

At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May 2006

**HON. ARTHUR M. SCHACK J.S.C.**

PRESENT:  
HON. ARTHUR M. SCHACK  
Justice

\_\_\_\_\_  
In the Matter of the Application of SEAN WILSON,

Petitioner,

- against -

CAROLINE KILKENNY,

Respondent,

-and-

CLAUDIA ROSE KILKENNY, an infant and subject  
of name change,

Respondent.

**DECISION & ORDER**

Index No. 8386/05

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\_\_\_\_\_  
The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Petition/Affidavits (Affirmations) Annexed\_\_\_\_\_

\_\_\_\_\_1\_\_\_\_\_

Opposing Papers\_\_\_\_\_

\_\_\_\_\_2\_\_\_\_\_

Memoranda of Law\_\_\_\_\_

\_\_\_\_\_3, 4, 5\_\_\_\_\_

This petition, to change the surname of a three-year-old minor and amend the child's birth and baptismal certificates, by the child's father, her non-custodial parent, is replete with accusations about the mother's alleged reprehensible and irresponsible conduct, as contrasted with the father's self-suffering assertions of religious devotion, piety, and upstanding behavior. Petitioner's histrionics are worthy of a Harlequin Romance novel or what was once known in Hollywood as a "four hankie" movie. The Court senses that the instant petition has been filed by the non-custodial father to punish the custodial mother, rather than asking for relief that is in the best interests of the child.

Petitioner requests three forms of relief. Each form of relief requested is claimed "to substantially promote the best interests of the child." First, he asks that the Court, pursuant to Public Health Law § 4138, order the issuance of an amended New York State Birth Certificate reflecting that petitioner is the father of the infant, Claudia Rose Kilkenny. Second, he requests that the Court order the Roman Catholic Church to issue an amended baptismal certificate for the child, in the name "Claudia Maureen Wilson" and/or identify petitioner as the child's father. Last, he requests, pursuant to Civil Rights Law § § 60 and 61, to change the child's name to "Claudia Maureen Wilson," or in the alternative to "Claudia Kilkenny Wilson."

The birth certificate issue is moot. Respondent filed an amended birth certificate with the New York State Department of Health on December 24, 2003 [exhibit 1 of verified answer], which named Sean Wilson as the child's father. Next, the Court lacks

authority to order the Roman Catholic Church to issue an amended baptismal certificate. I will not violate the constitutionally protected separation of church and state. However, the mother, in her verified answer, asserts that she will have the baptismal certificate amended to reflect Sean Wilson's fatherhood. Further, it is not in the best interests of the child to change her name.

### **Background**

It is undisputed that Sean Wilson and Caroline Kilkenny had a relationship from late 2001 to August 2002, and that Ms. Kilkenny became pregnant with Mr. Wilson's child, Claudia Rose Kilkenny, who was born on April 29, 2003 at Lawrence Hospital, Bronxville, New York. The infant has resided continuously with her mother, at the mother's residence in Yonkers, New York.

In a Westchester County, Family Court action, Matter of Caroline Kilkenny v Sean Wilson, Docket Numbers V-09983-03 and V-14407-03, the parties entered into a stipulation of settlement [exhibit A of petition], which stated, *inter alia*, that: the mother "shall have sole custody of the subject child, CLAUDIA KILKENNY, born April 29, 2003, subject to parenting access of the Respondent SEAN WILSON"; "[p]hysical residence of the subject child . . . shall be with the Mother"; and "[t]he Mother shall have final decision-making authority regarding all aspects of the daily life of CLAUDIA KILKENNY." Both parents agreed to keep each other informed of their current addresses and telephone numbers, the health of the child, the child's academic progress,

and “both parents shall have the right to participate in the decision-making process in all major, non-emergency matters affecting the child.” The parents agreed that the child “shall be raised as a Roman Catholic.” Further, most of the stipulation enumerates when the father has parenting access to the child. The only mention of any possible support by the father is found in clause (N), in which both parents agreed to share the costs of nursery school or day care, which “must be financially feasible” to both parents and both will share the cost “on a pro rata basis according to their respective incomes.”

