrate's decision. *See Civ. R. 53(D)(4)(e).* Though the trial judge is not bound by a magistrate's decision, the courts are generally accepting of their important role as finder of fact. *See generally Quick v. Kwiatkowski*, 2nd Dist. App. No. 18620 (Aug. 3, 2001) (acknowledging "Magistrates truly do the 'heavy lifting' on which we all depend").

Further, parties are afforded the opportunity to file objections to the magistrate's decision. Ohio Civ. R. 53(D)(3)(b). It is well-established law that a party objecting to a magistrate's decision must state with **particularity and specificity** the legal and factual grounds called to

error. *See generally*, Ohio Juv. R. 40; Ohio Civ. R. 53 (emphasis added). In essence, a judge is authorized to conduct a “de novo review of any issue of fact or law that a magistrate has determined.” *Knauer v. Keener*, 143 Ohio App. 3d 789, 793-794 (Ohio Ct. App., Clark Co. 2001). The trial court’s review is generally limited to errors of law found on the face of the decision itself, unless a timely objection is made, which then requires an independent review of the objected matters. *Id*

Generally speaking, a party shall not assign as error on appeal the court’s adoption of any finding of fact or conclusion of law, regardless if such is specifically designated, unless is specifically objected to as required by the governing rules. *See* Ohio Juv. R. 40(D)(3)(iv), Ohio Civ. R. 53(E)(3)(d). Here, the Appellant objected to the general decision of the magistrate without citing to any specific findings of fact or conclusions of law. Since the objections were not made in accordance with the applicable rules, any specific finding is deemed waived as issue of appeal.

Notwithstanding the foregoing, the trial court issued a written decision. Again, the trial judge cited the appropriate legal principles applicable to the matter by citing to *Bobo v. Jewell*, *supra*. Applying the *Bobo* factors in determining the best interests, the court analyzed the evidence factor by factor before making its decision.

The trial judge analyzed the length of time the child used the surname. Appellant’s Br. Appx. 11. The court concluded the child was just learning how to write his first and last name, and the child was just beginning to use his last name. *Id.* (emphasis added). The court recognized the child had Appellant’s surname since birth, but the child had not used the name until recent. *Id.* The court reasoned this was a short amount of time. *Id.*

The trial judge analyzed the effect the name change would have on the parental relationships. *Id.* Despite Appellant's assertions to the contrary, the court recognized Appellant and her daughter's commonality in last name. *Id.* But the court also recognized the daughter's last name was changed from the biological father's surname because that father had nothing to do with the child. *Id.* Appellant testified Appellee has a good relationship with the child and takes care of the child. *Id.* The court ultimately concluded neither parental relationship would be adversely affected by the name change. *Id.*

Next, the trial judge specifically analyzed the child's identification as part of the family unit. *Id.* at pg. 3. The court reasoned the child's mere presence in the Appellant's home identifies the child with her family unit. *Id.* Further stating, the court found that a commonality in surname with Appellee would reinforce the father-son family unit. *Id.* The court reasoned the father was far less likely to change his surname. *Id.* The court does state a hypothetical concerning Appellant taking the surname of a future husband and how that could result in three surnames: Appellant's, Appellee's and Logan's. *Id.*

Lastly, the trial judge considered the issue regarding embarrassment, discomfort or inconvenience in having a surname different from the residential custodian. *Id.* In its analysis, the court found Appellee was a deputy sheriff and a member of the military. *Id.* Appellant failed to address her reputation in her testimony. *Id.* The court concluded no embarrassment would result in identifying the child with father through surname. *Id.* Further, the court discussed Appellant's concerns about the developmental concerns expressed by Appellant. *Id.* The court rationalized the child had not mastered his name, had not begun kindergarten, and could easily have new classmates once school is started. *Id.* The court decided the child would not experience any

embarrassment, discomfort or inconvenience by change of surname. *Id.*

Considering other relevant factors, the court rejected Appellant's assertions that Appellee agreed to the maternal surname upon birth, Appellee is active in support and care for the child and a change in surname presents small difficulty to the child. *Id.* at 4. Looking at all of the evidence in its entirety, the court ruled the child's best interests would be served by a change in the surname. *Id.*

Generally, a reviewing court pays great deference to a trier of fact. This bedrock principle is founded on the trial courts position to "determine the credibility of witnesses because he or she is able to observe their demeanor, gestures and attitude." *In re LS*, 152 Ohio App.3d 500, P12 (Ohio Ct. App., Cuy. Co. 2003). A reviewing court should also presume the trial court's findings are accurate, since the trial judge is in a **unique position** to view the witnesses, observe the demeanor, gestrues and voice inflections and use these observations in weighing the credibility of witnesses. *In re Dayton*, 155 Ohio App.3d. 407, ¶ 9 (2003) (emphasis added).

