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COURT OF APPEAL FOR ONTARIO

LASKIN, FELDMAN and SIMMONS JJ.A.

B E T W E E N:	)	
	)	
ROBERT KREKLEWETZ	)	
	)	
	)	
(Applicant)	)	Philip M. Epstein, Q.C. and
Appellant	)	Aaron Franks for the appellant
	)	
- and -	)	
	)	
	)	
MARIAN SCOPEL	)	Joel Miller
	)	for the respondent
	)	
(Respondent)	)	
Respondent	)	**HEARD:** September 5, 2001
	)	

On appeal from the order of Justice Susan E. Greer of the Superior Court of Justice dated January 8, 2001, reported at (2001) O.R. (3d) 172.

FELDMAN J.A.:

[1] The parties to this appeal are the parents of William Joseph Kreklewetz Scopel. The issue is the proper interpretation of the provisions of the *Vital Statistics Act*, R.S.O. 1990 c. V. 4 with respect to the registration of the name of a child, and under what circumstances the mother is entitled to register the child's name with her surname, without the consent or participation of the father.

FACTS

[2] The parties had an "on again, off again" relationship beginning in January, 1995, and finally ending shortly after William's birth on January 25, 1998. Their last period of cohabitation terminated in November, 1997. Both parties agree that the appellant is the father of William. After William's birth the appellant paid for some expenses for William, and eventually began to pay child support in accordance with the *Child Support Guidelines*, O. Reg. 126/00. There is no formal custody order, but the respondent has full *de facto* custody, and full responsibility for William. The appellant exercises access rights. The appellant has since married.

[3] The parties discussed the name of the child after his birth. They agreed on the name William and the middle name Joseph. The appellant also wanted Raymond as one of the forenames, and a hyphenated surname of Kreklewetz-Scopel. In June, 1998 the respondent agreed to proceed to register the name as the appellant wanted it, although she did not want William to have the name Raymond which was the appellant's father's name, as she understood that he had deserted his family when the appellant was young. As the respondent described it, she acquiesced to the whole name because the appellant pressured her and deceived her about the three of them being a family. The appellant completed the Statement of Live Birth with his information included. The respondent, however, did not complete or send in the form at that time. In September, 1998 the appellant told her that she could not prove that they had had a relationship, because of all the women he had vacationed with while they were together. Because of this conversation, she concluded that he never had loved or respected her, and as a result she did not want to give William his surname.

[4] Based on her reading of the forms and the accompanying information sheet supplied to her by the Office of the Registrar General under the *Vital Statistics Act*, as well as phone calls to the information number included, the respondent concluded that she could unilaterally complete the form and choose the child's name for registration. As a result, that is what she did. She named the child William Joseph Scopel.

[5] The appellant applied to the Superior Court for an order that the respondent execute a joint election form to change the child's name to William Raymond Joseph Kreklewetz-Scopel, or for an order that the Registrar change the registered name as requested by the appellant, and for some ancillary orders. The application judge determined that because there was a conflict in the evidence as to whether the parties had truly agreed on the child's name, and because they were not living together when he was born, there was no legal reason to add the name Raymond as a third forename. That issue is not under appeal.

[6] As to the surname, the application judge noted that the respondent is willing to have the appellant's surname as the third forename of the child, but is unwilling to hyphenate the surname. At issue was the interpretation of s. 10(3)4 of the *Vital Statistics Act*, which provides:

> If the mother certifies the child's birth and the father is unknown to *or unacknowledged by her*, she may give the child her surname or former surname. [Emphasis added]

[7] The application judge held that the respondent was entitled to give the child her own surname. However, in accordance with the agreement of the respondent, the application judge ordered the Registrar to amend the Register so that the child's name would read William Joseph Kreklewetz Scopel. The appellant appeals the portion of the order denying his application to have William's surname be hyphenated as Kreklewetz-Scopel.

ISSUES

[8] The appellant raises two main issues:

1. Did the application judge err in her interpretation of the meaning of "unacknowledged" in ss. 9 and 10 of the *Vital Statistics Act*?
2. Did the application judge err in finding that there was no binding agreement between the parties regarding the name of the child?

