



KANSAS DISTRICT COURT

SHAWNEE COUNTY COURTHOUSE
200 S.E. 7TH STREET
TOPEKA, KANSAS 66603-3922
FAX (785) 291-4917

CHAMBERS OF
FRANK J. YEOMAN, JR.
JUDGE OF THE DISTRICT COURT
DIVISION EIGHT
SUITE 310

Denk v. Taylor
24 Kan. App. 2d. 172
(1998)

2000 overrules

AGO 88-102

July 13, 2000

Robin Wolfe, Supervisor
Amendment Unit, Vital Statistics
900 SW Jackson, Suite 151
Topeka, KS 66612-2221

RE: Proposed Change of Birth Certificate--In re: K.K.D. 199510024673

Dear Ms. Wolfe:

I am sorry but the request that you make in the referenced case cannot be granted and the documents you sent are returned to you with the order unsigned. This Court has no authority to grant the request that you are seeking.

Enclosed please find a copy of the letter I sent to Cynthia Keeling nearly two years ago alerting her to the ruling of the Court of Appeals in Denk v. Taylor (see below). That decision interprets K.S.A. 38-1130. The Court of Appeals, following the plain language of the statute, says that the District Court is without jurisdiction to issue an order pursuant to the 38-1130 procedure unless both parents have signed the pertinent affidavits.

Please understand that should a district court be inclined to enter an order in any matter where the court does not have jurisdiction then the order is void and without legal effect.

Please consider the following:

DENK v. TAYLOR, 25 Kan. App. 2d 172 (1998)
958 P.2d 1172

LORI DENK and COLTON DENK, by and through LORI DENK, his next friend,
Appellants, v. JASON TAYLOR, Appellee.
No. 79,797

Court of Appeals of Kansas
Opinion filed May 22, 1998

SYLLABUS BY THE COURT

1. PARENT AND CHILD -Birth Certificate -Amendment of Birth Certificate to Change Name of Parent or Child -Both Parent's Consent Required. K.S.A. 38-1130 allows the trial court to amend the birth certificate to add the name of a parent, correct the name of either parent or of the child, or change the child's last name, upon request of both parents.

2. SAME -Kansas Parentage Act -Trial Court without Authority to Change Child's Name without Both Parent's Consent. **The Kansas Parentage Act, K.S.A. 38-1110 et seq., does not give the trial court the authority to change a child's name, absent the express consent of both parents.** [emphasis supplied]

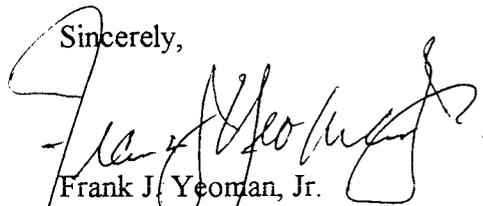
You included with your material the Attorney General's opinion issued in 1988. That was before the Denk v Taylor matter was decided. Now that the matter has been addressed by the appellate courts the Attorney General's opinion is invalid and cannot be relied upon for authority to take the action that you request.

You may wish to discuss with the Secretary and/or your legal department just what your options and obligations are. I can tell you that when the appellate courts--Court of Appeals or Supreme Court have acted in regard to a matter then the lower courts, all of them, are bound by that decision and must apply the law giving it the same interpretation.

No district court has authority to grant the change of birth certificate where only one parent has signed the request. The district court has no power to do so and any order entered contrary to that would be invalid.

I have checked to see whether the Denk v. Taylor decision might have been overruled by the Supreme Court and find no evidence that it has. I likewise find no indication that the legislature has taken action to change the requirements of the statute.

Sincerely,



Frank J. Yeoman, Jr.
Judge of the District Court

FJY:elh

Enclosure

cc: Carla Stovall, Attorney General
Clyde Graeber, Secretary

September 10, 1998

Cynthia Keeling, Chief
Office of Vital Statistics
900 SW Jackson, 1st Floor
Topeka, KS 66612

**RE: Kansas Parentage Act
K.S.A. 38-1130 (Amendment of Birth Certificates)**

Dear Ms. Keeling:

I am contacting you in regard to a recent development with respect to the Amendment of Birth Certificates pursuant to K.S.A. 38-1130. This is sent because there has been, in the past, a dispute over whether a parent who is the only parent listed on the birth certificate may use this procedure to change the name of the child. An Attorney General's opinion (88-102) had been given that such an amendment was allowed, at least under some circumstances. Some judges, including myself, disagreed with that opinion and had not followed it. I believe the matter to have now been resolved by our appellate courts.

In the case DENK v. TAYLOR, ___ Kan. App. 2d ___, ___ P.2d ___, (1998), the Court of Appeals reversed the trial court's order which had amended the birth certificate without the consent of one of the parents. The appeals court said, "**The Kansas Parentage Act, K.S.A. 38-1110 et seq., does not give the trial court the authority to change a child's name, absent the express consent of both parents.**"

In making that determination the Court of Appeals relied on an also recent case, that being one decided by the Kansas Supreme Court, IN RE MARRIAGE OF KILLMAN, 264 Kan. 33, ___ P.2d ___, (1998). In that case, in its discussion of the manner in which courts are to understand and apply statutes the Court said:

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. City of Wichita v. 200 South Broadway, 253 Kan. 434, 436, 855 P.2d 956 (1993). The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect

to the intention of the legislature as expressed, rather than determine what the law should or should not be. *Brown v. U.S.D. No. 333*, 261 Kan. 134, 141-42, 928 P.2d 57 (1996) (interpreting the Kansas Administrators' Act). **Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.** *State v. Alires*, 21 Kan. App. 2d 139, Syl. ¶ 2, 895 P.2d 1267 (1995).