The instant petition contains numerous conclusory statements and assertions about what is in the best interests of the child. For example, petitioner claims in paragraph 43 of the petition that “Claudia’s best interests would be substantially promoted by remedial measures correcting her Baptismal Certificate to reflect petitioner as the father. Such remedy would immeasurably protect Claudia’s innocence and substantially promote any potential religious aspirations Claudia may possess in the near future.” Respondent mother notes in paragraph 14 of her verified answer that she is willing to amend the baptismal certificate, but that petitioner “does not communicate with Respondent in a reasonable fashion, preferring instead to take a generally abusive and uncivil tone through his succession of lawyers.”

Petitioner’s grounds for changing the child’s name include that the father: has an M.B.A. degree and is a C.P.A.; is a practicing Roman Catholic; and, is a member of the “Ancient Order of Hibernia” [sic]. Further, petitioner claims that “[m]y family heritage

stems from Ireland and has a depth of history and vitality that procures immediate respect and good will in that region by the mere mention of my surname, Wilson.” He then claims that the name change would: save Claudia “the embarrassment associated with being a fatherless child”; “avoid any feelings of alienation arising in the child from having a different surname from that of Petitioner”; and, “prevent scorn and contempt from befalling Claudia as being associated as a societal ‘bastard’ child.”

Respondent opposes the instant petition, contending that beyond petitioner’s bald assertions he has failed to provide any basis in law or in fact that the best interests of the child would be promoted by changing her name. Respondent notes that the birth certificate has been amended, that the baptismal certificate will be amended, and that a name change to that of the non-custodial parent would have an adverse impact upon the child. The mother notes in her verified answer that since she has had custody of Claudia from birth, and the father agreed in the Family Court stipulation of settlement to custody and visitation, the child’s “best interests will be substantially promoted by having the same surname as Respondent.”

#### **The baptismal certificate issue**

Petitioner’s request for the Court to order the Roman Catholic Church to issue an amended baptismal certificate flies in the face of the United States Constitution and the bedrock principle of church and state separation. In School Dist. of Abington Tp., Pa. v Schempp, 374 US 203, 215 (1963), the United States Supreme Court instructed that “this

Court has decisively settled that the First Amendment's mandate that 'Congress shall shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment." With respect to the actions of the various states toward religion, Justice Hugo Black, in Everson v Board of Education of Ewing Tp., 330 US 1, 18 (1947), noted that the First "Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." Similarly, in Epperson v State of Arkansas, 393 US 97, 103-104 (1968), the Court held that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice." Further, Justice William O. Douglas, in Zorach v Clausen, 343 US 306, 312 (1947), observed that:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.

And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.

Justice Black, in Engel v Vitale, 370 US 421, 431(1962), discussed the First

Amendment's Establishment Clause, and noted that "[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." He then held, at 431-432, that "[t]he Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." If in the instant action I were to order the Roman Catholic Church to issue an amended baptismal certificate, my violation of religious neutrality would be an "unhallowed perversion."

The New York Court of Appeals applied this doctrine in First Presbyterian Church of Schenectady v United Presbyterian Church, 62 NY2d 110 (1984). The Court, at 116, instructed that consistent with the First and Fourteenth Amendments to the United States Constitution, "civil courts are forbidden from interfering in or determining religious disputes. Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct for the organization while interfering with the free exercise of the opposing faction's beliefs." Further, at 116-117, the Court held that "[t]he Constitution directs that religious bodies are to be left free to decide church matters for themselves, uninhibited by State interference (Serbian Orthodox Diocese v Milivojevich, 426 US 696; Kedroff v St. Nicholas Cathedral, 344 US 94)." See Park Slope Jewish Center v Stern, 128 AD2d 847 (2d Dept 1987); Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282 (3d Dept 1999); Kapsalis v Greek

Orthodox Archdiocese of North & South America, 276 AD2d (2d Dept 2000); Mandel v Silber, 304 AD2d 538 (2d Dept 2003).

Thus, this Court cannot interfere in what is essentially a religious dispute between the parents in the instant action. While the issue might now be moot, as respondent claims that she is going to amend the baptismal certificate, it is for the appropriate Roman Catholic authorities to decide if young Claudia's baptismal certificate should be amended. The judiciary is precluded from interfering with wholly religious matters within any church, synagogue, mosque, temple or any other religious institution. The Roman Catholic Church's decision with respect to Claudia's baptismal certificate must be "uninhibited by State interference."

