Legitimation Proceedings and a Change in the Child's Surname

A legitimation is a special proceeding that is heard in the superior court (by the clerk, unless a transfer to superior court is required by G.S. 1-301.2(b)). G.S. 49-10; 12.1(a). The purpose of the proceeding to is to address the status of a child who is born out of wedlock and have him or her declared the legitimate child of the mother and father. *See id*. It also imposes on the mother and father all the rights, privileges, and obligations of a parent to the child and entitles the child and parent to inherit by succession. G.S. 49-11. The sole issue before the court is whether the putative father who initiated the proceeding is the biological father of the child. *In re Papathanassiou*, 195 N.C. App. 278 (2009). If so, a legitimation order is entered. After the order of legitimation is entered, the clerk must send a certified copy to the State Registrar of Vital Statistics (Vital Records). G.S. 49-12.1(e); -13.

The order declares the child legitimated and must include the full names of the mother, the father, and the child. G.S. 49-10; -12.1. A related issue that may be addressed by the court is whether the child's surname changes. *See* G.S. 49-12.1; -13. However, the statutes that addressed the change to the child's surname were inconsistent, and one that required the child's surname be changed to that of the father's was held to be unconstitutional. Effective June 21, 2019, the various statutes have been amended by S.L. 2019-42 so that they are consistent and address the constitutional issues identified by the NC Court of Appeals.

Applicable Statutes

Legitimation proceedings are governed by G.S. 49-10 through 49-13. A legitimation may require an amended birth certificate for the child, which triggers the application of G.S. 130A-118. Upon receipt of a certified copy of the legitimation order, Vital Records must issue a new birth certificate naming the father and make a corresponding change to the child's surname when applicable. G.S. 12.1(e); -13; 130A-118(b)(2) & (3), (c); *see* Hunt v. Collinsworth, 822 S.E.2d 790 (2019) (unpublished).

A Mandatory Change of the Surname Is Unconstitutional

Prior to June 21, 2019, G.S. 49-13 required that upon the child's legitimation, Vital Records issue a new birth certificate with the full name of the father and "change the surname of the child so that it will be the same as the surname of the father." In 1981, the Court of Appeals decided *Jones v. McDowell*, 52 N.C. App. 434 (1981) and determined the statutory scheme that mandated the change to the child's surname was unconstitutional. The court further decided that the child's surname would remain that of the mother's in the event the putative father decided to continue with the legitimation proceeding.

In its opinion, the court held that the constitutionally protected liberty and privacy interests "of certain matters of family life extends to the interest of the mother of an illegitimate child in retaining the surname given the child at birth" (*Jones at* 436) and that "the valid purpose served by the provisions of G.S. 49-10 and 49-13 of establishing the filial relationship between illegitimate children and their fathers is not enhanced, advanced, or served in any useful or justifiable way by the additional requirement that the child's surname be changed to that of the father… [and] denies the mother of an illegitimate child the equal protection of the laws, and … a protected liberty interest without due process of law." *Jones* at 442.

Despite this holding, the statute that mandated the change of the child's surname to that of the father remained unchanged until June 21, 2019.

The New Statutory Language Requires an Agreement or a Best Interests Determination

S.L. 2019-42 amended the following statutes:

- G.S. 49-12.1 – Legitimation when mother married,
- G.S. 49-13 – New birth certificate on legitimation, and
- G.S. 130A-118 – Amendment of birth and death certificates.

All three statutes recognize the holding of *Jones v. McDowell* in that they all state that the court "may" change the child's surname. This means the change of surname is not mandatory but rather is discretionary with the court. *See In re Hardy*, 294 N.C. 290 (1978). All three statutes allow for the child's surname to be changed based upon an agreement of the parties or the court's determination that a surname change is in the child's best interests.

G.S. 49-13 addresses birth certificates and applies to proceedings initiated under G.S. 49-10, which is when the mother was not married at any time from the child's conception to birth. It now states "the surname of the child shall remain the same except if the mother and father agree and request that the child's surname be changed under G.S. 130A-118 or the court orders a change in surname after determination that the change is in the best interests of the child."

G.S. 49-12.1 applies to legitimation proceedings when the mother was married at any time during the child's conception to birth. Subsection (c) now states the clerk "may change the surname of the child after determination that the change in in the best interests of the child."

G.S. 130A-118(c)(2) applies to new birth certificates and the language now explicitly refers to both types of legitimation proceedings: G.S. 49-10 and 49-12.1. The statute authorizes the change to the child's surname on his or her birth certificate when the parents agree and request the change or the court orders a change based on the a determination that it is in the child's best interests.

What is not addressed in the statutes or case law is what constitutes the best interests of the child.

Yesterday, I had the privilege of teaching a session on legitimation proceedings to the assistant and deputy clerks at their summer conference, and we discussed this issue. Examples that were raised included if a surname was culturally significant or had an important place in the community regarding reputation and/or respect, the child's age, and/or if the child identified with a surname. One thing to note is that the child is a party in the proceeding, and therefore, has a voice. G.S. 49-10; -12.1(a). If the child is an unemancipated minor, a Rule 17 guardian ad litem must be appointed. G.S. 49-12.1(a); 1A-1, Rule 17; *In re Papathanassiou*, 195 N.C. App. 278 (2009). Through the child and/or his or her GAL, the child's preferences and best interests perspective may be presented to the court. *See Hunt v. Collinsworth*, 822 S.E.2d 790 (2019) (unpublished).