Therefore, an appellate court is not free to substitute its judgment for that of the trial court when reviewing a decision that a child's surname should be changed. *Boysel v. Perrill*, 2001 Ohio App. LEXIS 3999 (Ohio Ct. App., Fayette County Sept. 10, 2001) *citing Jarrells v. Epperson*, 115 Ohio App.3d 69, 71 (1996). Thus, a trial court's determination of a child's best interest is in the sound discretion of the trial court and should only be reversed upon a showing of an abuse of discretion. *In re Dayton*, 155 Ohio App.3d. ¶9. An "abuse of discretion" is defined as more than an error of law or judgment. It is an unreasonable, arbitrary or unconscionable attitude of a court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (OH 1983).

Appellee carefully lays out this standard because Appellant attempts to construe the trial

court's decision as facially discriminatory. Appellant tries to paint the trial court's decision as being so lacking in principle, fact, evidence or reason that this extremely high burden of abuse of discretion is obvious, shocking and illegal. However, the court's reasoned decision does not support such inference.

As stated above, Appellant rightfully asserts that a trial court cannot determine a child should bear a child's paternal surname based on custom which endured for many years. *Bobo*, 38 Ohio St.3d at 334. The trial court in *Bobo* stated, "upon a determination of paternity, and upon a request **that the name customarily is changed**, therefore the court orders that the name be changed on the birth certificate to that of Bobo." *Id.* at 331 (emphasis added). The Supreme Court was reviewing a decision based entirely on custom. A trial court speaks through its entries, and the *Bobo* trial court articulated its only evidentiary reason for the name change was patrilineal custom. *Id.* The Supreme Court decided both parents had equal interest in having a child bear their surname and using custom as a basis is discriminatory. *Id.* at 334. Therefore, the *Bobo* Court articulated several factors upon which a trial court should consider when exercising its best interests discretion. *Id.*

Appellant cites to *In re Willhite* as evidence the court abused its discretion in changing Logan's surname. The trial court in *Willhite* ruled the children of divorcing parents should exclusively maintain the paternal surname based on the rationale articulated in another case. *In re Willhite*, 85 Ohio St.3d 28, 31 (1999) citing *In re Newcomb*, 15 Ohio App.3d 107 (1984). The *Newcomb* decision stood for the proposition that if a father was supporting his child, interested in the child, exercised his rights, was not infamous and promptly objected to the name change, then, absent some overwhelming interest, the father would have a **greater interest** in maintaining the

paternal surname than a mother. *In re Newcomb*, 15 Ohio App.3d at 110-111 (emphasis added).

The Supreme Court incorporated the spirit of the *Bobo* decision in a trial court's surname petitions pursuant to O.R.C. §2717.01(A). *In re Willhite*, 85 Ohio St.3d at 31-32. The *Willhite* court guided trial courts to consider the *Bobo* factors in determining whether a surname change is in the child's best interests. *Id.*

1. The Clinton County Juvenile Court properly considered each applicable *Bobo* factor and its decision was not grounded in gender-based tradition as Appellant asserts.

Apart from Appellant's assertions, even the most fleeting of glances shows the trial court took the time to specifically lay out each *Bobo* factor and apply the evidence to its decision. The trial court separated each factor and articulated the available evidence to each. The trial court articulated all other relevant factors it considered in rendering its decision. Despite this carefully articulated decision, Appellant latches on to one statement contained within the trial court's decision. Appellant basis her entire argument on the trial court's general note that "children of divorced mothers usually retain their father's surname" and "[i]f the mother remarries, she often takes her spouse's surname." Appellant Br. Appx. 10-14. The court concluded with a hypothetical that if Appellant remarried and took her spouse's surname, then there would be three surnames: mother's, father's and Logan's. *Id.* These two sentences, contained within the trial court's four-page decision, are the facially gender-based discrimination mandating an immediate reversal of a magistrate's decision, the trial court's decision and an Appellate Court's decision.