ANALYSIS

Issue 1: Interpretation of "unacknowledged by" in the Vital Statistics Act

[9] This same issue was recently dealt with by the British Columbia Court of Appeal in the case of *Trociuk v. British Columbia (Attorney General)* (2001), 200 D.L.R. (4th) 685; leave to appeal to the Supreme Court of Canada granted, Nov. 8, 2001. In that case, the court was asked to interpret a similarly worded provision of the British Columbia *Vital Statistics Act*, R.S.B.C. 1996, C. 479, and to rule on whether the provision violates s. 15, the equality section of the *Canadian Charter of Rights and Freedoms*. No *Charter* issue is raised in this case.

[10] Each of the three judges of the British Columbia Court of Appeal wrote extensive reasons, which included a review of the history of the naming of children from the common law and through the relevant legislation. I propose to deal more briefly with the Ontario common law and legislative development of the rules regarding the naming of children, drawing upon the British Columbia case, the Ontario Law Reform Commission *Report on Changes of Name* (Toronto: Ministry of Attorney General, 1976), and the relevant legislation.

History of the Legislation

[11] At common law, a child could be given the surname of either parent, although the conventional practice came to be that children born in wedlock would be given the father's surname. The surname was acquired by inheritance and the child was free to dispense with it at any time. A child born out of wedlock acquired no surname by inheritance but could acquire it by reputation.

[12] Between 1875 and 1948, the *Vital Statistics Act* and its predecessors (beginning with the *Act to Provide for the Registration of Births, Marriages and Deaths* 39 V.c.2), dealt only with the registration of the birth of children, not with what name could be given to a child. In 1948 the *Vital Statistics Act,* S.O. 1948, c.97, s. 6(5) was amended to provide that the surname of the child of an unmarried woman would be the mother's surname, and that no person was to be named as the father. However, upon a joint request from the mother and the father, the particulars of the father could be provided and the child could take the father's surname. In 1875, it was the father's responsibility to provide the Registrar with notice of the birth, but by 1948, the Act provided that the responsibility was primarily on the mother, unless she was incapable.

[13] In 1961 the Act was amended to provide, for the first time, that a child born to a married woman would be given the surname of the woman's husband and his particulars would be given as those of the father of the child. The Act also provided that a married woman could file a declaration that when the child was conceived, she and her husband were separated and that her husband was not the father of the child, in which case, with a joint acknowledgement from the father, the child could be registered with the father's surname.

[14] However, the 1961 amendments did not change the practice with respect to children born out of wedlock. They continued to be registered with the surname of the mother and with no particulars of the father, unless the father acknowledged himself by statutory declaration and both parents requested that the father's particulars be provided and that the child be registered with the surname of the father. See *Vital Statistics Act*, S.O. 1961, c.102, ss. 6(5), 6(7), 6(8).

[15] In 1976, the *Vital Statistics Act* was amended to allow for a hyphenated surname of children born in or out of wedlock, comprising the surnames of the father and the mother, if they so requested jointly: R.S.O. 1980, c. 534, ss. 6(11), 6(12).

[16] In 1986, the *Vital Statistics Act* was amended following recommendations arising from the *Ontario Law Reform Commission Report* of 1976, and from the redrafted *Uniform Law Conference Vital Statistics Act*, which was recommended for adoption by the Conference in 1986, replacing the 1949 version. On the issue of names, much of the discussion and impetus for reform was based on equality rights of women and the s. 15 equality guarantee of the *Charter*. Interestingly, neither the Law Reform Commission Report not the Report of the Uniform Law Conference specifically discuss the situation where a mother does not acknowledge the father.

[17] The current Act remains in the form of the 1986 amendments. With respect to the naming of a child at birth, s. 10 of the Act provides a scheme which allows the parents of a child to effectively agree to give the child either of their surnames, or any combination of their surnames. It provides a method of determining the surname of the child if the parents cannot agree on a surname, or if one or both is incapable. If the mother does not

know or acknowledge the father, it provides that the child shall have the mother's surname.

