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## Family Law

# Which Surname Is in a Child's Best Interest?

The primary custodial parent's choice is insufficient, by itself, to support a name change

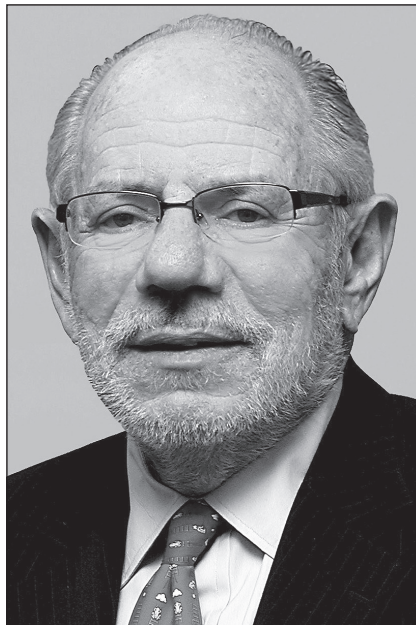
By Edward S. Snyder

The Supreme Court's term included two notable cases in the area of family law, though only one stems from a matrimonial matter. One case, *Emma v. Evans*, 215 N.J. 197 (2013), required the court to address the standard in a dispute to rename a child of divorced parents, which was an issue of first impression for New Jersey. The other case, *New Jersey Div. of Youth & Family Servs. v. R.G.*, 217 N.J. 527 (2014), addressed whether imprisonment alone was sufficient to terminate a party's parental rights.

### Changing Child's Last Name

In *Emma v. Evans*, the court affirmed the judgment of the Appellate Division, holding that: (1) in a dispute to rename a child of divorced parents, the party seeking to alter the surname jointly given to the child at birth bears the burden of proving by a preponderance of the evidence that the change is in the child's best interest; and (2) irrespective of whether the parents were married at the time of the child's birth, the best-interests-of-the-child test should be applied in a renaming dispute without a presumption in favor of the custodial parent's decision to change the jointly given surname of the child.

Jessica Evans and Paul Emma were married in 1999. During their marriage, they had two children, the first born on Jan. 11, 2006, and the second born on



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Nov. 6, 2007. At birth, the children were given their father's surname, Emma. In 2010, when the children were ages three and four, Jessica and Paul were divorced. Pursuant to the parties' property settlement agreement, the parties shared joint legal custody, and Jessica was the parent of primary residence.

Shortly after the parties' divorce, Paul learned that Jessica had modified the children's surname from Emma to Evans-Emma on school and health-care records. He filed a notice of motion, seeking to restrain Jessica from doing so. Jessica filed a notice of cross motion, seeking to change the children's surname from Emma to Evans. The trial court denied Paul's notice of motion and granted Jessica's. The trial court relied on *Gubernat v. Deremer*, 140 N.J. 120 (N.J. 1995), wherein the Supreme Court deter-

mined that the appropriate standard in a name-change dispute is the best interest of the child, and there should be a presumption in favor of the surname chosen by the custodial parent. In this case, the trial court considered Jessica the custodial parent, and therefore applied a presumption in her favor.

Paul appealed the trial court's decision, arguing that *Gubernat* only applied to parents who were never married to each other. The Appellate Division reversed the trial court, indicating that the name change for a child of parents who were married and subsequently divorce was an issue of first impression for New Jersey. The Appellate Division further placed great emphasis on the fact that the parties had joint legal custody, and therefore should share in making such significant decisions. Pursuant to the Appellate Division's

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decision, the best-interests standard should be applied, without a presumption in the custodial parent's favor.

The Supreme Court held that in addressing a name-change request between divorced parents, the parent seeking to change the surname given to the child at birth bears the burden of proving by a preponderance of evidence that the change is in the child's best interest. However, the court also held that regardless of the parties' marital status at the time of birth, the standard to be utilized should be the best interest of the child, without a presumption in favor of the custodial parent.

