ORIGINAL

IN THE SUPREME COURT OF OHIO

D.W.,

Appellee,

v.

T.L.,

Appellant.

Case No. 2011-1979

On Appeal From The Clinton County Court Of Appeals, Twelfth Appellate District

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REPLY BRIEF OF APPELLANT TRICIA LAUG

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INTRODUCTION

The record contains no evidence that changing an emotionally-troubled child's name was in the child's best interest. Perhaps it was this dearth of evidence that caused Father to mischaracterize the facts, the record, and Mother's arguments. Father accuses Mother of exaggerating, supplementing her brief with evidence that was not in the record, highlighting portions of the record without context, and taking "liberties" with the trial court's decision. But Father's accusations are baseless distractions from the real issue in this case—the trial court abused its discretion by ordering a child's name to be changed based on nothing other than gender tradition and a parent's desire for his child to carry his name.

This Court requires trial courts to grant a parent's name-change petition for a minor child *only* after determining that the name change is in the child's best interest by considering specific factors. *Bobo v. Jewell*, 38 Ohio St.3d 330, 528 N.E.2d 180 (1988); *In re Willhite*, 85 Ohio St.3d 28, 706 N.E.2d 778 (1999). But the petitioning parent presented no evidence that the name change was in the child's best interest. The trial court ignored mandatory factors, distorted other factors, and granted a name change not because it was in the child's best interest, but because the father wanted the child to carry his surname.

To allow the lower courts' decisions to stand would render the best-interest-of-the-child requirement meaningless. Therefore, the decisions below must be reversed.

ARGUMENT IN REPLY

A. Mother Sufficiently Objected to the Magistrate's Decision

Father[1] asserts that Mother failed to specifically object to the magistrate's findings of facts and conclusions of law. (Father Br. at 1, 5, 8-9, 18.) He is incorrect. Mother first filed a

[1] Capitalized terms in this Reply shall have the same meaning as Mother's merit brief. Citations to Mother and Father's merits briefs shall be "Mother Br." and "Father Br.", respectively.

general objection to the magistrate's decision in which she reserved the right to supplement her objection after receiving the transcript. (Appx. 20-21. Appendix pages 20-29 are attached.) Mother filed a supplemental memorandum in support of her objection. (*Id.* 22-29.) Citing *Willhite*, Mother argued that Father failed to meet his burden to prove that the name change was in Logan's best interest. (*Id.* 25-28.) She argued that the magistrate erred because he did not consider the negative aspect of a name change and ordered the name change based on history and tradition rather than Logan's best interest. (*Id.* at 27.) She pointed out that the name change would cause Logan unnecessary confusion that would "effectively reverse[] what Mother has accomplished in five years with this child." (*Id.* at 28.) She noted that:

- Logan had been known as Logan Laug since birth, had been learning to write his name for a year, and recognized his name (*id.* at 26-27);
- Logan shared a surname with every member of his primary household (*id.* at 26);
- Father's "evidence" consisted only of his own desire for to Logan carry on his name (*id.*);
- Father's entire name was embedded within Logan's name (Logan David White Laug) (*id.*);
- The trial court was not permitted to give primary or greater weight to Father's interest in having Logan bear the paternal surname (*id.*);
- The name change would be contrary to Logan's best interest due to his developmental disabilities (*id.* at 26-27); and
- Logan is very sensitive to change and would have a hard time adjusting. (*Id.* at 27.)

Mother named specific grounds for her objection; the trial court considered the specific issues raised in Mother's objection. (*Id.* 10-15; 22-29.) The Twelfth District conducted an abuse-of-discretion review, rather than a plain-error review; therefore, it also determined that

Mother's objection was sufficient. (Appx. 5-7.) Father's assertion that Mother failed to properly object to the magistrate's decision is baseless and must fail.

B. Father Mischaracterizes Mother's Arguments and Brief

1. Mother's arguments are based on multiple grounds

Father argues that Mother "cherry-picks statements without any further context" and that "[d]espite [the trial court's] carefully articulated decision, [Mother] latches on to ***one statement*** contained within the trial court's decision. [Mother] basis [sic] 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.'" (Emphasis added.) (Father Br. 13-14.) Father also argues that Mother "places ***complete emphasis***" on a very different concept—that the trial court failed to consider whether the name change would cause Logan's surname to be different from Mother's. (Emphasis added.) (*Id.* at 20.) It is unclear whether Father's position is that Mother's entire argument is based on the trial court's discriminatory statements or on the trial court's failure to consider one of the *Willhite* factors. His contradictory assertions alone prove that Mother bases her argument on more than one ground.

Mother did not cherry pick portions of the record or trial court decision without context—she described the trial court's decision in great detail. (Mother Br. 8-10.) Mother's factual statement accurately recited the facts as given in testimony. (*Id.* at 3-11.) Her argument was based upon that testimony and the law. (*See, generally, id.*)

These arguments were not confined to one or two factors. She argued that the trial court arbitrarily, unreasonably, and unconscionably changed her child's surname because it 1.) explicitly relied on gender-based tradition (children usually retain their father's surnames and women often change their surnames upon marriage); 2.) granted the change despite there being

no evidence in support of the name change other than Father wanting his son to carry his name; 3.) failed to mention or consider *Willhite*;[2] 4.) failed to consider whether Logan's name would differ from his residential parent's; 5.) failed to consider whether having a different surname than his residential parent's would cause Logan embarrassment, discomfort, or inconvenience; 6.) gave primary weight to the child's identification with the non-residential parent instead of with the residential parent and half-sibling; 7.) employed an arbitrary test to determine how long Logan had been using the name Laug; and 8.) considered "other" factors that were not relevant to Logan's best interest. (Mother Br. 11-33.) Mother's arguments highlight what Father does not wish to acknowledge—that the trial court's best-interest analysis was framed in terms of the father's interest in his child bearing the paternal surname.

