

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Baker v. Aboud*, 2017 NSSC 42

Date: 2017-02-17

Docket: Sydney No. SFSNMCA-066014

Registry: Sydney

Between:

Dwayne Baker

Applicant

v.

Stephanie Aboud

Respondent

LIBRARY COVER SHEET

Judge: The Honourable Justice Theresa M. Forgeron

Heard: January 13, 2017, in Sydney, Nova Scotia

Oral Decision: February 17, 2017

Written Decision: February 17, 2017

Subject Family Law – Name Change Application

Issues: Was Mr. Baker’s signature forged on the Vital Statistics Consent Form which changed the child’s surname from Baker to Aboud?

Should Ms. Aboud’s consent be dispensed with to change the child’s surname?

Result: Ms. Aboud knew that Mr. Baker would not consent to changing her son’s surname. Ms. Aboud wanted her son to carry the surname of Aboud. Ms. Aboud wanted to elevate the status of her husband as her son’s father. Ms. Aboud took matters into her own hands and submitted a forged consent to Vital Statistics. The Vital Statistics consent form does not require an Affidavit of Execution. Perhaps it should.

Mr. Baker proved that his signature was forged on the consent form. The alleged witness never saw Mr. Baker sign the form. Mr. Baker was credible. Ms. Aboud was not.

The surname of a child has symbolic importance. A surname is evidence of the biological tie between a parent and a child. A surname

affirms meaningful parental participation in a child's life. A surname is a symbol of filiation.

It was in the best interests of the child to dispense with Ms. Aboud's consent so that the child's surname is registered as Aboud-Baker. The focus underlying this analysis is the child's best interests.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
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Counsel: Dwayne Baker on his own behalf
Stephen Jamael, articling clerk for the Respondent

By the Court:

Introduction

[1] When he was born in 2009, Gavin was given the surname of Baker - the surname of his father, Dwayne Douglas Baker. In 2012, Gavin's surname was changed to Aboud. Aboud is the current surname of Gavin's mother, Stephanie Aboud and her husband, Richard Aboud.

[2] Vital Statistics registered the change to Gavin's surname based on a 2012 application filed by Ms. Aboud. The application was accompanied by a consent form that was allegedly signed by Mr. Baker. Lindsay Margettie signed as a witness to Mr. Baker's signature. Remarkably, the government consent form does not require an Affidavit of Execution. Perhaps it should.

[3] Mr. Baker denies signing the consent form. He alleges that his signature was forged.

[4] Mr. Baker wants his son to carry his surname. Mr. Baker therefore filed an application to dispense with Ms. Aboud's consent so that Gavin's surname can once again be registered as Baker.

[5] Mr. and Ms. Aboud deny forging Mr. Baker's surname. They state that Mr. Baker voluntarily signed the necessary consent. He did so in the presence of Ms. Margettie. Ms. Aboud wants Gavin to be known as Aboud.

[6] Ms. Margettie gave evidence under subpoena. She categorically denied watching Mr. Baker sign the consent form. She stated that she never met Mr. Baker before attending court. She stated that she signed the form at the request of Ms. Aboud; she was not a witness to the signature.

Issues

[7] The two issues which I will determine are as follows:

- Did Mr. Baker prove that his signature was forged on the consent form used to change Gavin's surname from Baker to Aboud?
- Should the consent of Ms. Aboud be dispensed with so that Gavin's surname can be registered as Baker?

Analysis

[8] Did Mr. Baker prove that his signature was forged on the consent form used to change Gavin's surname from Baker to Aboud?