[18] I note that from an historical perspective, fathers of children born out of wedlock never had any "right" either at common law or by statute, to have such a child bear their surname. From 1948 until 1986, only if both the unmarried mother and the father requested it, could the child bear the father's surname. And in respect of children born within wedlock, only in 1961 did the custom that a child would bear the family name of the mother and father who were married (i.e. the husband's surname), become a statutory requirement.

Current Provisions of the Vital Statistics Act

[19] I will set out s. 9[1] and all of s. 10 for ease of reference:

> **s. 9.** (1) In this section and in sections 10, 11 and 12,

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[1] A new version of section 9 is contained in the 1994 Statutes of Ontario but has not yet been proclaimed in force. The new version is the following.

> 9. (1) The mother and father, or either of them in such circumstances as may be prescribed, or such other person as may be prescribed, shall certify the birth in Ontario of a child in the manner, within the time and to the person prescribed by the regulations.
>
> (2) A person who finds a new-born deserted child or who has received custody or care and control of an abandoned child and any other person as may be prescribed shall provide such information and documentation as may be prescribed in respect of the child and the child's birth in the manner, within the time and to the person prescribed by the regulations.
>
> (3) The Registrar General, acting on a certification under subsection (1) or information under subsection (2) or on such information as may be prescribed or as he or she considers appropriate, may register the birth of a child in Ontario of which he or she becomes aware.
>
> (4) Despite the receipt of any documentation or information related to a birth, the Registrar General may refuse to register the birth until he or she is satisfied that the documentation or information correctly states the facts and, for such purposes, he or she may require such supplementary evidence as he or she considers appropriate.
>
> (5) Division registrars shall perform such duties as may be prescribed in respect of the notification, certification and registration of births.
>
> (6) The Registrar General may amend a birth registration in the circumstances and upon application by the person or persons prescribed by the regulations.
>
> (7) On receiving a certified copy of an order under section 4, 5 or 6 of the *Children's Law Reform Act* respecting a child whose birth is registered in Ontario, the Registrar General shall amend the particulars of the child's parents shown on the registration, in accordance with the order.
>
> (8) This section and sections 8, 10, 11, 21, 22 and 26 apply with necessary modifications to still-births.

"incapable" means unable, because of illness or death, to make a statement;

"statement" means a statement in the prescribed form respecting a child's birth referred to in subsection (2).

(2) Within thirty days of a child's birth in Ontario, the mother and father shall make and certify a statement in the prescribed form respecting the child's birth and shall mail or deliver the statement to the division registrar of the registration division within which the child was born.

(3) Subsection (2) does not apply,

(a) to the child's mother, if she is incapable; or

(b) to the child's father, if he is incapable or is unacknowledged by or unknown to the mother.

Where one parent incapable

(4) If one parent makes the statement without the other parent because the other parent is incapable, a statutory declaration of the fact shall be attached to the statement.

(5) If a child's parents are both incapable, or the child's mother is incapable and the father is unacknowledged by or unknown to her, another person acting on her behalf may make and certify the statement and shall mail or deliver the statement, together with a statutory declaration that the parents are both incapable or that the mother is incapable and the father is unacknowledged by or unknown to her, as the case may be, to the division registrar of the registration division within which the child was born.

(6) A statement shall contain particulars of the mother and, if the father makes the statement, particulars of the father.

(7) Where no statement is received by the appropriate division registrar within thirty days of a child's birth in

Ontario, the Registrar General may complete, certify and register a statement.

(8) If a pregnancy results in the birth of more than one child, a separate statement shall be made in respect of the birth of each child.

(9) Where a statement completed by only one parent of the child or by a person who is not the child's parent is registered, any of the following persons may apply to the Registrar General to amend the statement:

1. The child's mother and father together.

2. The child's mother, if the father is incapable or is unacknowledged by or unknown to the mother.

3. The child's father, if the mother is incapable.

(10) The Registrar General shall amend the registration accordingly.