2. Mother Did Not Suggest Abrogating the Best-Interest Analysis

Father asserts that Mother proposed a bright-line test so that name-change decisions "should always be rendered in favor of the residential parent." (Father Br. 20; 21, 23.) Mother did not suggest that a child should automatically be given the residential parent's name. Rather, Mother cited various cases where courts have *preferred* that a child's surname matches that of the siblings and parent who live in the child's primary household. (Mother Br. 27-28.) The preference stated by these courts is a far cry from the bright-line test for which Father accuses Mother of advocating. Mother recognizes that an automatic residential-parent surname designation would be contrary to law, as it would fail to analyze the child's best interest.

The only bright-line test referenced in Mother's brief was the test laid out by a number of

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[2] Father extensively cites the magistrate's oral ruling, which cites *Willhite*. (Father Br. 5, 7-8, 16, 26.) But a magistrate's oral ruling is not a judgment. Even a written magistrate's decision is not a final judgment until adopted by the trial court. Juv.R. 40(D)(4)(a). Here, the trial court did not simply adopt the magistrate's decision—it ruled via separate entry. (Appx. 10-14.) That separate entry contained no mention of *Willhite*. (*Id.*) It does not matter how many times the magistrate referred to *Willhite*; the trial court's separate entry only cited and considered *Bobo*.

courts of appeals, which determined that it is per se improper for a trial court to grant a name change based only on a father's testimony that he wants the child to bear or carry forward the paternal surname. (Mother Br. 16-17.) Despite Father's assertion that Mother "exaggerates these decisions," each case clearly stated that when the only evidence supporting a name change is a parent's desire for the child to carry his or her surname, the petitioner does not meet his or her burden to demonstrate that the name change was in the child's best interest. *E.g.*, *In re C.L.T.*, 12th Dist. No. CA2011-04-073, 2012-Ohio-427, ¶ 32 ("Father's only reasons 'for wanting the name change were that this is his only child, and he wanted to carry on the family name.'"); *Erin C. v. Christopher R.*, 129 Ohio App.3d 290, 293, 717 N.E.2d 787 (6th Dist.1998) ("The trial court ruled on the question of the name change with nothing more than the statement that '*** the last name of the child be changed to [R.].'"); *In re Wolfe*, 2nd Dist. No. 19136, 2002-Ohio-3277, ¶ 17 ("[Father] had the burden of establishing that in consideration of the *Willhite* factors a change of surname was in [the child's] best interests. After reviewing the evidence, he clearly failed to meet that burden. * * * The only relevant evidence [Father] produced was that he desired [the child] to have his surname."); *Patrick L. v. Michelle L.*, 6th Dist. No. WD-00-005, 2000 Ohio App. LEXIS 5578, *17 (Nov. 30, 2000) ("this court finds that the only evidence in support of the name change consisted of [Father's] testimony at the hearing that [the child] was the only male heir in his family and that [Father] wanted his son to have his surname."); *Sharp v. Sayre*, 4th Dist. No. 1855, 1990 Ohio App. LEXIS 4966, *11-12 (Oct. 22, 1990) ("[Father's] only testimony to the contrary was to the effect that it would 'be good for him to have some lineage' and he 'would like him to have the same last name.' This testimony effectively relies upon the antiquated and discriminatory legal theory which espoused customary succession to the paternal surname even to children born out of wedlock.").

3. Mother's assertions of fact were found in the record

Father accuses Mother of "supplement[ing] her argument with evidence not found in the record." (Father Br. 22.) Father confuses 'evidence' with 'argument.' The examples to which he points were either evidence in the record or were argument based on that testimony.

Mother testified, "I think it's going to be very hard for a child that has developmental disabilities to walk into a class and say oh, no, my name is different now when all the kids know him [a]s [Logan Laug], and he's learning to write [his name]. And then he has to explain to his friends why his name is different than his mom and his sister who he resides with." (Supp. & Tr. 36.) Further, "I think [the name change] would be difficult for [Logan] considering that he's going to be residing most of the time in my house with his sister, and we both have the same last name as Laug." (Supp. & Tr. 31-32.)

As the Twelfth District acknowledged, the trial court did not consider whether Logan would suffer embarrassment, discomfort, or inconvenience as a result of his surname being different from Mother's. Therefore, based on her testimony, Mother argued that this *Willhite* factor disfavored Father's petition because due to his disabilities, Logan would struggle to understand why his name is different, may feel alienated, and would have difficulty explaining the change to his friends. This argument is not "manufacturing" or "supplementing" evidence—it is *argument* based on the testimony adduced at trial. Mother did not distort the record—her *factual* statement and *factual* assertions can be directly traced to the record below.

C. Father's Brief Mischaracterizes the Facts and Record

1. There is no evidence that Mother prevented Father from contacting Logan

Father disingenuously asserts that there was evidence demonstrating that Mother had prevented contact between Logan and Father: "[Father] attempted to contact his child, but

[Mother] threatened to press charges if he continued his efforts to maintain contact" (Father Br. 2); "[Mother] already prevented contact with the child during a prior deployment" (*id.* at 3); "to prevent the child from paternal alienation while overseas (something that happened once prior)." (*Id.* at 16.) The evidence belies Father's contention. The following is the verbatim transcript involving the supposed interference with contact.