Appellant takes several liberties in interpreting the trial court's decision to reach her ultimate conclusion that the court was motivated by gender bias. Appellant asserts any mention of custom or paternal interest deems the decision tainted by gender bias. Notwithstanding the fact

that the trial court's decisions in both *Bobo* and *Willhite* were specifically grounded on patrilineal tradition (as in *Bobo*) or a father has greater interest when he complies with his legal responsibilities (as in *Willhite*), this court articulated its rationale in a greater context of applying the factors this Supreme Court stated it must consider in light of a best interests analysis. Appellant simply cherry-picks statements without any further context.

The damaging statements asserted by the trial court appear within its factor by factor analysis. Specifically, the court was analyzing the identification with a family unit factor. Adding full context to the court's rationale, the court stated the mere presence in Appellant's home readily associates the child with Appellant's family unit. Appellant Br. Appx. 12. The court continued by saying the mutual surname between Appellee and child would reinforce the father-son family unit while they are together. *Id.* After these statements, the court articulates the general custom of a married woman taking her husband's surname. *Id.* The court then states a hypothetical. In this hypothetical, should the Appellant marry and take her husband's surname, then there exists the potential of three surnames. *Id.* These statements comprise of three sentences of a four page factor by factor analysis. The court does not stop its analysis at this hypothetical nor does it articulate this hypothetical as the entire basis for changing the child's surname. Yet, Appellant leads this court to believe this is what motivated the trial court.

Contrary to Appellant's belief, the trial court was not rendering its decision on this factor alone. Appellant is correct the law allows a woman to decide whether to embrace or reject the tradition of taking her husband's name. The trial court did not stop its analysis with this rationale, nor did the court state this was the most persuasive argument. This was a very small portion of a complete and thorough analysis of the best interest factors articulated in *Bobo*.

2. The trial court did not abuse its discretion as its decision was supported by competent evidence articulated by the court, and the decision was not made on Appellee's testimony alone, as Appellant suggests.

Appellant argues that appellate courts have created a bright-line test regarding the best interests standard when court's consider requests for a surname change. As suggested by the Appellant, a petitioner fails as a matter of law if the only evidence supporting the petition is father's desire for the child to carry the paternal surname. *Appellant Br.* pg. 16. Appellant cites several cases that allegedly identify this bright-line test. First, Appellant cites to *In re CLT*, in which the Twelfth District refused to substitute its decision to that of the trial court and found the only evidence in the record was petitioner's desire to have the child bear his surname. 2012 Ohio 427, (12<sup>th</sup> Dist. 2012). Further, Appellant cites to *Erin C. v. Christopher R.*, as well as other cases, which ruled a trial court did in fact abuse its discretion for granting a name change with petitioner's preference being the only evidence supporting the action. 129 Ohio App.3d 290, 293 (6<sup>th</sup> Dist. 1998).

The best interests test rising from the *Bobo* decision requires courts to consider very specific facts prior to rendering a decision in a particular case. In its decision in *In re CLT*, the Twelfth District refused to, like in this case, substitute its own judgment over that of the trier of fact. Appellant exaggerates these decisions by creating a bright-line test. In each and every case cited by Appellant, the respective court reiterates the only applicable test in contested surname changes is a best interests test incorporating the *Bobo* factors as a guide. *See Id.* at ¶¶8-9; *In re Wolfe*, 2002 Ohio 3277, ¶¶8-9 (2<sup>nd</sup> Dist. 2002); *Erin C.*, 129 Ohio App.3d at 293; *Patrick L. v. Michelle L.*, 2000 Ohio App. LEXIS 5578, \*16 (6<sup>th</sup> Dist. 2000); *Sharp v. Sayre*, 1990 Ohio App. LEXIS 4966 \*9 (4<sup>th</sup> Dist. 1990).