(11) If one parent applies to amend the statement without the other because the other parent is incapable, a statutory declaration of the fact shall be attached to the application.

(12) On receiving a certified copy of an order under section 4, 5 or 6 (child's parentage) of the *Children's Law Reform Act* respecting a child whose birth is registered in Ontario, the Registrar General shall amend the particulars of the child's parents shown on the registration, in accordance with the order.

s. 10 (1) A child whose birth is certified under section 9 shall be given at least one forename, subject to subsection (2), and a surname.

(2) A child whose birth is certified under section 9 need not be given a forename if the registrar General is satisfied that,

(a) the child's sex is undetermined;

(b) every consent required by the *Child and Family Services Act* for the child's adoption has been given or dispensed with; or

(c) the child has died.

(3) A child's surname shall be determined as follows:

1. If both parents certify the child's birth, they may agree to give the child either parent's surname or former surname or a surname consisting of one surname or former surname of each parent, hyphenated or combined.

2. If both parents certify the child's birth but do not agree on the child's surname, the child shall be given,

    i. the parents' surname, if they have the same surname, or

    ii. a surname consisting of both parents' surnames hyphenated or combined in alphabetical order, if they have different surnames.

3. If one parent certifies the child's birth and the other parent is incapable, the parent who certifies the birth may give the child either parent's surname or former surname or a surname consisting of one surname or former surname of each parent, hyphenated or combined.

4. If the mother certifies the child's birth and the father is unknown to or unacknowledged by her, she may give the child her surname or former surname.

> 5. If a person who is not the child's parent certifies the child's birth, the child shall be given,
>
> i. the parents' surname, if they have the same surname,
>
> ii. a surname consisting of both parents' surnames hyphenated or combined in alphabetical order, if they have different surnames, or
>
> iii. if only one parent is known, that parent's surname.
>
> (4) A child's surname determined under paragraph 1, 3 or 4 of subsection (3) may be in a masculine or feminine form.
>
> (5) Where the person who certifies a child's birth indicates in the statement that he or she wishes to give the child a surname that is determined, not under subsection (3) but in accordance with the child's cultural, ethnic or religious heritage, the child may be given that surname if the Registrar General approves.

[20] Section 9 obligates the mother and father of a child to make and certify a statement respecting the child's birth. However, that obligation does not apply to a mother who is incapable, as defined, or to a father who is incapable, or who is either unknown to or unacknowledged by the mother, in which case the obligation falls solely on the other parent. The term "incapable" is defined as "unable, because of illness or death, to make a statement." A statutory declaration is required to be filed by the certifying parent that the other is incapable. However, no such statutory declaration is required where the mother states that the father is unknown to her or unacknowledged by her. The statement always contains the particulars of the mother, but only contains the particulars of the father when he makes the statement. Nor can a father apply unilaterally to amend the registered statement of birth that was made by the mother, unless she is incapable. However, if the father obtains a declaration of paternity under the *Children's Law Reform Act*, he can provide a certified copy to the Registrar General of the *Vital Statistics Act*, who will then amend the particulars of the child's parents in the registration. There is no provision, however, for amending the surname of the child in those circumstances.

[21] Section 10 provides a protocol for the naming of children born in Ontario. It is linked to whether one or both parents (or another person if both were incapable or the mother was incapable and the father was unknown to or unacknowledged by the mother) made and certified the statement of birth of the child. There are four circumstances within the protocol where the child can be given the mother's surname: (i) where both parents have certified the birth and agreed to give the child the mother's surname; (ii) where the mother has certified the child's birth and the father is unknown to or unacknowledged by her; (iii) where the mother has certified the birth and the father is incapable; (iv) where another person has certified the birth and only the mother is known. Also, the protocol can be avoided with the approval of the Registrar, if the person who certifies the birth wishes to give the child a surname that is in accordance with the child's cultural, ethnic or religious heritage.