Q. How long did you reside with Logan and his mom?

A. I believe I want to say '06, '06 to '09, August of -- actually, as soon as I left August 8 of '09, that's when I stopped living with her.

A. Okay. And why did you move out of the residence?

Q. Well, I really didn't have a choice. I went overseas and I was over there for a mission for humanity for the military. And I left on the 18th, I called --

Q. 18th of when?

A. August of '09. I've called on the 21st of August to see how everything was going. First, I contacted her father, then I contacted her.

Q. When you say her, do you mean?

A. Tricia.

Q. Okay.

A. And she told me not to call or she will press charges.

(Supp. & Tr. 14-15.) Father testified that he contacted Mother and her father, but there exists no testimony that Father tried, or was prevented from, contacting Logan. Indeed, nowhere in this exchange did Father even mention Logan's name. Distorting testimony for the purpose of gaining an advantage—especially when the distortion paints a party as a bad parent—has no place in a courtroom.

2. Father's stated reasons justifying name change mischaracterize testimony

In his statement of facts, Father asserts that he testified at trial that the name change was in Logan's best interest because

> it would help the child identify with [Father] while the two are apart, including times of overseas deployment when [Father] is not readily available, and will allow the child to remember [Father] should he not return from overseas combat. [Father] did admit he grew up without a father and never knew his father. And father believes the commonality of the surname would help solidify the father-child relationship. (Internal citations omitted.) (Father Br. 3.)

Elsewhere in his brief, Father claimed that he had "presented several other reasons" besides his own preference that justified the name change: "reasons of military separate [sic] 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." (*Id.* at 16.)

The testimony does not support Father's creative presentation of the facts. Father testified that he never knew his father and that he wanted Logan to carry his surname in case he was killed in the line of duty. But Father's other "factual" assertions involving testimony in favor of the name change were mischaracterizations not supported by the record.

First, as discussed above, Father did not testify that Mother had prevented contact between Logan and him or that he ever asserted that there was a risk of parental alienation. He cannot now invent an issue that was not presented to the trial court.

Second, contrary to his assertion in his brief, Father did not testify that he "believes the commonality of the surname would help solidify the father-child relationship." (Father Br. 3.)

When asked how changing Logan's name would "preserve or develop" his and Logan's relationship, he speculated, "I believe it would -- I really don't know how to answer that question. I just -- I mean, me and Logan, we're pretty close. I think it would be meaningful to both of us, you know, when he gets older." (Supp. & Tr. 19.) His hesitant speculation is a far cry from testifying that commonality in names would solidify or reinforce their relationship.

Finally, Father did not testify that the name change would comfort Logan, help Logan identify with Father, or help Logan remember him if he died in the line of duty. Indeed, nothing that Father said at trial involved what would aid Logan's interests. Father testified to some reasons why he believed that the name change would not *hurt* Logan. (*Id.* at 18-19 ("I don't believe there would be no effect. I mean, his mother stated to me that he's just now learning his name, his last name and writing it."); *id.* at 23 (testifying that a name change would not cause Logan embarrassment, discomfort, or inconvenience.)) But his only testimony involving why the name change would *help* Logan's best interests only involved Father's interests.

> Q. What do you want Logan's surname to be? A. I would like it to be White. Q. Okay. And why is that? A. I am the only one in my family with the last name of White. I believe, you know, since I've joined the military, I've -- we've had mobilization briefings and stuff like that, you know, and it just kind of worries me now. I don't want to -- I want my son to have my last name. I want my son to carry my last name on, you know. Q. What is a mobilization briefing? A. It talks about being deployed. Q. And why would a mobilization briefing and being deployed cause you concern about your name? A. Because it's my son. He's going to be left with his mother, you know. I want him to have something of mine. I want him to, you know, have a piece of me, you know, and my last name.

> Q. Is it you fear that on a deployment you may be killed? A. Yeah. (*Id.* at 16.)
>
> * * *
>
> Q. Do you think it's important for Logan to have your surname? A. Yes. * * * A. I'd prefer him to have my last name, you know, my last name be at the end. Q. Okay. Any do you believe it's in Logan's best interest for the Court to order that Logan have White as part of his surname? A. I believe it is because I've grown up without a father. I never knew my real father. I've had -- I have my stepfather now, and my brother's father. We've got a bond, but it's just not that bond, you know. It's -- there's -- I don't know. There's just not that fatherly love there. I just want -- I'm just trying to do the right thing because I know how it is growing up without a father, not being around, not even knowing your real father. It's very important to have a father figure in your life, you know, especially just pretty much carrying the last name too. You know, that's huge to me. (*Id.* at 23-24.)

Nowhere in the 16 pages of Father's trial testimony did Father ever say that if he and Logan shared a surname, their relationship would improve, or that Logan would feel comforted when his father was away, or that Logan would better identify with his father while he was overseas, or that a name change would prevent paternal alienation. (*Id.* at 13-28.) This makes sense—Logan and Father experienced a close and loving father-son bond and spent time together, despite the fact that they did not share a surname. (*Id.* at 19-21.)

