

FEDERAL CIRCUIT COURT OF AUSTRALIA

LEGGETT & WILLIS

[2014] FCCA 1779

Catchwords:

FAMILY LAW – Children – parenting orders – name of child – change of name – best interests of child – where applicant seeks to change surname of child – application to register change of name – best interests of the child the paramount consideration.

PRACTICE AND PROCEDURE – Registration of change of name – where child born in Victoria – where particulars of child’s birth registered in Victoria – where child resides with mother in New South Wales – whether *Births, Deaths and Marriages Registration Act 1995* (NSW) applies – whether *Births, Deaths and Marriages Registration Act 1996* (Vic) applies – jurisdiction of Federal Circuit Court – where *Births, Deaths and Marriages Act 1996* (Vic) applies to the child – where “*the Court*” is given jurisdiction to approve a proposed change of child’s name – where “*Court*” is defined as “*the County Court*” – where Federal Circuit Court has no jurisdiction to approve a proposed change of name for a child under *Births, Deaths and Marriages Registration Act 1996* (Vic) s.26(3) or s.26(4) – where application should be made to County Court of Victoria to approve change of child’s name.

Legislation:

Australian Passports Act 2005 (Cth), s.11

Family Law Act 1975 (Cth), ss.4, 60CA, 61B, 61DA, 64B

Births, Deaths and Marriages Registration Act 1995 (NSW), s.28

Births, Deaths and Marriages Registration Act 1996 (Vic), ss.4, 26

Cases cited:

Beach & Stemmler (1979) 5 Fam LR Note 13; FLC 90-692

Chapman & Palmer (1978) 4 Fam LR 462; FLC 90-510

Gerald & Kenwood [2013] FCCA 2038

Rennick & Yardman [2014] FCCA 556

Vine & Wands [2013] FCCA 2284

Whinney & Kelleher [2013] FCCA 1939

Applicant: MS LEGGETT

Respondent: MR WILLIS

File Number: SYC 2561 of 2014

Judgment of: Judge Scarlett
Hearing date: 4 August 2014
Date of Last Submission: 4 August 2014
Delivered at: Sydney
Delivered on: 4 August 2014

REPRESENTATION

Solicitor for the Applicant: Mr Webeck
Solicitors for the Applicant: HWL Ebsworth Lawyers
The Respondent: No appearance

ORDERS

- (1) The Applicant is granted leave to proceed *ex parte*.
- (2) The Applicant is to have sole parental responsibility for the child X born (omitted) 2002 who is henceforth to be known as X.
- (3) The name of the child X born (omitted) 2002 is changed to X.

IT IS NOTED that publication of this judgment under the pseudonym *Leggett & Willis* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975 (Cth)*.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYC 2561 of 2014

MS LEGGETT
Applicant

And

MR WILLIS
Respondent

REASONS FOR JUDGMENT

Application

1. This is an Application by the Mother of a boy called X to change his surname from his father's surname of Willis to the Mother's surname of Leggett. The child's father cannot be found and has had no contact with either the Mother or the child since 30th December 2002.
2. The child is known by the name of X and the Mother wishes to change his name officially to that surname. The child's birth certificate, however, shows that he was registered as X. The child was born in (omitted) in the State of Victoria on (omitted) 2002 and, accordingly, his birth was registered in that State.

Background

3. The Mother deposed in her affidavit of 15th March 2014 that she and the child's father lived together from February to early November 2002, when they separated. During their cohabitation, their child X was born on (omitted) 2002.
4. It is the Mother's evidence that she and the child have had no contact with the Father since 30th December 2002. She has been the child's sole

caregiver since November 2002 and has not received any financial support from the Father. She does not know where he lives or how he can be contacted.

5. The Mother deposed that she has been in regular contact with the Child Support Agency, to use its former name, in order to locate the father in order to collect child support from him. The most recent letter from the Agency, dated 8th June 2011, is annexed to the Mother's affidavit and states that the Agency:
 - a) has been unable to collect child support from the Father;
 - b) has exhausted all collection opportunities currently available; and
 - c) is unable to take the matter further.