As indicated more fully above, the best interest analysis is a fact oriented analysis of the

evidence requiring the deciding court to weigh several factors before rendering its decision. A court who fails to consider the *Bobo* factors commits reversible error. *Evangelista v. Horton*, 2011 Ohio 1472 \*P69 (Ohio Ct. App., Mahoning County Mar. 2011). In the *Evangelista* decision, the appellate court overturned a trial court's decision to change a name because the court failed to articulate the facts required under the *Bobo* factors in making its best interests decision. *Id.* A trial court that does articulate the facts and evidence, in light of the *Bobo* factors, will be afforded deference in its decision making. *Jarrells*, 115 Ohio App.3d at 72-73 (stating sufficient evidence is in the record to support the trial court's decision...does not support a finding the determination was arbitrary, capricious or unconscionable); *Lichterman v. Molls*, 2002 Ohio 2115 ¶23 (11<sup>th</sup> Dist. 2002)(The trial court, in making its decision, considered the *Willhite* factors, discussed the applicable factors to the case and made a best interests determination. Therefore, the decision was not an abuse of discretion). The best interests test

“sets out matters that must be considered by the court on the basis of the record before it, and each party has an opportunity to persuade the court that the record properly supports his or her position. [] In cases of this kind the record is usually thin, and absent a showing that the trial court's decision has no basis in the evidence before it or was otherwise an abuse of discretion, an appellate court will not reverse the decision on appeal.” *Boysel*, 2001 Ohio App. LEXIS 3999 citing *Bobo*, 38 Ohio St.3d at 335 (emphasis added).

Despite Appellant's exhortations to the contrary, Appellee presented several other reasons for the court's consideration than his general preference to have a common last name. Appellee presented reasons of military separate allowing a child the comfort of associating with his father when away, to prevent the child from paternal alienation while overseas (something that happened once prior) and to reinforce the father-son relationship while both together and apart. Mother presented evidence the child's sister and Appellant had commonality in last names, but

the sister did not start with Appellant's surname. The surname was changed when sister's biological father was no longer involved with the child. Taking Appellant's own rationale to its logical conclusion, Appellee's involvement with his son would make differing surnames from that of the residential parent acceptable. A fact the trial judge points out in her opinion.

Furthermore, the magistrate and trial judge both articulated a factor by factor analysis as required under *Bobo*, and it articulated the evidence contained within the record supporting such. After such analysis, the court determined the child's best interests are served by changing the surname to, among other factors, strengthen the father-son bond. Unlike Appellant's assertions, the trial court's determination is not unheard of, unfounded or against precedent. *In the matter of Change of Name of Barker*, 155 Ohio App.3d 673, 676-677 (12<sup>th</sup> Dist. 2003) (changing the surnames would undermine his role as father, further disassociate them from their father, not foster their relationship with father and may undermine that relationship); *In re Willoughby*, 2004 Ohio 2079 \*P14 (11<sup>th</sup> Dist. 2004) (the record shows a name change would destroy an already strained relationship between the children and their father); *Jarrells*, 115 Ohio App.3d at 72 (The court was persuaded that while the mother-child relationship would be unaffected by the surname change, the father-child relationship would benefit...since the father is not the residential parent, the child's best interests are served by establishing an identity with the father); *Boysel*, 2001 Ohio App. LEXIS 3999 (the court was not inclined to conclude that the trial court abused its discretion as the trial court heard the testimony of both appellant and appellee and, in a written decision, applied the evidence to the best interest factors).

The trial court clearly articulated its analysis as applied against the *Bobo* factors. The trial court afforded both parties an opportunity to present its evidence. Upon receiving all of the

testimony and evidence, the court rendered a decision, which now Appellant disputes. The court clearly complied with the law. Appellant cannot now question the facts which the trial court found most persuasive as she failed to properly object to the magistrate's decision. Appellant's only recourse is to argue the decision was improper as a matter of law and cherry picks very narrow reasons justifying her position. The Appellant has a heavy burden to show an abuse of discretion, which she fails to do as the court properly considered each *Bobo* factor before exercising its discretion in determining best interests. Therefore, this Supreme Court should affirm the magistrate's decision, trial judge's decision and the decision of the Twelfth Appellate District of Ohio.