Interpretation of these Provisions

[22] In *Macartney v. Warner* (2000), 46 O.R. (3d) 641 (Ont. C.A.) Laskin J.A. discussed the use of the ordinary meaning in the process of statutory interpretation. He stated at para. 47:

> A basic principle of statutory interpretation is that the ordinary meaning of a legislative provision should prevail absent a good reason to reject it. The ordinary meaning is presumed to be the intended or most appropriate meaning unless the context or the purpose and scheme of the legislation or the consequences of adopting the ordinary meaning suggest otherwise. Professor Ruth Sullivan, who edited the third edition of *Driedger on the Construction of Statutes*, sets out the presumption in favour of the ordinary meaning at p. 7:
>
> (1) It is presumed that the ordinary meaning of a legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> (2) Even where the ordinary meaning of a legislative text appears to be clear, the courts must consider the purpose and scheme of the legislation, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning.

> (3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

[23] In *The Shorter Oxford English Dictionary*, 3rd ed. (1990), the term "acknowledged" is defined as: "recognized, admitted as true, valid or authoritative." That definition accords with the position asserted by each side in this case. The application judge referred to the definition of "acknowledge" from *Black's Law Dictionary*, 6th ed. (1990): "To own, avow, or admit; to confess; to recognize one's acts and assume the responsibility therefor." Again, the definition is not, in my view, what is in contention in this case.

[24] The disagreement is whether the term "unacknowledged by" the mother, refers to a position she takes only for the purposes of the certification of the birth of the child under the Act, or refers to the mother's conduct generally in admitting, for any purpose, the identity of the father of the child.

[25] The appellant submits that the respondent does not have the option of saying she does not acknowledge him as the father under the Act, because she has acknowledged him by, among other things, sharing information about his paternity with her family and their church, consenting to a paternity declaration, permitting his involvement with William through visitation and access, and accepting his child support payments.

[26] It is common ground that the mother does admit that the appellant is the father of the child. What she does not wish to do, is acknowledge him for the purpose of registration of the child's birth and the requirements of the Act regarding his name.

[27] In *Teck Corp. v. Ontario (Minister of Finance)* (1999), 124 O.A.C. 58 (C.A.) at para. 11, this court approached the task of statutory interpretation by seeking the "appropriate interpretation" of the relevant provisions and referred with approval to a further reference to the Sullivan version of *Driedger on the Construction of Statutes* 3rd ed. (1991) where the learned author states at p. 131:

> An appropriate interpretation is one that can be justified in terms of a) its plausibility, that is, its compliance with the legislative text; b) its efficacy, that is, its promotion of the legislative purpose; and c) its acceptability, that is, the outcome is reasonable and just.

See also *Bapoo v. Co-Operators General Insurance Company* (1998), 36 O.R. (3d) 616 at 620-21.

[28] Therefore, to determine the appropriate interpretation of "unacknowledged by" in the context of ss. 9 and 10 of the Act, requires an examination of the plausibility, efficacy and acceptability of the two competing interpretations.

[29] The legislative purpose of the registration and naming provisions of the Act is to provide a system which ensures that children born in Ontario will have their births registered with a central registry, in a timely manner, and with the accurate particulars the legislature has determined are needed. It is the intention of the Act that children born in Ontario will receive at least one forename, and a surname which conforms with a standard protocol. Essentially, a child will have either the family surname, or if the mother's and father's names are different, then either the mother's surname, the father's surname, or a hyphenated or combined name including both. In the exceptional case, the surname will be a name that reflects the child's cultural, ethnic or religious heritage.

[30] In the context of the legislative purpose of the provisions, it is important to note that, unlike the former Acts, the scheme no longer turns on the marital status of the parents of the child. The scheme is the same whether the parents are married, in an ongoing relationship, or not in a relationship at all. It turns on the wishes of both parents if they are capable, or the wishes of only the mother if the father is unknown to or unacknowledged by her.

[31] Sections 9 and 10 both use the term "unknown to or unacknowledged by" the mother. Where a statute uses two different terms in the alternative, they are not to be treated as redundant but as having two different meanings: *Driedger, supra*, at p. 163. Therefore, although a mother knows the identity of the father, the Act contemplates that she may still not acknowledge him as the father. Because acknowledgment involves a volitional act of admitting knowledge of a fact, it is possible for a person to acknowledge something to be true in one context, but to decline to do so in another context.