6. Sadly, the Mother deposes that:

I have been informed by representatives of CSA that there are other women in my position seeking to locate and find Mr Willis.¹

7. The Mother deposes that the child has always been known by the surname of "Leggett" at pre-school, at school and in sporting activities. The Mother and child no longer live in Victoria but in the (omitted) of New South Wales.

Ex Parte Proceedings

8. I am satisfied on the evidence that the Mother has no knowledge of the whereabouts of the child's father and has exhausted all available means of locating him. Accordingly, it is appropriate for her to be given leave to proceed on an *ex parte* basis.

Change of Name

9. When a Court is considering whether or not to change the surname of a child, the Court is guided by a number of authorities, such as *Chapman & Palmer*² and *Beach & Stemmler*³ to consider a number of factors, such as:

¹ Affidavit of Ms Leggett 15.3.2014

² (1978) 4 Fam LR 462; FLC 90-510

³ (1979) 5 Fam LR Note 13; FLC 90-692

- a) the best interests of the child;
 - b) any embarrassment likely to be experienced by the child if the child's name is different from that of the parent with whom the child normally lives;
 - c) any confusion of identity that may arise for the child if the child's name is or is not changed;
 - d) the amount of contact that the other parent has had with the child;
and
 - e) the degree of identification the child has with each parent.
10. The issue has been more recently considered in this Court in such decisions as *Whinney & Kelleher*⁴, *Gerald & Kenwood*⁵, *Vine & Wands*⁶ and, quite recently, *Rennick & Yardman*⁷.
 11. In my view, it is clear that the Mother should be permitted to change the child's surname from "Willis", which he never uses, to the name of "Leggett", which he has used for virtually all of his life.
 12. It is obviously in the best interests of the child that he should have the same surname as his mother, who has been his sole caregiver since he was only a few months old. This is a case where the child has had no contact with his father since he was four months old. He would not recognise his father if he saw him, nor would his father recognise him.
 13. I propose to order that this child should be known by the name of X.
 14. The difficulty for this child is that his birth certificate shows him to have a different surname to the one that he customarily uses. This will be a source of particular difficulty for him when he wishes to obtain a passport or a driver's licence, amongst other documents.
 15. In the absence of the other parent, if the Mother wishes to apply for a passport for the child, she must abide by the provisions of s.11 of the *Australian Passports Act 2005* (Cth), either by obtaining the consent of

⁴ [2013] FCCA 1939

⁵ [2013] FCCA 2038

⁶ 2013] FCCA 2284

⁷ [2014] FCCA 556

the child's father or to obtain a court order permitting the child to travel internationally.

16. I propose to make an order that the child's mother is to have sole parental responsibility for the child, as I consider that this would be in the child's best interests.

Registration of the child's change of name

17. What this Court cannot do in this case is to order the appropriate Registrar of Births, Deaths and Marriages to register the child's name in its changed form, as the appropriate Act does not give the Court jurisdiction to do so.

18. The mother's solicitor has, in the Application, sought these Orders:

1. *Pursuant to section 28 of the Births, Deaths and Marriages Registration Act 1995 (NSW) order that the registration of the Child's name be changed to X.*
2. *Order that the Registrar of Births, Deaths and Marriages (NSW) register the Child's name as X.*
3. *Pursuant to section 26 of the Births, Deaths and Marriages Registration Act 1996 (Victoria), order that the registration of the Child's name be changed to X.*
4. *Order that the Registrar of Births, Deaths and Marriages (Victoria) register the Child's name as X.*
5. *Any further or other order this Court may think fit.*

19. Quite obviously, the New South Wales and the Victorian Acts cannot both apply.

20. The *Births, Deaths and Marriages Registration Act 1995* (NSW) provides at subsection 28(1) that:

The parents of a child may apply to the Registrar, in a form approved by the Registrar, for registration of a change of the child's name if:

- (a) *the child's birth is registered in the State, or*
- (b) *the child was born outside Australia, the child's birth is not registered in Australia and the child has been*

resident in the State for at least 3 consecutive years immediately preceding the date of the application.