**Appellant's Proposition of Law No. 2: To determine whether changing a child's name is in the child's best interest, trial courts must properly consider the *Bobo v. Jewell* and *In re Willhite* factors.**

Appellant is right that a court must make a best interest determination when deciding to change a child's surname. However, the Appellant again misstates the law in requiring the courts to have affirmative evidence establishing every factor listed *In re Willhite* and *Bobo*. The *Willhite* Court held that "in determining whether a change of a minor's surname is in the best interest of the child, the trial court **should** consider the following factors..." *In re Willhite*, 85 Ohio St.3d at 32 citing *Bobo*, 38 Ohio St.3d paragraph two of the syllabus; *In re change of Name of Andrews*, 235 Neb. 170 (1990) (emphasis added). The Court continues by articulating several factors inclusive upon which the trial court should consider.

Appellant asserts the trial court failed to consider each and every factor articulated in the *Willhite* decision. Appellee respectfully disagrees. As stated in further detail above, the trial court considered each of the *Bobo* factors as articulated by the decision. The trial court explains, cites to and considered all evidence presented to it, and how it applied the evidence to the factors prior

to rendering its decision. The analysis was complete.

Further, the courts have held not all surname cases must demonstrate affirmative evidence regarding each and every factor. *In the Matter of the Name Change of Armin Lawrence R.*, 2007 Ohio 1523 \*P12 (The *Willhite* factors are suggestive; the list is neither exhaustive nor is consideration of each mandatory); *Boysel*, 2001 Ohio App. LEXIS 3999 citing *State ex rel. WCCSEA v. Felter* (Dec. 22, 1999), Wayne App. No. 98CA0059, unreported; *Hodge v. Gentit* (Aug. 8, 1991), Montgomery App. No. 12505, unreported (This is so because the trial court is not required to have before it affirmative evidence proving each of the elements in the "best interest" test).

As articulated more fully above, the trial court does not abuse its discretion so long as it can point to evidence contained in the record and how the court applied the evidence to the enumerated factors.

Appellant argues the trial court failed to consider whether a name change would cause a child to have a different name and whether such change would cause embarrassment, discomfort or inconvenience.

1. The Trial Court recognized a surname change would cause Logan to have a different surname than his residential parent and did discuss whether such change would cause embarrassment, discomfort or inconvenience.

The trial court's decision makes several acknowledgements as to Appellant's status as residential parent. Specifically, the court states, "the child's mere presence in the mother's household identifies the child as part of a family unit." Appellant's Br. Appx. 12. Further, the court acknowledges the commonality of the name between sister, Appellant and Logan, and Appellee's parenting time. *Id.* The court was fully aware that any change would cause Logan's surname to differ from his custodial parent.

Appellant places complete emphasis on this one factor, and as stated above, attempts to create a bright-line test in which the residential parent would presumptively have a more significant interest in the child's surname than a non-custodial parent. However, this factor is one of many a trial court should consider when making a best interest determination.

The court, after considering all of the evidence presented, must make a best interest determination in accordance with the factors articulated in *Bobo* and *Willhite*. Appellant proposes the decision should always be rendered in favor of the residential parent. However, case law does not support such a proposition. *In the matter of Change of Name of Barker*, 155 Ohio App.3d at 676-677 (changing the surnames would undermine his role as father, further disassociate them from their father, not foster their relationship with father and may undermine that relationship); *In re Willoughby*, 2004 Ohio 2079 \*P14 (the record shows a name change would destroy an already strained relationship between the children and their father); *Jarrells*, 115 Ohio App.3d at 72 (The court was persuaded that while the mother-child relationship would be unaffected by the surname change, the father-child relationship would benefit...since the father is not the residential parent, the child's best interests are served by establishing an identity with the father); *Boysel*, 2001 Ohio App. LEXIS 3999 (the court was not inclined to conclude that the trial court abused its discretion as the trial court heard the testimony of both appellant and appellee and, in a written decision, applied the evidence to the best interest factors).

As the above referenced cases indicate, there are real concerns about parental alienation and disassociation issues that can result from a child having a name change different from the non-custodial parent. These issues are best discovered and dispensed with by a fact specific analysis on a case-by-case basis. So long as a trial court can reasonably articulate its findings in

accordance with the *Bobo* and *Willhite* factors, the appellate courts will give deference to the trial courts discretion.

Similarly, the Appellant argues the court failed to analyze the embarrassment, discomfort and inconvenience Logan would experience by having a surname different than his residential custodian. The court in fact analyzed this factor conspicuously under the banner, “The embarrassment, discomfort or inconvenience that may result when the child bears a surname different from the custodial parent.” Appellant’s Br. Appx. 12.