This Court can scour the record, but it will find that none of the additional "reasons" that Father describes in his brief actually exist on the record. The only justifications that Father gave to support his position were vague speculation that the name change might "be meaningful * * * when [Logan] gets older" and Father's own fears, desires, and needs.

D. Father's Arguments Fail to Demonstrate That Father Met His Burden of Proving That the Name Change Was In the Best Interest of the Child

1. Circumstances of Sister's name change are irrelevant to Logan's best interests

Throughout his brief, Father attempts to justify the trial court's decision by pointing out that Mother changed Sister's surname because the girl's father was not involved in her life. (Father Br. 5, 10, 16-17, 21, 23-24.) According to Father, "Taking [Mother's] own rationale to its logical conclusion, [Father'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. [sic]" (*Id.* at 17.) There is nothing logical about Father's conclusion.

The only issue at stake in this case was whether changing Logan's surname was in *Logan's* best interest. Whether Sister's name change had been in Sister's best interest is irrelevant. If a court were to find that a name change for a child was proper simply because the child's parent had changed a half-sibling's name, the court would no longer be looking at the individual child's best interest. Instead, the court would be mechanically changing children's names based on the circumstances surrounding a completely different child.

Analogizing Father's "logic" to custody reveals his argument's flaws: A father has two children, Child A and Child B, with two mothers, Mother A and Mother B, respectively. The father has full custody only of Child B. He moves for, and is awarded, full custody of Child A because Mother A is not involved in Child A's life. Later, Mother B, who is actively involved in Child B's life, moves to modify custody. Under Father's "logical conclusion," Mother B would be awarded full custody of Child B simply because Mother B was actively involved in Child B's life. A trial court's order awarding custody of a child based solely on this ground would be an abuse of discretion—it ignores the child's best interest. Both custody and name changes require a court to conduct a best-interest analysis. Father's "logical conclusion" is utterly illogical.

While Sister's *name* is relevant to this case—all members of Logan's primary household (Sister, Logan, and Mother) share a surname—Sister's name *change* is not relevant to whether changing Logan's name from Laug to White is in Logan's best interest. In Sister's case, the trial court apparently determined that a name change was in Sister's best interest. This makes sense—after all, Mother was Sister's residential parent. But the circumstances surrounding Sister's name change do not impact Logan's best interest.

2. Father's contention that strengthening the father-child bond favors the name change is contradicted by the record and case law

Father asserts that the trial court analyzed the *Bobo* factors, articulated evidence supporting each factor, and "[a]fter 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 [Mother's] assertions, the trial court's determination is not unheard of, unfounded or against precedent." (Father Br. 17.)

The trial court did not find that the name change would strengthen Logan and Father's relationship. (Appx. 11.) Both the magistrate and the trial court specifically found that both parents had a good relationship with Logan. (Supp & Tr. 41-42; Appx. 11.) Father has never disputed this finding, nor should he—Father testified that he tries to spend as much time with Logan as possible, that he attends Logan's games and practices, and that during Father's parenting time, the two of them play trucks, watch television, work in the yard, and swim. (Supp. & Tr. 19-20.)

Instead, the trial court found that the change would reinforce the identification of the father-son family unit. (Appx. 12.) But as Mother argued in her brief, this Court and many courts of appeals have articulated a preference for a child sharing a surname with the residential parent, especially when half-siblings live in the child's primary household because the family

unit is reinforced when the family members share a surname. (Mother Br. 22, 27.)

The cases cited by Father are distinguishable. *In re Change of Name of Barker* involved a mother who, six years after she had divorced her children's father, sought to change the children's name to her new married name. 155 Ohio App.3d 673, 2003-Ohio-7016, 802 N.E.2d 1138, ¶ 2-3. The trial court denied the name-change petition because it would further disassociate [the children] from their father." *Id.* at ¶ 11. Similarly, *In re Willoughby* involved children who, through their mother, petitioned to change their name from their father's surname to their mother's reverted maiden name. 11th Dist. No. 2003-L-050, 2004-Ohio-2079, ¶ 1, 3. The trial court denied their petition because the name change would "destroy an already strained relationship between the children and their father." *Id.* at ¶ 14. In both cases, the trial court denied, rather than granted, the petition—the petitioning party carries the burden of proving that the name change is in the child's best interest. Moreover, the relationships between the children and the fathers were already strained. Logan and Father have a good relationship. Further, *Boysel v. Perrill* involved a wholly dissimilar set of facts—the child's surname differed from both parents' surname; therefore, the trial court found that his name did not "foster his affiliation with either parent." 12th Dist. No. CA2000-11-032, 2001 Ohio App. LEXIS 3999, * 7.

Interestingly, the *Jarrells v. Epperson* court cited the same stereotype that the trial court in the instant case cited: "[Mother] someday intends to marry, thereby changing her surname." 115 Ohio App.3d 69, 72, 684 N.E.2d 718 (3rd Dist.1996). *Jarrells* was decided in 1996, three years before *In re Willhite* rejected the "absurd" notion that women should be punished for changing their names. 85 Ohio St.3d 28, 32, 706 N.E.2d 778 (1999). Further, the petitioning parent in *Jarrells* testified that he would feel a closer bond to the child if they shared a surname and that the mother had given the child her surname without any input from him. *Jarrells* at 72.

It is unclear how it would ever be in a child's best interest to share a surname with a parent who would feel any less affection for or closeness with a child simply due to having different surnames; however, that issue is not a factor in the instant case. Neither parent testified that a name change would change their relationship to Logan. Father's suggestion that "parental alienation and disassociation" could result if Logan's name is not changed is specious. Logan has never shared Father's surname; yet, Father himself testified about the strength of their relationship. (Supp. & Tr. 19-20.)