#### **The name change issue**

The father, in his instant petition, admits that his counsel has informed him that while he is interested in having Claudia bears his surname, New York courts have recognized that when a child's parents are unwed neither parent has a superior right in determining the child's last name. The Court, in Matter of Cohan v Cunningham, 104 AD2d 716 (4<sup>th</sup> Dept 1984), held that, "neither parent has a superior right to determine the surname of the child, and the question is always whether the best interest of the child will be served by the proposed change."

In discussing what is in the best interests of the child, Supreme Court, Suffolk

County, in Rio v Rio, 132 Misc2d 316, 320-321 (1986), discussed the history of parental surname customs and reviewed the use of paternal surnames for government convenience. The Court observed, at 321, that “[n]otoriously absent from any discussion of convenience is the inconvenience to custodial mothers who must explain to pediatricians, teachers, school administrators, insurance companies, welfare workers and college financial aid officers that a child is hers despite their differing surnames.” One year after Rio, the Appellate Division, Second Department in The Matter of Shawn Scott C., 134 AD2d 821 (1987), held that:

The petitioner father of an infant born out of wedlock has failed to establish that his child's interest will be substantially promoted by changing the child's surname to his. There is also a reasonable objection to the change since the child lives with his mother and sharing her surname minimizes embarrassment, harassment, and confusion in school and social contacts.

In Swank v Petkovsek, 216 AD2d 920 (4<sup>th</sup> Dept 1995), the Court reversed the decision of Supreme Court, Herkimer County, which, in a divorce proceeding, changed the surname of a child from the mother to the father. The mother was granted custody, and despite the father being in arrears in support, moving to Wyoming, and not sending the child birthday or Christmas gifts, the Supreme Court changed the surname of the

infant because it would be “in the best interest of the child that he maintain this vital link with his father.” In holding that this was error, the Court stated:

A court may change the name of an infant if it determines that "the interests of the infant will be substantially promoted by the change" (Civil Rights Law § 63). Contrary to the court's determination, the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his surname. Defendant has no "legal entitlement" to have the infant receive his surname (Matter of Bell v Bell, 116 AD2d 97, 99; *see*, Matter of Cohan v Cunningham, 104 AD2d 716) and failed to present any evidence to support the change.

The Appellate Division, Second Department, relied upon the Fourth Department's Swank and Cohan decisions several months later, in Ryan v Schmidt, 221 AD2d 449, 450 (1995), holding that, “[a]lthough a father has a recognized interest in having his child bear his surname, he has no legal entitlement to require the child to bear his name.” *See* Mercado v Townsend, 225 AD2d 555 (2d Dept 1996); Cinquemani v Guarino, 290 AD2d 554 (2d Dept 2002); In re David Robert T., 10 AD3d 453 (2d Dept 2004).

Petitioner, in the instant action, has failed to present any valid reason why the best interests of the child would be served by changing the child's surname from "Kilkenny" to "Wilson" or "Kilkenny Wilson." Petitioner's Irish-American heritage, professional qualifications, religious affiliation and membership in the Ancient Order of Hibernians are laudable, but do not overcome the fact that Mr. Wilson has never had custody of Claudia. Claudia has always lived with her mother. As she gets older, and goes to school and interacts with other children, the use of her mother's surname will minimize any embarrassment, confusion and possible harassment. Changing Claudia's surname to "Wilson" or "Wilson Kilkenny" could potentially harm the child. It appears that the actual purpose of the instant petition is to inflict pain upon the respondent, not promote the best interests of Claudia.

When Claudia reaches the age of majority she certainly has the option, if she desires, to change her surname to "Wilson" or "Kilkenny Wilson," or anything else. Smith v United States Casualty Co., 197 NY 420 (1910); In re Zanger, 266 NY 165 (1935); Matter of Maliszewski on Behalf of Bowe, 162 Misc2d 79 (Sup Ct, Rockland County 1994).

### **Conclusion**

Accordingly, it is

ORDERED, that the instant petition seeking to change the surname of a minor and other relief is denied in its entirety.

This constitutes the Decision and Order of the Court.

E N T E R



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HON. ARTHUR M. SCHACK

J. S.C.

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