The trial court concluded that the child would not suffer any embarrassment, discomfort or inconvenience based on the reasons articulated by Appellant at trial. *Id.* Appellant testified that the child was still working on mastering his name, but had not done so by the time of trial. *Id.* The child would be starting kindergarten at a new facility in the fall and could have different classmates when school started. *Id.* Appellant provided no testimony regarding her reputation in the community, but Appellee did by testifying he was a member of the sheriff’s department and a member of the military. *Id.* Appellant also points to Logan’s half-sister as further justification. However, earlier in its decision, the court pointed out sister’s original name was different than the residential custodian. *Id.* This only became an issue to Appellant once this child’s father was not actively participating in the child’s life. *Id.* Contrary to Appellant’s assertions, the trial court exhaustively analyzed this issue. Appellant is upset that she could not persuade the court from making the decision it made based on Appellee’s case-in-chief.

Appellant further implies, through her proposal of a bright-line test, that all children would suffer embarrassment, discomfort or inconvenience if the child’s last name differed from the residential parent. The Twelfth Appellate District reasoned, “divorce is common in our

society, [and] children are subject to some confusion, embarrassment and inconvenience due to having a surname different from their residential parent[.] This unfortunate fact of modern society [and the] inconvenience should not be so great as to be intolerable.” *In the matter of change of name of Barker*, 155 Ohio App.3d. \*P12.

Appellee offered testimony as to why the child’s interests would be served with a surname change, which the trial court found to be persuasive in light to the requisite *Bobo* and *Willhite* factors. The court articulated the evidence used to support its conclusion. Appellant is just naturally upset that a court failed to find in her favor and now manufactures her justification. Further, Appellant attempts to supplement her argument with evidence not found in the record or considered as evidence, which she failed to present at trial and excluded from consideration. (It is virtually certain that a five year old with developmental disabilities would struggle to understand why his name is different from every other person in his household; forcing Logan to be excluded from sharing his primary family’s surname creates risk that this child feel more than embarrassment, discomfort and inconvenience; may leave him feeling insecure and alienated; he would suffer embarrassment, discomfort and inconvenience because he would have to explain to his friends why his name changed; because of his developmental disabilities, it would be difficult for Logan himself to understand why his surname is different). Appellant’s Br. pg. 24-25. The trial court exercised sound discretion, as it articulated each applicable enumerated factor and applied the evidence contained within the record, when making its best interest decision.

2. The trial court did not abuse its discretion in its application of the best interest factors set out in *Bobo* and *Willhite*.

A trial court applying best interest factors depends on a fact intensive analysis differing in each case based on the family and circumstances surrounding each instance. This allows courts a

wide latitude to apply the evidence to the best interest factors prior to making a decision. This guided discretion, coupled with a trial court's unique position to view and weigh the credibility of witnesses, lends to the rationale that only unreasonable, arbitrary and unconscionable decisions must be overturned.

With this spirit in mind, the trial court listened to all of the evidence presented. There were no objections to any substantive evidentiary issues. Upon conclusion of Appellees case, Appellant was afforded time to present her evidence. Appellant participated in the trial and never once objected to the proceeding. Now, upon receipt of the decision, Appellant complains of significant judicial error simply because she lost.

As stated numerous times throughout, the trial court issued a decision specifically articulating how it applied the testimony and evidence to the requisite factors. Despite this analysis, Appellant claims the trial court failed to place emphasis on certain factors, such as the child living with his mother and sister who share a common surname. Further, Appellant argues the trial court's decision regarding the child using his surname constitutes a decision so wrought with discriminatory motive it must be deemed an abuse of discretion. *See Appellant Br. pg 27-31.*

First, Appellant claims the trial court failed to consider Logan's commonality of last name with his residential parent and half-sister. Appellant belabors this point in hopes this Court will endorse the bright-line test that all residential custodians will automatically gain favor in a surname dispute. Appellant's argument fails for two reasons.

Appellant's half-sister was born under a different surname despite Appellant's role as the residential custodian. Appellant changed this name upon a showing by the child's biological

father that he would not be an active participant in the child's life. Using this logic, had sister's biological father been active in her life, Appellant would have continued using the father's surname, even though it would have been different from the child's residential parent. This fact did not go unnoticed by the trial court. Appellant's Br. Appx. 11-12 ([Appellant] testified Logan's half-sister had the last name Laugh (sic.), which Ms. Laug changed as the girl's father had nothing to do with her.") The court was able to properly place weight and credibility on Appellant's testimony, which it had absolute discretion to do.