3. Trial court did not properly consider *Willhite* factors

Father asserts that a trial court should, but is not required to, consider each *Willhite* and *Bobo* factor. (Father Br. 6, 18-19.) Yet, he also asserts "[a] court who [sic] fails to consider the *Bobo* factors commits reversible error." (*Id.* at 16.) These contradictory arguments make it unclear whether Father believes that consideration of each factor is optional or mandatory. Regardless, there is no question that the trial court failed to consider *Willhite*—it did not mention or cite *Willhite* and did not analyze two of *Willhite's* eight factors. *Willhite*, 85 Ohio St.3d 28, 706 N.E.2d 778, paragraph two of the syllabus; Appx. 10-14.

But even if the trial court only was required to analyze the *Bobo* factors, it failed to properly do so. Father 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." Father Br. 13. But the existence of sentences appearing under a listed factor does not mean that a trial court properly considered that factor, or even considered it at all.

Father argues that the trial court analyzed whether Logan would experience embarrassment, discomfort, or inconvenience as a result of having a surname different from his residential parent's. (Father Br. 21.) The Twelfth District recognized that the trial court had not

considered whether Logan would suffer embarrassment, discomfort, or inconvenience as a result of bearing a different surname than his residential parent. *D.W. v. T.L.*, 12th Dist. No. CA2011-03-004, 2011-Ohio-5228 at ¶ 16 ("the juvenile court did not appear to specifically mention it considered whether the child would suffer embarrassment, discomfort, or inconvenience when he had a surname different than his residential parent").

Father cannot point to any part of the trial court's decision that suggests that it considered whether Logan would suffer embarrassment, inconvenience, or discomfort if his name were different than Mother's. Instead, he points out that the trial court concluded that Logan had not mastered his name, that Logan would start kindergarten at a new school with different classmates, that Mother did not provide evidence regarding her reputation, and that Father testified that he was in the military. (Father Br. 21.) But the two analyses are completely separate. The trial court's focus was on whether the name itself would be embarrassing, uncomfortable, or inconvenient to Logan—with no consideration of the name in context of Logan's day-to-day life. The *Bobo* and *Willhite* factor, however, required the trial court to consider whether changing Logan's name to White would be embarrassing, uncomfortable, or inconvenient for Logan considering the overall context of Logan's day-to-day life—everyone in Logan's primary household would be named Laug except for Logan. Never once did the trial court opinion discuss the very issues that this Court found to be so important in *Willhite*—whether having a different name would avoid confusion and embarrassment at school, church, sports, and social activities as a result of the child having a different surname from the residential parent because "[t]he child with [the residential parent's] surname does not have to explain why his or her last name is different." *Willhite*, 85 Ohio St.3d at 33, 706 N.E.2d 778. Its failure to do so was an abuse of discretion.

4. Whether the trial court's decision was based on discriminatory tradition or a discriminatory hypothesis, the trial court's decision was discriminatory

Father attempts to explain away the trial court's discriminatory statements by focusing on the magistrate's oral ruling from the bench, asserting that Mother took the trial court's discriminatory statements out of context, labeling the discriminatory statements as "a hypothetical," and accusing Mother of misleading this Court "to believe this is what motivated the trial court. Contrary to [Mother's] belief, the trial court was not rendering its decision on this factor alone." (Father Br. 5, 7-8, 10-14.) But nothing that Father argues changes the fact that the trial court's decision was grounded on the very discriminatory customs that this Court prohibited.

Father extensively cites the magistrate's oral ruling, which cites *Bobo* and *Willhite*. (Father Br. 5, 7-8, 16, 26.) But a magistrate's oral ruling is not a judgment. Even a written magistrate's decision is not a final judgment until adopted by the trial court. Juv.R. 40(D)(4)(a). Here, the trial court did not simply adopt the magistrate's decision—it ruled via separate entry. (Appx. 10-14.) That separate entry was the judgment in this case, and that is the judgment from which Mother appeals. It is irrelevant how well or poorly a magistrate articulates a best-interest analysis if the trial court rules via a separate entry.

The "context" that Father asserts excuses the trial court's discrimination involved an analysis of Logan's identification with a family unit. (Father Br. 14.) The trial court suggested that "[Logan's] mere presence in the mother's household identifies" Logan as part of Mother's family unit and that if Father and Logan shared a surname, it would reinforce the identification of the father-son family unit during Father's parenting time. (Appx. 12.) The trial court then states that "children of divorced mothers usually retain their father's surname. If the mother remarries, she often takes her spouse's surname," which would cause Mother, Father, and Logan to have three surnames. (*Id.*) It concluded that Father is far less likely to change his surname

than Mother. (*Id.*) The trial court's statements remain just as discriminatory when read in context. Whether these statements were hypotheticals, predictions, or the court's views on gender roles, the statements were still discriminatory and influenced the trial court's decision.

Father also states that Mother "asserts any mention of custom or paternal interest deems the decision tainted by gender bias." (Father Br. 13.) Not so. What she actually said was, "When discriminatory tradition is the foundation for a trial court's conclusion that a name change is in a child's best interest, the best-interest test becomes nothing more than a specious means of accomplishing exactly what this Court has prohibited—ordering a child's name to be changed to the paternal surname because it is tradition to do so. The result is just as discriminatory as if the trial court had skipped the best-interest analysis altogether and explicitly granted a father's name-change petition based on patrilineal tradition." (Mother Br. 16.) Merely mentioning tradition or paternal interest is a far cry from discriminatory tradition being the foundation of a best-interest decision.