21. If the child comes within one of the categories in s.28(1), an application for registration of a change of a child's name may be made by one of the child's parents under subsection (3) if one of the following applies:
 - (a) *the applicant is the sole parent named in the registration of the child's birth under this Act or any other law (including a corresponding law), or*
 - (b) *there is no other surviving parent of the child, or*
 - (c) *a court approves the proposed change of name.*
22. Subsection (4) empowers the District Court of New South Wales to approve a proposed change of name for the child if satisfied that the change is in the child's best interests.
23. Subsection (5) gives power to other courts, saying:

If any court (including any court of another State or the Commonwealth) approves a proposed name for a child, the court may order the Registrar to register the child's name in a form specified in the order.
24. The Federal Circuit Court is a court of the Commonwealth, so it clearly has the jurisdiction under s.28(5) to approve a proposed change of name for a child and order the Registrar to register the change of name.
25. However, the child concerned does not come within the criteria set out in s.28(1). A copy of the child's birth certificate is annexed to the mother's affidavit and it shows that the child's birth was registered in the State of Victoria and both parties were recorded as the child's parents.
26. Thus, the child's birth was neither registered in the State of New South Wales nor was he born outside Australia. His birth was registered in Australia, namely Victoria. The child does not come in either category set out in s.28(1) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) and so the Act does not apply.

27. The law that applies to the registration of this child's birth is the law of the State of Victoria, namely the *Births, Deaths and Marriages Registration Act 1996* (Vic).

28. Subsection 26(1) of that Act provides that:

The parents of a child may apply to the Registrar in the approved form for registration of a change of the child's name if-

(a) the child's birth is registered in Victoria; or

(b) the child –

(i) was born outside Australia; and

(ii) is a child whose birth is not registered in Victoria or another State or a Territory; and

(iii) has been ordinarily resident in Victoria for at least 12 months immediately before the application is made.

29. This child's birth was registered in Victoria, so he meets the criterion in s.26(1)(a).

30. Subsection (3) sets out the requirements for registration of a change in a child's name:

An application for registration of a change of a child's name may be made by one parent if-

(a) the applicant is the sole parent named in the registration of the child's birth under this Act or any other law; or

(b) there is no other surviving parent of the child; or

(c) the Court approves the proposed change of name.

31. Subsection (4) is in almost identical terms to s. 28(4) of the New South Wales Act in that it empowers the Court to approve a proposed change of name for the child if satisfied that the change is in the child's best interests.

32. However, there is no equivalent subsection to subsection (5) of the New South Wales Act empowering any court of a State or the

Commonwealth to approve a proposed change of name and order the Registrar to register the name in the form specified in the order.

33. The word “Court” is defined in Subsection 4(1) of the *Births, Deaths and Marriages Registration Act 1996* as:

“Court” means the County Court.

34. The Federal Circuit Court has no jurisdiction to approve a proposed change of name for the child under the provisions of subsections (3) or (4) of section 26 of the *Births, Deaths and Marriages Registration Act 1996* (Vic). The mother must make an application to the County Court of Victoria for approval to change the child’s surname and have the change of name registered by the Registrar of Births, Deaths and Marriages in Victoria.

35. The Applicant also seeks any further or other order the Court may think fit. In my view, the Court should make such orders as the Court considers are in the child’s best interests, as provided by s.60CA of the *Family Law Act*. Clearly, the mother should have sole parental responsibility for the child. There is evidence that the father has had no contact with the child since 2002. I am satisfied that it would not be in the child’s best interests for his parents to have equal shared parental responsibility for him (see s.61DA(4)).

36. Subsection 64B(2) provides that a parenting order may deal with (*inter alia*):

(c) *the allocation of parental responsibility for a child;*

(i) *any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for the child.*

37. Under s.61B of the Act, parental responsibility in relation to a child means “*all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.*”

38. As the mother is to be given sole parental responsibility for the child, she will have the responsibility for making decisions about major long-term issues relating to him. The term “*major long-term issues*” is

defined by s. 4(1) of the *Family Law Act* to include “*the child’s name*” (at paragraph (d)).

39. In my view, to avoid doubt, the Court should make an order to provide that, for all intents and purposes, that name of the child formerly known as X should be X. Such an order should suffice for many purposes but it should be stressed that it will not suffice to bring about a change to the registration of the child’s name by the Registrar of Births, Deaths and Marriages for the State of Victoria.
40. The County Court of Victoria is the only court empowered by the legislation to make that Order.

I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of Judge Scarlett

Associate:

Date: 4 August 2014