In an opinion for a unanimous court, Justice LaVecchia wrote that the factors to be considered in a best-interests-of-the-child analysis in a naming dispute are: (1) the length of time that the child has used one surname; (2) the identification of the child as a member or part of a family unit; (3) the potential anxiety, embarrassment or discomfort the child might experience if the child bears a surname different from the custodial parent; and (4) any preferences the child might express, assuming the child possesses sufficient maturity to express a relevant preference. In addressing the presumption in favor of the custodial parent, the court wrote that while the presumption made sense at the time it arose in *Gubernat*, its continued use can arguably shrink the best-interests analysis to an automatic endorsement of the primary custodial parent's choice in a renaming dispute. A primary custodial parent's choice is an insufficient reason in and of itself to support a change in a child's surname.

The Supreme Court's rejection of a presumption in such name-change circumstances applies irrespective of whether or not the parents originally were married at the time of the child's birth. However, the court noted that it nevertheless takes into account special knowledge that a custodial parent may have as to the benefits and

detriments to the current surname and the proposed surname in the life of the child in that parent's custody.

### Incarceration of Parent

The other case decided by the Supreme Court this term, *New Jersey Div. of Youth & Family Servs. v. R.G.*, addresses the issue of whether the Division of Child Protection and Permanency (DCPP, formerly Division of Youth and Family Services) proved by clear and convincing evidence that a father's parental rights could be terminated based solely on his incarceration. The Supreme Court upheld the trial court, and reversed the Appellate Division, holding that although incarceration is a relevant factor in resolving termination of parental rights cases, incarceration alone—without particularized evidence of how a parent's incarceration affects each prong of the best interest of the child standard—is an insufficient basis for terminating parental rights.

J.G. is the biological father of Tara, who was born in February 2004. R.G. is the biological mother. The mother and father lived together for four years prior to Tara's birth. When Tara was born, she was four weeks premature. According to the father, he was a very active part of Tara's life. He fed her, bathed her, changed her diapers and took her to her doctors' appointments. When Tara was six months old, the father was arrested for eluding a police officer, and he was sentenced to five years in state prison.

In July 2008, when Tara was four years old, DCPP was called because it was alleged that the mother was excessively drinking and placing Tara and her older brother in danger. The division filed a complaint for care, custody and supervision of Tara and her brother. After the mother was unable to remain sober, DCPP sought to terminate the mother and father's parental rights. The mother voluntarily surrendered

her parental rights to both children, contingent upon her mother adopting them.

During trial, the only issue was the termination of the father's parental rights to Tara. The father indicated that he was not seeking physical custody of Tara, but he sought to maintain a relationship with her. He testified that after he was released from prison and transferred to a halfway house in 2007, he spoke with Tara nearly every day until the spring of 2009, at which time the children were removed from the mother's care. The father indicated that DCPP did nothing to facilitate his communications with Tara.

The trial court utilized the four-prong standard for termination of parental rights as set forth in N.J.S.A. 40:4C-15.1(a), and determined that DCPP failed to prove by clear and convincing evidence that the father's rights should be terminated. The division appealed, and the Appellate Division reversed. The appellate court held that the father's incarceration, which lasted from when Tara was six months old until she was nearly six years old, prevented the formation of a parental bond, and constituted a harm to Tara, as required by the first prong of the four-prong standard.

In an opinion for a unanimous court, Judge Rodriguez, P.J.A.D. (temporarily assigned), wrote that the trial court's finding was supported by the evidence, and that the division failed to show by clear and convincing evidence that the father's incarceration caused harm to Tara. The court determined that DCPP also failed to prove clearly and convincingly that the father was unwilling to remediate the harm his incarceration caused to Tara. Further, the court found that the father demonstrated that he was an active parent at the beginning of Tara's life, and the division failed to facilitate a relationship between them. As a result, the court reversed the Appellate Division and reinstated the matter. ■