Appellant continues to argue the point that all residential custodians get preferential treatment simply in a surname change proceeding. However, as cited above, the courts have found strong justification in promoting the surname of a non-custodial parent such as preventing parental alienation and skew or to promote the parental relationship. *In the matter of Change of Name of Barker, supra; In re Willoughby, supra.; Jarrells, supra; Boysel, supra.* Again, these decisions are fact intensive as applied to the *Bobo* and *Willhite* factors. As long as the courts can identify some evidence to support its decision, the appellate courts grant deference.

Further, the Appellant claims the trial court used novel, precedent setting rationale regarding the using a surname rather than having a surname. Specifically, the trial court found Logan was just beginning to use his surname after recognizing the child had Appellant's surname since birth. Appellant Br. Appx. page 11. However, this is not the case. The factor specifically states, "the length of time the child has used the surname." *Bobo*, 38 Ohio St.3d, paragraph two of the syllabus. The plain meaning of this factor implies a differentiation between using and having a surname. The trial court concluded Logan was just beginning to use his surname, had not mastered his name yet, had not started kindergarten and may have different classmates than at

his preschool. These factors were influential to a trial court with the discretion to apply facts and evidence to the *Bobo* and *Willhite* factors prior to rendering a decision.

Appellant's argument is best summed up to one single argument; I lost a trial, and I firmly believe I should have won. The Appellant manufactures and conjures issue upon issue in hopes one might be persuasive. The trial court in this case analyzed the factors as they applied to the evidence and concluded the child's best interests would be best served with a surname change as such would help the child identify with his father, would not affect the relationship with his mother, had not been using the name long and would not suffer any harm as a result. *Generally*, Appellant's Br. Appx. 10-14 . This analysis was sound, reasoned and within the sound discretion of the trial court. Appellant is naturally upset that she lost the trial. But as the decision was supported by competent, credible evidence, the trial court did not abuse its discretion. Therefore, the decision of the magistrate, trial judge and the Twelfth Appellate District should be affirmed.

## V. CONCLUSION

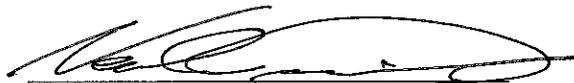
Generally, a trial court's decision is given considerable deference based on the trial judge's unique position to view the witness' credibility, demeanor and other intangibles that do not translate onto paper. When a trial court uses the guidelines and factors set out through statutory mandate and common law and properly points to evidence contained within the record, then appellate courts should grant deference to the trial court's decision making.

The trial court held an evidentiary proceeding allowing both parties to promote its legal position. Understanding Appellee had the burden of persuasion, the court listened to all evidence justifying a name change, in light of the *Bobo* and *Willhite* factors, and made a best interests

determination favoring a name change. The magistrate articulated how he applied the evidence to the factors to demonstrate Appellee met his burden of persuasion. Appellant failed to properly object to any particular finding of fact or conclusion of law, thus waiving such on appeal. The trial judge affirmed the magistrate and carefully crafted a decision analyzing each and every applicable factor to the evidence before the court. The trial judge decided the surname change would be in Logan's best interests.

Despite Appellant's unilateral assertions to the contrary, the trial court's decision reflected the law and placed mother and father on equal grounds as it pertains to the surname. The court weighed the factors and decided. The Twelfth District, as so many other appellate courts in these cases, refrained from questioning the rationale of a trial court because of its unique position of viewing the trial and witnesses. Therefore, absent some additional showing that the trial court had abused its discretion, this Supreme Court should affirm the Clinton County Juvenile Court's decision as upheld by the Twelfth District Court of Appeals.

Respectfully Submitted,



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## VI. CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing brief was served upon the parties listed above by regular U.S. mail, postage prepaid on this the 21<sup>st</sup> day of May, 2012.

Ginger S. Bock (0082253)  
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A handwritten signature in black ink, appearing to read 'Neal W. Duiker', written over a horizontal line.

Neal W. Duiker  
Attorney for Appellant

**VII. APPENDIX**