Position of the Parties

[9] Mr. Baker states that he did not sign the 2012 consent form. He states that his signature was forged. In support of his position, Mr. Baker noted as follows:

- Ms. Margettie testified that she did not see him sign the consent form.
- Ms. Margettie testified that she signed as a witness at the request of Ms. Aboud who brought the form to the daycare where she worked.
- Ms. Margettie did not meet Mr. Baker before testifying in court.
- Mr. Baker would not have agreed to changing his son's surname.
- Ms. Aboud hid the fact that she changed Gavin's surname.
- Mr. Baker suspected that Ms. Aboud changed Gavin's surname and sought legal advice.
- In December 2014, he obtained a copy of Gavin's birth certificate which confirmed that Gavin's surname was Aboud.
- In January 2015, Ms. Aboud sent Mr. Baker a text which was intended for Gavin. It said "Higavinaboud." Mr. Baker responded with "No not gavin about, it's gavin Douglas baker. Thanks" Ms. Aboud then texted "I KNOW" "He was asking me to spell MY NAME While I cooked his breakfast bacon and eggs Toast milk and juice" Mr. Baker responded "Good one that's believable".
- Later, when Ms. Aboud realized that Mr. Baker was aware that Gavin's surname had been changed, she repeatedly approached him to negotiate a deal. Mr. Baker consistently stated "no".
- Mr. Aboud contacted the police to investigate the forging of his name.

- Mr. Baker states that the signature on the consent form does not match his signature on a number of other documents that he signed.
- The evidence of Mr. and Mrs. Aboud was erroneous. For example, Mr. Aboud said that the consent was signed outside Mr. Baker's apartment situate at Spruce Haven Drive. In fact, Mr. Baker had not yet moved to that apartment at the time the consent form was allegedly signed. He was still living with his mother on Alexandra Street.

[10] In contrast, Ms. Aboud states that Mr. Baker's signature is not forged. In support she confirmed as follows:

- Mr. Baker signed his name to the consent after Ms. Aboud explained what the document was.
- Ms. Aboud saw Mr. Baker sign the consent form, as did Ms. Margettie and her husband, although Ms. Margettie's view may have been obstructed as the form was signed on the engine hood of her husband's truck while Ms. Margettie was sitting in the back seat.
- Ms. Margettie's testimony was incorrect. She was confused.
- Mr. Baker's evidence is not true.

Legislation and Law

[11] In order to resolve this issue, I must assign the burden of proof and make a credibility determination. Mr. Baker bears the burden of proof because he is alleging that the government record is incorrect. Section 43 of the *Evidence Act*, R.S., c.154, s.1 states that a court may receive either an original or certified copy of a certificate, entry or record of birth as evidence of the facts stated in the document.

[12] The burden of proof is the civil standard based on a balance of probabilities. The evidence, in its totality, must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: **C. (R.) v. McDougall**, 2008 SCC 53 (S.C.C.).

[13] Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, which guidelines include the following:

- Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. c. Gagnon**, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.
- There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: **Novak Estate, Re**, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, **Novak Estate, Re**, supra.
- Demeanor is not a good indicator of credibility: **R. v. Norman** (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
- Questions which should be addressed when assessing credibility include:
 - a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, supra;
 - b) Did the witness have an interest in the outcome or were they personally connected to either party;
 - c) Did the witness have a motive to deceive;
 - d) Did the witness have the ability to observe the factual matters about which they testified;
 - e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
 - f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorny**, [1952] 2 D.L.R. 354 (B.C.C.A.);
 - g) Was there an internal consistency and logical flow to the evidence;

h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and

i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

Decision

[14] Mr. Baker discharged the burden upon him. Mr. Baker did not sign the 2012 consent form to change Gavin's surname from Baker to Aboud. I make this finding for the following reasons:

- Mr. Baker would never have cooperated in a process that was designed to change Gavin's surname from Baker. Mr. Baker firmly believes that Gavin's surname should be Baker, a name which Gavin held at birth. Mr. Baker sees any change as an attempt to undermine his position as Gavin's father.
- I accept Mr. Baker's evidence that he did not sign the consent form. Mr. Baker was credible. Mr. Baker was truthful.
- Ms. Margettie never witnessed Mr. Baker sign the consent form. I accept Ms. Margettie's evidence that she never met Mr. Baker before she attended court. I accept Ms. Margettie's evidence that she signed the consent form at the daycare where she worked and at the request of Ms. Aboud. Mr. and Ms. Aboud's recollection of Ms. Margettie's involvement is false.
- Ms. Aboud changed Gavin's surname because she wanted to elevate her husband's status as Gavin's father. This finding is in keeping with para 14 of Ms. Aboud's affidavit which states: "My husband Richard has been with me and Gavin since Gavin was two months old, playing a large role in raising Gavin, the same role a father would be expected to play." Such a finding is also consistent with exhibit 3, the student cumulative record. The only parents mentioned on this document are Mr. and Ms. Aboud. There is no mention of Mr. Baker, Gavin's father. Further, Ms. Aboud sanctions Gavin's use of "Dad" in reference to her husband.

- Ms. Aboud attempted to hide Gavin's name change from Mr. Baker as is evident in the previously detailed January 2015 email exchange. If Gavin's name change was consensual, why did Ms. Aboud, in her email, state that Gavin's surname was Baker, when in fact it had been changed to Aboud?
- Ms. Aboud attempted to negotiate a name change after Mr. Baker discovered the truth. She would not have done so if consent had already been given in 2012.
- When Mr. Baker discovered that Gavin's surname was changed, he immediately undertook several steps in an attempt to correct the unilateral action. He contacted a lawyer; he contacted Vital Statistics; he contacted the police; and he finally made application to the court. All of these steps were time consuming and would have been unnecessary had Mr. Baker consented in the first place.
- Mr. and Ms. Aboud were not credible; they were not truthful. I reject their evidence where it conflicts with the evidence of Mr. Baker or Ms. Margettie.
- Mr. and Ms. Aboud's story does not have an internal consistency or logical flow, nor is it in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions. If there was consent, why would the document be signed on an engine hood, and not at a table somewhere? Why was there so much subterfuge following the alleged consensual signing?
- I accept that Mr. Baker was living with his mother on Alexandra Street when the consent was allegedly signed, and not on Spruce Haven Drive as stated by Mr. Aboud.

[15] In summary, Ms. Aboud knew that Mr. Baker would not consent to changing Gavin's surname. Ms. Aboud wanted Gavin's surname to be Aboud. Ms. Aboud therefore took matters into her own hands and sent a forged document to Vital Statistics. Ms. Aboud was strategic and manipulative throughout. Mr. Baker's signature on the consent is forged.

[16] Should Ms. Aboud's consent be dispensed with so that Gavin's surname can be returned to Baker?

Position of the Parties

[17] Mr. Baker states that it is in Gavin's best interest to have Ms. Aboud's consent dispensed with so that Gavin's surname can revert to Baker for a number of reasons including the following:

- His signature was forged and Gavin's name was illegally changed.
- Ms. Aboud should be punished for her actions.
- Gavin will not be confused by a further name change. Gavin is known as Baker in his home and by Mr. Baker's family.
- Gavin is well rounded and can readily adjust to a return of his birth surname.
- Mr. Baker would have considered a hyphenated name change but for Ms. Aboud's deceitful conduct.

[18] In contrast, Ms. Aboud states that it is not in Gavin's best interest to have his name changed, but if one is contemplated, the hyphenated name of Baker-Aboud would be a better option. Ms. Aboud's position is based on a number of factors, including the following:

- Gavin is known as Aboud at school and with his friends. It will be difficult for him to explain a name change.
- Her husband has assumed a fatherly role in Gavin's life.
- She is Gavin's custodial parent. Gavin should share the surname which she and her husband have.

Legislation and Law

[19] Section 10(1)(h) of the *Change of Name Act* provides the court with the jurisdiction to dispense with the consent of a parent to a change of name application. Section 10(1)(h) states as follows:

10 (1) Where a judge is satisfied that a person whose consent is required under this Act

...

(h) is a person whose consent in all the circumstances of the case ought to be dispensed with,

the judge may order that the person's consent be dispensed with, if it is in the interest of the person whose name is to be changed to do so.