Moreover, although these so-called "hypotheticals" were the clearest indications that the trial court' decision was grounded in patrilineal tradition, it was not the only indication. The trial court approvingly cited Father's testimony that "from his own experience he recognizes the importance of the last name vis-à-vis a father." (Appx. 13.) It made no parallel finding regarding the importance of a last name vis-à-vis a mother, which demonstrates a clear preference for a child bearing the paternal surname. The trial court granted this name-change petition based only on Father's testimony that he wanted Logan to carry his name. That alone is a clear signal that the best-interest analysis was improperly framed in terms of giving greater or primary weight to Father's interest in Logan bearing the paternal surname.

5. Father did not demonstrate that the name change was in the child's best interest

Father argues that "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." (Father Br. 19.) But Father misses a crucial part of the test. A trial court's name-change order must be supported by relevant evidence offered by the petitioner that shows that a name change was *in a child's best interest*, considering the *Willhite* and *Bobo* factors. It was Father's burden to prove that the name change was in Logan's best interest.

Father criticizes Mother's testimony, stating that "[Mother] repeatedly offered her own exaggerated opinions about the detrimental effects [of the name change] on her son with absolutely no tangible evidence to substantiate her assertions." (Father Br. 4.) There is nothing showing that Mother's opinions were exaggerated. A parent's concern and worry about a child's well-being certainly does not equate an "exaggerated opinion." Moreover, it was not Mother's burden to show that the name change would be harmful to Logan. Rather, it was Father's burden to show that the name-change would be in Logan's best interest.

Father simply did not meet his burden of proof. His testimony was not about how a name change would help *Logan*. His testimony was about how the name change would help *Father*. The only person's interests that were at issue in this case were Logan's; yet, the trial court improperly granted this name change based on no evidence other than Father's testimony that it was "huge" to him that he wanted Logan to carry his surname. Its decision was arbitrary, unreasonable, and unconscionable and must be reversed.

CONCLUSION

Perhaps Father understood that the trial court's decision—which was based on no evidence other than the trial court's improper gender-based conclusions and Father's own desires

and childhood abandonment issues—was an abuse of discretion because is brief to this Court did not accurately reflect the evidence, the record, or Mother's arguments. If one reviewed Father's brief alone, there is a distant chance that it could appear that there was no abuse of discretion. But the record clearly shows that:

- Mother properly and specifically objected to the magistrate's decision;
- No testimony exists even remotely suggesting that Mother prevented contact between Father and Logan or that parental alienation was a factor in this case;
- Father and Logan's relationship is in no danger of deteriorating if Logan continues bear the same surname that he has had since birth;
- The trial court failed to consider whether Logan would suffer embarrassment, discomfort, or inconvenience due to his name differing from Mother's; and
- Most importantly, the only evidence Father offered to show that the name change would be in Logan's best interest was that it was "huge" to him that Logan carry his surname.

The trial court based its decision on zero relevant evidence showing that the name change was in Logan's best interest. Instead, it was a decision based on gender-based traditions, stereotypes, and Father's own desire for his son to carry his surname.

Absent a showing that a name change is in a child's best interest, a trial court is not permitted to grant a name change. But here, the trial court ordered that this developmentally-disabled child's name be changed without any showing by Father that the name change would be in Logan's best interest. That order was a clear abuse of discretion.

Allowing this decision to stand would undermine this Court's directives in *Bobo* and *Willhite* that a trial court should not give primary or greater weight to a father's interest in his child bearing the paternal surname. Even worse, however, is that if this trial court's decision is

found to be acceptable, then the requirement that a trial court must consider a child's best interest before ordering a name change will deteriorate. Instead, a trial court could do exactly what it did here—grant a name-change petition based solely on a parent's own interests, needs, and desires, regardless of how the name change will affect the child. Such a change in law will be detrimental to the interests of children throughout Ohio. For all of these reasons, Mother respectfully asks this Court to reverse the trial court and Twelfth District decisions.

Respectfully Submitted,

Ginger S. Bock (0082253), Counsel of Record
COUNSEL FOR APPELLANT, TRICIA LAUG

CERTIFICATE OF SERVICE

I certify that a copy of REPLY BRIEF OF APPELLANT TRICIA LAUG was sent by ordinary U.S. mail to Neal W. Duiker, Whitaker & Shade, LLC, 226 Reading Road, Mason, OH 45040, on June 11, 2012.

Ginger S. Bock

COUNSEL FOR APPELLANT,
TRICIA LAUG

APPENDIX

(APPX. 20-29)

FILED
COMMON PLEAS COURT
JUVENILE DIVISION
2010 SEP 27 PM 3:43
CLINTON COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO
JUVENILE DIVISION

DAVID WHITE **502 Powell Road** **New Vienna, Ohio 45159** Plaintiff, -vs- **TRICIA LAUG** **570 North Walnut Street** **Wilmington, Ohio 45177** Defendant.	: : : : : : : : : : : : : : :	**CASE NO. 20094105** **Judge Gano** **Magistrate Miars** **DEFENDANT'S OBJECTION TO MAGISTRATE'S DECISION AND ORDER DATED SEPTEMBER 20, 2010**

Now comes Defendant, Tricia Laug ("Mother"), by and through counsel, and hereby respectfully objects to the Magistrate's Decision and Order dated September 20, 2010 pursuant to Juv. R. 40(D)(3)(b).