[32] That is the interpretation given to the provisions by the City of Toronto Clerk, a division registrar under the Act. In the document entitled "Important Information" sent to the respondent with the Statement of Live Birth Form, para. 20 provides that "Signatures of BOTH parents are required unless the mother does *not know or wish to acknowledge* the Father." [Italics added]

[33] The public identification of the father of a child is not normally an issue when the parents are in an ongoing relationship. For mothers who are not living with or in a relationship with the father, it is not the policy of the law to discourage them from identifying the father for the sake of the child. Fathers have the right to seek access to and custody of their children, and they have the obligation to support them. Furthermore, the right to child support is the child's and can be exercised only when the mother is able to

identify the father: *Family Law Act*, R.S.O. 1990, c.F.3 s. 31(1); *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.), s. 15.1(1). In most cases it is in the best interests of the child to have a relationship with both parents.

[34] Consequently, it would normally be very difficult for a mother to avoid identifying the father to the child and others. Even in situations where a mother may not wish to make any acknowledgment of the identity of the father, such as where a child is born after a rape by a stranger, or as a result of an abusive relationship which she does not wish to continue, the mother may be obliged to make the identification (such as in court proceedings) and hence the acknowledgement. However, in such a circumstance, the mother may not wish to acknowledge the father for the purpose of the registration of the child's birth, and be forced to give the child the father's surname.

[35] If the Act is interpreted in the manner advocated by the appellant, having acknowledged the father for one purpose, the mother would be obliged to acknowledge him in her certifying statement. It would only be in circumstances where the mother has been able to successfully avoid identifying the father for any purpose, that she would also be able to avoid acknowledging him under the Act.

[36] In my view, in structuring the provisions as it did, the legislature made a policy decision to allow the mother to have the ultimate ability to determine the surname of the child in recognition of the fact that there will be circumstances where a mother will have the ongoing responsibility for the child, and should not be forced to have the child linked by name with the biological father. Counsel for the appellant acknowledged that, for example, in the case of rape, a mother should not be forced to have the child bear the surname of the father. Yet there is no provision in the Act for specific exceptions. It is the ability of the mother to treat the father as "unacknowledged by" her which accomplishes that legitimate legislative goal.

[37] Furthermore, the legislature has structured a scheme which provides no mechanism for a fact-finding inquiry and adjudication of whether a mother has "acknowledged" a father in the case of dispute.[2] This reinforces my conclusion that the intent of the Act was to provide a straightforward scheme for birth registration and naming of children wherein the parents or parent involved will provide information which is accepted by the authority.

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[2] Section 34 provides a mechanism for error correction which includes a fact-finding inquiry, but does not contemplate a hearing and adjudication of disputed facts.

[38] In the British Columbia Court of Appeal decision in *Trociuk*, all three judges agreed that the father could be unacknowledged by the mother even if he was not unknown to her. Having made that finding, the majority concluded that the provisions did not contravene s. 15 of the *Charter*, while Prowse J.A., in dissent, concluded that they did.

[39] In her reasons, Madam Justice Southin, one of the judges speaking for the majority, at para. 65 dismissed the argument of the father that "he had a right to complete the birth registration because he is not 'unacknowledged by or unknown to the mother' within s. 3(1)(b) of the Act." Although she found the submission attractive because it would preserve a right of husbands and give the same right to fathers of children born out of wedlock to have their names on the birth certificates of their children, she could not accept it. Her interpretation of the section as a whole, was that it gives the mother the choice of whether the father's name is on the birth certificate, and that the mother is under no obligation to either acknowledge paternity or give her child the father's surname.