[20] The burden is upon Mr. Baker to prove that the dispensation is in the best interests of Gavin: **Hubley v. Hubley** [1998] N.S.J. No. 166. (C.A.)

[21] In **L.M.D. v. J.R.S.** [2010] N.B.Q.B. 188, French J., as he then was, noted the symbolic importance attached to a child's surname. A surname is evidence of the biological tie between a child and a parent. A surname affirms meaningful parental participation in a child's life. A surname is a symbol of filiation. In noting the importance of a child's surname, French J. quoted from the Supreme Court of Canada's decision of **Trociuk v. British Columbia Attorney General**, 2003 SCC 34, at paras 16 – 19, which state as follows:

16 Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life. The significance of this affirmation is not only subjectively perceived. The legislature of British Columbia has attached important consequences to the presence of a father's particulars on his child's birth registration. It has decided that where a father's particulars are included on the birth registration, his consent is always required for his child's adoption. However, where his particulars are not included, a father must fulfill at least one of an alternative set of conditions. As Prowse J.A. notes, ss.13(1)(c) and 13(2)(a) of the *Adoption Act*, R.S.B.C. 1996, c. 5, provide that "a father who is named on the birth registration must be given notice of the proposed adoption of his child. He may, or may not, qualify for notice apart from registration" (para. 141).

17 Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse J.A. notes, naming is

often the occasion for celebration and the surname itself symbolizes, for many, familial bonds across generations (paras. 138-39).

18 The significance of choosing a surname is particularly evident if viewed in light of the rationales for reforms which extended to mothers the ability to transmit their surnames to their children. As Professor Castelli wrote on this subject, in a comment on the (Quebec) *Civil Code Revision Office's Report* on the Name and Physical Identity of Human Persons:

[TRANSLATION] one of the most serious and most fundamental inequalities is indeed for women not to be able to pass on their surnames; for that matter, this is how that impossibility has always been viewed: a sign of the inferiority of women and their incapacity to perpetuate a line by filiation; was it not regarded ... as a misfortune not to have a son, precisely because the "line", the "name", died out with girls, who were unable to perpetuate them. People in our time have admittedly become relatively indifferent to those sorts of considerations; nevertheless, transmission of the surname remains the symbol of filiation, and it is not normal to deny to women any possibility of seeing their surnames passed on to their children or to some of them. M.D. Castelli « Rapport de l'O.R.C.C. sur le nom et l'identité physique de la personne humaine » (1976), 17 C. de D. 372 at 374.

Although the activity of naming may not hold the same significance for all, it is clearly important to many in our society. A father who is arbitrarily excluded from this activity would reasonably perceive that a significant interest has been affected.

19 The conclusion flowing from the above is that a father's ability to include his particulars on a child's birth registration and to contribute to the process of determining the child's surname can reasonably be perceived to be modes of meaningful participation in a child's life. As a further consequence, arbitrary exclusion from such means of participation negatively affects an interest that is significant to a father. I turn now to the question of whether the impugned provisions affect this interest in a way that a reasonable claimant would view as demeaning to his dignity.

[22] In **L.M.D. v. J.R.S.**, *supra*, the court held that it was in the child's best interests to have a hyphenated name so that the child's relationship with both parents would be demonstratively recognized, as would the child's continuity with each of the child's families. The court assigned little weight to the status quo given that the application was neither random nor without purpose, and was founded on the child's best interests.

[23] In **Bromley v. Furlong**, 2012 NLCA 56, the Newfoundland Court of Appeal granted the mother's appeal noting that the trial judge erred by focusing on the mother's attitude as opposed to the child's best interests. The Court of Appeal then adopted the approach set out in **L.M.D. v. J.R.S.**, *supra*, and found that it was in the child's best interests to have a hyphenated name.