Mother further requests an extension of time to supplement her objections so that a transcript can be obtained. A praecipe for transcript has been submitted to the Court.

Mother makes the following specific factual and legal objection:

1. The Magistrate erred in ordering the minor child's name be changed to Logan David Laug White.

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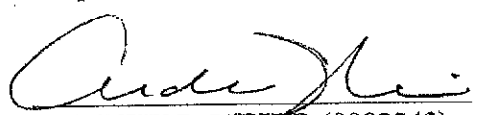
DOCUMENT 24

Mother hereby reserves the right to supplement her objection upon receipt of the transcript of the hearing in this matter.

Respectfully submitted,



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NOTICE OF HEARING

You are hereby notified that the foregoing objections will be heard on the ____ day of _____, 2010 at _____ before Judge Gano, Clinton County Juvenile Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon John C. Kaspar, Attorney for Plaintiff, 130 E. Mulberry Street, Lebanon, OH 45036, by ordinary U.S. Mail, this 24th day of September, 2010.

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CLINTON CO. OHIO

IN THE COURT OF COMMON PLEAS
CLINTON COUNTY, OHIO
JUVENILE DIVISION

DAVID WHITE **502 Powell Road** **New Vienna, Ohio 45159** Plaintiff, -vs- **TRICIA LAUG** **570 North Walnut Street** **Wilmington, Ohio 45177** Defendant.	: : : : : : : : : : : : :	**CASE NO. 20094105** **JUDGE G. ALLEN GANO** **Magistrate Miars** **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OBJECTION**

Now comes the Defendant, Tricia Laug ("Mother"), by and through counsel, and hereby submits the attached Supplemental Memorandum in support of her Objection to Magistrate's Decision and Order of September 20, 2010. Mother's Objection was timely filed with the Court on September 27, 2010 and this matter is now ripe for review.

Respectfully submitted,

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SUPPLEMENTAL MEMORANDUM

I. Procedural Posture

Plaintiff, David White ("Father"), filed a Complaint to Determine Paternity and Establish Parental Rights and Responsibilities on September 28, 2009. Litigation ensued. Father's complaint came before the Magistrate on August 31, 2010 for a final hearing. Before trial, the parties reached an agreement on custody, allocation of parental rights and responsibilities, child support, and other financial matters. The parties' agreement was memorialized in an Agreed Entry Allocating Parental Rights and Responsibilities, which was filed with the Court on September 23, 2010. However, one issue remained for trial – the minor child's surname.[1] This issue was tried to the Magistrate on August 31, 2010. On September 20, 2010, the Magistrate filed a Decision and Order changing the minor child's name to Logan David Laug White.

Mother timely filed objections to the Magistrate's Decision and Order on September 27, 2010, specifically:

1. The Magistrate erred in ordering the minor child's name be changed to Logan David Laug White.

Mother submits this Supplemental Memorandum in support of her objection.

II. Argument

Since birth, the child's name has been Logan David White Laug. (T.p. at 25) He goes by Logan Laug. (T.p. at 33) Father requested his surname be changed to White. (T.p. at 16) Mother did not want to change his surname, but the Magistrate granted Father's request. Mother objects to the Magistrate's decision to change the child's name from Logan David White Laug to Logan David Laug White because (1) the Magistrate did not have

[1] Pending a ruling on this Objection, the minor child's name is Logan David White Laug.

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jurisdiction to make such a determination; and (2) the Magistrate's decision is not in the child's best interest.

A. The Magistrate did not have jurisdiction to change the child's surname.

Jurisdiction to change a person's name lies with the probate court of the county in which the person resides.[2] Section 2717.01 of the Ohio Revised Code provides the procedure for proceedings to change the name of a person. Specifically, R.C. 2717.01(A) provides in pertinent part:

> A person desiring a change of name may *file an application in the probate court of the county in which the person resides.* The application shall set forth that the applicant has been a bona fide resident of that county for at least one year prior to the filing of the application, the cause for which the change of name is sought, and the requested new name. [Emphasis added]

"An application for change of name may be made on behalf of a minor by either of the minor's parents[.]" R.C. 2717.01(B). Father did not file an application with the probate court. He merely made a request at the final hearing in juvenile court on August 31, 2010 to change the child's surname. Therefore, the Magistrate in juvenile court did not have jurisdiction to change the child's name. For this reason alone, the Magistrate's Decision and Order must be reversed.

B. The Magistrate's decision to change the child's surname is not in the child's best interest.

Even if the Magistrate had jurisdiction to change the child's surname, Mother still objects to the Magistrate's Decision and Order on the basis that the name change is not in the child's best interest.

[2] Although Mother did not raise the issue of jurisdiction at trial, the issue is not waived. " 'Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time.' " *Rosen v. Celebrezze* (2008), 117 Ohio St.3d 241, ¶ 45 (quoting *Pratts v. Hurley* (2004), 102 Ohio St.3d 81, ¶ 11). Therefore, Mother may raise this issue on objection.