[40] In her concurring judgment, Newbury J.A. did not question that the Act allows a mother to choose whether she wishes to acknowledge the paternity of the father for the purposes of registration of the birth and the name of the child. It is on that basis that she discusses whether the impugned sections discriminate against men and thereby contravene s. 15 of *Charter*. In concluding that the sections do not contravene s. 15, and that if they do, the discrimination is justified under s. 1, Newbury J.A. was of the view that there are circumstances where a mother would have legitimate reasons for not wishing to acknowledge the father in a public document and to maintain the privacy of mother and child. She included such circumstances as: where the father is not in contact with the mother, the father disputes paternity, the mother had sexual relations with multiple partners but does not want to state that the father is unknown, the birth resulted from an abusive relationship which the mother does not want to continue, the birth resulted from incest or sexual assault, the mother and father are married to other people, teenage pregnancy, or where the father is an infamous criminal. Newbury J.A. pointed out that the effect of the Act is not to deprive a father of rights to have a relationship with the child nor of the obligation to support the child, but only to have his name associated with the child. She concluded at para. 187:

> In summary, I acknowledge that the comprehensive plan adopted by the Legislature, after careful consideration by the Uniform Law Conference, will not work perfectly in every case. But keeping in mind the admitted importance of timely registration and name identification, I am not persuaded these provisions could be successfully redrafted (i.e. without possibly offending s. 15 of the *Charter*) except by giving

> fathers an absolute right to be included in the registration or to require the disclosure of reasons by mothers who oppose such inclusion. In my view, there is good reason to believe such an approach would cause far more harm than good and would be unreasonable in most cases where the problem arises. I conclude, therefore, that on balance, the default provisions are a reasonable limitation on any *Charter* right that may be breached by the impugned provisions of the *Vital Statistics Act*.

[41] Finally, Prowse J.A., in dissent on the *Charter* issue, considered the argument of the father that the mother could only say that the father was unacknowledged by her where she had not acknowledged his identity prior to registration of the birth. Prowse J.A. rejected that argument. She concluded that the Act distinguishes between fathers who are unknown and fathers who are unacknowledged, and, at para. 118 that "it is apparent that the Legislature has chosen to give the mother the sole power to acknowledge or refuse to acknowledge the father under s. 3 of the Act." Prowse J.A. also referred to the evidence filed in that case by the Director of Vital Statistics, that it is necessary in the interests of accurate and timely reporting for the Act not to force a mother to acknowledge a father where she has reasons to want to avoid doing so. Prowse J.A. found that the Director's evidence supports the conclusion that the Legislature made a deliberate decision to give mothers the right not to acknowledge a father for the purposes of the Act.

[42] I agree with the conclusion reached by the British Columbia Court of Appeal. In my view, the only interpretation which gives an effective meaning to the phrase "unacknowledged by" as distinct from "unknown to" in s. 10(3) of the Act, is the one which allows the mother to know the identity of the father, to acknowledge him as the father for other purposes, but not to acknowledge him for the purpose of registration of the birth of a child under the Act. This is the only interpretation which gives effect to the plain meaning in the context of the section as a whole.

[43] I am satisfied that it is also the appropriate interpretation on the criteria endorsed in the *Teck* case. It satisfies the requirements of plausibility, efficacy and acceptability as a legislative choice for accomplishing the purposes of the Act. Furthermore, for the appellant, as a father of a child born out of wedlock, the Act does not remove any right to be included in the register or to have the child bear his surname, as he never had such rights under prior legislation or at common law. There was no *Charter* challenge of the provision in this case. The issue of infringement of a father's rights will be dealt with by the Supreme Court of Canada in the *Trociuk* appeal.

[44] The appellant also argues that to interpret the Act as allowing any mother to decide not to acknowledge the father, and thereby avoid giving the child the father's surname, has the effect of rendering the naming protocol in s. 10(3)2 pointless or redundant. He argues that if the mother and father disagree on the name, the mother can achieve the result she wants by stating that the father is unacknowledged by her.

[45] I take a different view of the provision. The purpose of s. 10(3)2 is to provide a mechanism to resolve a situation where the parents in good faith cannot agree on the surname of the child. It also makes the parties aware of the fall-back result if they fail to agree. Where parents are in an ongoing relationship with each other, there are, in my view, going to be very few situations where a mother will take the step of denying acknowledgment of the father of her child on the birth registration in order to have the child bear only her surname. It may be assumed that most mothers place the best interests of their children above all other considerations. A mother would have to be satisfied herself, and be confident that the child would agree, that this step was in the child's best interests.