[24] In **X.G. v. R.M.**, 2013 NSSC 206, MacLellan, J. also adopted the approach stated in **L.M.D. v. J.R.S.**, *supra* in finding that it was in the child's best interests to have a hyphenated name notwithstanding the negative conduct and attitude on the part of the mother.

[25] In **X.G. v. R.M.**, , MacLellan, J. also reviewed the factors outlined as relevant in Halsbury's Law of Canada (2009) at para 119, which states as follows:

119 In Halsbury's Laws of Canada (2009), the following factors were listed as relevant in making this determination:

- 1) The short and longer term effects of any change in the child's surname
- 2) Embarrassment that the child may feel in having a different surname then (sic) that of the custodial parent.
- 3) Confusion of identity that may arise if the name is changed or not changed.
- 4) The effect of the change of name on the relationship with the parent who's (sic) name the child bore during the marriage.
- 5) The effect of frequent or random changes of name.

[26] I adopt the reasoning stated in these authorities and the mandated child-focussed analysis. After applying this law to the evidence, I find that it is in Gavin's best interests to dispense with Ms. Aboud's consent to have Gavin's surname changed to the hyphenated surname of Aboud-Baker. I make this finding for the following reasons:

- Although Ms. Aboud's conduct was devious, manipulative and indefensible, I must nonetheless focus on Gavin's best interests. This decision is not about punishing Ms. Aboud for her conduct.
- Gavin is accustomed to being called Aboud and Baker. He is familiar with both surnames. He identifies with both surnames.

- Despite the parental conflict, Gavin appears to be doing well. I have little credible evidence to suggest that he will suffer emotional harm, confusion or embarrassment by having a hyphenated name.
- Gavin must share his father's surname because this was his birth name. One of the ways Gavin identifies with his father is through the Baker surname.
- Gavin must share his father's surname because such will underscore the importance of Gavin's relationship with his father. Mr. Baker is Gavin's father. Mr. Aboud is not.
- Gavin must also share the surname of his mother because Gavin also identifies with his mother and the surname of Aboud.
- The status quo was unlawfully obtained and cannot be used as justification to refuse Mr. Baker's modified request.

[27] I find it is in Gavin's best interests, from a short and long term perspective, to have the hyphenated name of Aboud-Baker.

Conclusion

[28] Mr. Baker has proven that Ms. Aboud arranged to have his signature forged on the 2012 Name Change Consent Form which she submitted to Vital Statistics. Gavin's surname was thus changed from Baker to Aboud without Mr. Baker's knowledge or consent. Mr. Baker has further proven that it is in Gavin's best interests to dispense with Ms. Aboud's consent to change Gavin's surname to Aboud-Baker.

[29] Mr. Baker requested all costs associated with this application and subsequent name change. I grant his request given Ms. Aboud's conduct and Mr. Baker's success. Ms. Aboud must forthwith pay Mr. Baker costs of \$1,000, which includes the Change of Name application fees. I make this decision for the following reasons:

- This application required two pretrial conferences of less than an hour each. The pretrial conferences were held on July 5 and December 22, 2016.

- The application required a hearing of less than a half day, which hearing was held on January 13, 2017. The oral decision was rendered at a hearing on February 17, 2017.
- Tariff C suggests a basic range for costs between \$1,500 and \$2,500 although a reduction is necessary in that Mr. Baker is self-represented. Although self-represented, Mr. Baker suffered an economic deprivation because of the litigation. Mr. Baker missed time from work and also expended time preparing for the hearing. Mr. Baker's documents were well presented, and for the most part, his focus was appropriately directed.
- I did not increase the Tariff amount by a permissible multiplier because Mr. Baker was self-represented. Mr. Baker would otherwise have been entitled to a multiplier of 2 given the importance of the matter to the parties and the amount of effort involved in preparing for and conducting the application.
- Mr. Baker is the substantial successful party. Hearing time would have been significantly reduced had Ms. Aboud admitted that Mr. Baker did not sign the consent.

[30] The court will draft and circulate the order.

Forgeron, J.