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In *In re Willhite* (1999), 85 Ohio St.3d 28, the Ohio Supreme Court held that "when deciding whether to permit a name change for a minor child pursuant to R.C. 2717.01(A), the trial court must consider the best interest of the child in determining whether reasonable and proper cause has been established." *Id.* at 32. The party requesting the name change bears the burden of showing the name change would be in the child's best interest. *Id*; *Bobo v. Jewell* (1988), 38 Ohio St.3d 330. Further, in determining whether changing the child's surname is in the child's best interest, the trial court should consider the following factors:

- The effect of the change on the preservation and development of the child's relationship with each parent;
- The identification of the child as part of a family unit;
- The length of time that the child has used a surname;
- The preference of the child if the child is of sufficient maturity to express a meaningfully preference;
- Whether the child's surname is different from the surname of the child's residential parent;
- The embarrassment, discomfort, or inconvenience that may result when a child bears a surname different from the residential parent's;
- Parental failure to maintain contact with and support of the child; and
- Any other factor relevant to the child's best interest.

In re Willhite, 85 Ohio St.3d at 32.[3]

A review of the transcript and evidence presented during the hearing reveals that Father did not meet his burden of showing why the requested name change was in the

[3] All of the factors are relevant in this case except the child's preference because he is only five years old and did not testify to express his preference.

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child's best interest. The factors above simply do not weigh in favor of changing the child's surname from Laug to White.

Mother and Father were never married. (T.p. at 14) The child was born out of wedlock on June 24, 2005. (T.p. at 13) Father was not around much. As Father acknowledged, the child has resided with Mother since birth. (T.p. at 14) Further, the child has gone by the surname of Laug for five years. (T.p. at 18) Mother's surname is Laug. Mother has another child with the surname Laug. (T.p. at 30) Moreover, the parties agreed Mother would be residential parent and legal custodian of the child. (T.p. at 5) Therefore, the child's "family unit" has the collective surname Laug, and he will be spending a majority of time with this "family unit".

Yet Father requested the name change because he is "the only one in [his] family with the last name of White[, and he wanted the child] to carry [his] last name on[.]" (T.p. at 16) But he did not offer any cohesive explanation of exactly how changing the child's surname to White would be in the child's best interest other than denying it would have any negative impact on the child. Rather, Father simply wanted the child to "have a piece of him". But the child's current name – Logan David White Laug – already contains a piece of Father. Therefore, Father's rationale for changing the last name to White holds no weight and does not meet the burden of showing why a juxtaposition of White and Laug is in the child's best interest.[4]

The evidence actually establishes that changing the child's surname is not in his best interest. Mother testified the child sees a therapist for developmental disabilities and is on

[4] In fact, in *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, the Ohio Supreme Court cautioned courts "to refrain from defining the best-interest-of-the-child test as purporting to give primary or greater weight to the father's interest in having the child bear the paternal surname." *Id.* at 334. Accordingly, this Court should not give greater weight to Father's request merely because he wants to "carry on" his surname.

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an Individualized Education Plan ("IEP") to prepare for kindergarten. (T.p. at 30) He did not start kindergarten according to schedule because of these issues. (T.p. at 30) The child has been learning to write his first and last name for over a year; he is known as "Logan Laug" at preschool; and he recognizes his name. (T.p. at 31, 33) Mother opined it would be detrimental to the child to learn a different name or even to hyphenate the name at this stage of the child's life because of his developmental disabilities. (T.p. at 31) Mother further explained that the child does not adjust well to change. (T.p. at 33) And in her opinion, as the child's mother, he would be very sensitive to such a change. (T.p. at 33, 36) Who better to know the tendencies and emotions of this child than his Mother, who has taken care of every aspect of his life for the past five years?

The foregoing undisputed facts establish the Magistrate erred in changing the child's surname to White because he did not consider the negative impact of such a change. The *Willhite* Court recognized that "a child's surname has been a sort of quid pro quo for the father's financial support." *In re Willhite*, 85 Ohio St.3d at 31. But it also found "that this [concept] ignores the mother's parallel duty to support the child whether or not she is the residential parent." *Id.* And the *Willhite* Court even stated that "[t]hrough the advent of the Married Women's Property Acts, no-fault divorce, and gender-neutral custody statutes, today the rationale for the preference for paternal surname has disappeared." *Id.* at 30. Here, Father placed great emphasis on the paternal surname. The Magistrate seized on history and tradition rather than what was in the child's best interest. In fact, and probably most important, the *Willhite* Court found that a woman's desire to avoid confusion carries a lot of weight:

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> Equally important, with the name addition, [Mother] seeks to avoid the confusion so prevalent with having a mother and child in the same household with two different surnames. The addition of the maternal surname may aid in avoiding confusion and embarrassment at school, at the doctor's office, at church, in sports or other social activities, and within the community.

Id. at 33.

The Magistrate only created more unnecessary confusion in this child's already difficult life, and effectively reversed what Mother has accomplished in five years with the child. The facts demonstrate that the change in surname will only lead to embarrassment, discomfort, and inconvenience in the child's life. If the Magistrate's decision stands, the child will have a different surname than Mother (the residential parent and legal custodian) and his sister, with whom he will spend a majority of his time. This confusion alone should be sufficient to overrule the Magistrate's Decision and Order. It simply is not in the child's best interest to reverse five years of what has already been established.

WHEREFORE, Mother respectfully requests that this Court reverse the Magistrate Decision and Order, and allow the minor child to keep his given name – Logan David White Laug.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon John C. Kaspar, Attorney for Plaintiff, 130 E. Mulberry Street, Lebanon, OH 45036, by ordinary U.S. Mail, this 1st day of December, 2010.

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