[46] Furthermore, if the mother were to take that step in circumstances where the parents share custody of the child, the father has a remedy under s. 5 of the *Change of Name Act*, R.S.O. 1990, c. C-7, which allows a parent with custody of a child to apply to change the child's name. If the other custodial parent does not consent, a hearing is held where the decision is made in the best interests of the child.

[47] The appellant also raises the argument that the court should exercise its *parens patriae* jurisdiction, and in furtherance of William's best interests order that he bear the hyphenated name of his father and mother. The appellant argues that this will allow William to identify with both parents and with both branches of his lineage. However, there is a legislative scheme in place for the naming of children, which is encompassed by s. 10 of the *Vital Statistics Act*, as well as s. 14, which provides a method for the lawful custodians of a child to change the forename or surname of a child under 12 years of age, and also by the *Change of Name Act*. That scheme reflects the intent of the legislature as to how a child will be named. The legislative structure represents the view of the legislature that the best interests of affected children are met by compliance with the legislation.

[48] Even if the court's broad *parens patriae* jurisdiction allowed it, in an unusual case, to order a change of name in the best interests of a particular child notwithstanding the provisions of the relevant statutory scheme, this is not such a case. In my view, this case presents one of the situations contemplated by the drafters, where a mother and father are not in an ongoing relationship from the time of the birth of the child, and the mother is going to raise the child alone. The father will enjoy his parental rights and obligations and the child will enjoy his relationship with his father. However, in recognition that the three were never a family unit, and that the family unit will comprise only the mother and child, the mother wishes the child to have only her surname. Of course, if the child

wishes in the future to change his name, he may do so pursuant to s. 4 of the *Change of Name Act*.

[49] Finally, I agree with the application judge and with the British Columbia Court of Appeal that the role of the Registrar under s. 34 of the Act to correct errors has no application where the mother has stated that the father is unacknowledged. This statement is made by choice of the mother and is not an inadvertent error. The fact that there is no appeal from the Registrar under this section is therefore not a legislative gap to be filled by the intervention of the court. Neither can the statement by the mother be treated as a fraud under s. 52 of the Act. In this case, as noted by the respondent, the appellant made no attempt to apply to the Registrar under that section.

Issue 2: The Finding by the Application Judge of No Agreement Between the Parties

[50] From my reading of the reasons, the application judge made no specific ruling with respect to the effect of the parties' agreement in June 1998 to submit a joint statement of live birth and to give the child the hyphenated surname Kreklewetz-Scopel. The application judge referred to the mother's position that the appellant had pressured her and lied to her about his intention that the three of them were to be a family, in order to persuade her to send in the form he had completed. The application judge also referred to the fact that the mother had never wanted the child to have the name Raymond, which was also included in that form. On the latter issue, the application judge made the finding: "Given the conflicting evidence of the parties as to whether there was any real agreement between the parties on William's names and given the fact that they were not living together at William's birth, there is no legal reason why a third forename should be added."

[51] Clearly, however, in the result, the application judge gave no effect to the alleged agreement, and did find in connection with it, that there was conflicting evidence as to whether there was a real agreement.

[52] I see no basis to interfere with the finding of the application judge that there was conflicting evidence as to whether there was a "real" agreement. The mother's evidence was that she had been pressured into it. That speaks to the reality and potential enforceability of such an agreement. The appellant suggests in his factum that the parties would have believed that their agreement was in William's best interests. The fact that the mother felt pressured into it belies that submission.

CONCLUSION

[53] I would dismiss the appeal with costs. If the parties cannot agree as to costs, the respondent shall submit a bill of costs together with brief written submissions within 10 days, and the appellant shall make brief reply submissions within 10 days thereafter.

Signed: "K. Feldman J.A."

"I agree John Laskin J.A."

"I agree Janet Simmons J.A."

RELEASED:"JL" JUNE 19, 2002