I believe these decisions clarify the issue and remove any doubt about whether the Court has authority to enter orders based on the request of only one parent. The plain language of the statute is that it requires the request of both parents and if there is no request from both parents, regardless of the reason that is so, then the procedure authorized under K.S.A. 38-1130 cannot be used.

I trust that the consumers who come to your office will be so advised when there are discussions about amendment of birth certificates. They will be less likely to have false expectations about what they can do by contacting their local court on the matter.

A copy of each of the decisions is enclosed for your convenience. A copy of this letter is being forwarded to the Attorney General as well for use by that office. Thank you for your consideration.

Sincerely,

Frank J. Yeoman, Jr.
JUDGE OF THE DISTRICT COURT

FJY:elh
cc: Carla Stovall
Attorney General



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 14, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88-102

Dr. Stanley C. Grant, Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Minors -- Determination of Parentage -- Changes
Made to Minors Birth Certificates -- Necessity of
Parental Consent When Both Parents of Minor are not
Available

Synopsis: The procedure for amending a birth certificate to
add or correct the name of a parent or to change
the name of a child to that of a parent, is
intended to reconcile a birth certificate with the
facts which existed at the time the certificate was
issued. The statute generally requires
participation of both parents in the proceeding.
However, on a case-by-case basis, an individual who
is a single parent because of death or lack of
acknowledgment of the other parent may proceed
under that section if doing so does not broaden
application of the statute, conflict with other
statutes, or infringe on the interest of the absent
parent. Cited herein: K.S.A. 38-1115, 38-1130,
60-1402, 65-2422a, 65-2422c, K.S.A. 1987 Supp.
77-201 Third; K.A.R. 28-17-20; L. 1986, ch. 157.

*

*

*

Dear Secretary Grant:

As Secretary of the Kansas Department of Health and Environment (KDHE) you request our opinion regarding procedures for amendments to birth certificates. Specifically you inquire whether the birth certificate of a minor child may be amended to correct the name of either parent or of the child, or to change the child's last name to that of either parent pursuant to K.S.A. 38-1130, if the required affidavit is executed by the only named or surviving parent.

Initially, we note that various procedures exist for changing a name or amending a birth certificate. A legal change of name may be obtained through a judicial determination pursuant to K.S.A. 60-1402. This procedure may be used by a person, including a minor through a next friend, upon a showing of the truth of the allegations in the petition, and upon a showing of reasonable cause for the name change. In re Application to Change Name, 10 K.A.2d 625, 626 (1985). Following the judicial determination, the individual's birth certificate may be amended pursuant to K.S.A. 65-2422a.

Minor corrections to birth certificates may be made using the procedure set forth in K.A.R. 28-17-20, as authorized by K.S.A. 65-2422c. The regulation differentiates between minor corrections made within 90 days of receipt of the certificate in the office of vital statistics and minor changes made after 90 days of receipt. Minor corrections to be made within the 90-day period are accomplished by the procedure set forth in K.A.R. 28-17-20(a), while those occurring after the 90-day period are to be accomplished through K.A.R. 28-17-20(b). Changes after 90 days which involve adding or correcting the name of either parent or of the child, or changing the child's surname to that of a parent, are to be made pursuant to K.S.A. 38-1130. K.A.R. 38-17-20(b)(c)(ii).

Finally, amendments to birth certificates may be obtained through K.S.A. 38-1130, the procedure about which you inquire. That section allows parents to add or correct the name of either parent or to change the child's last name to that of either parent. Both parents are required to appear before a judge of the district court or a hearing officer appointed pursuant to Kansas Supreme Court Rule 172, and to execute affidavits attesting that each is the child's parent. K.S.A. 38-1130(a). Upon a showing of evidence of the child's birth, and a finding that the certificate is incorrect, then the judge or hearing officer forwards the affidavits and order

to prepare a new certificate to the state registrar of vital statistics. K.S.A. 38-1130(b).

In light of the statutory language indicating that the presence and affidavits of both parents are required, you ask whether a single parent may obtain an amendment pursuant to K.S.A. 38-1130 when the other biological parent is unavailable due to death or lack of parental acknowledgement.

It is a fundamental rule of construction that the legislative purpose and intent controls when such can be ascertained from the entire act. Harris Enterprises, Inc. v. Moore, 241 Kan. 59, Syl. ¶1 (1987). The statute in question, K.S.A. 38-1130, is part of L. 1986, ch. 157, entitled "An Act concerning parentage proceedings," which generally provides for parentage determination. This is a determination of facts which existed at the child's birth, but were not known or not substantiated. The procedure, set forth in K.S.A. 38-1130, is for voluntary reconciliation of the facts, as opposed to involuntary proceedings brought pursuant to K.S.A. 38-1115. Additionally, we note that the procedure mandates a degree of confidentiality beyond that required when a change results from a proceeding brought under K.S.A. 60-1402 or K.S.A. 65-2422c. The latter sections require that the new certificate be marked "amended." No such requirement appears in K.S.A. 38-1130. Rather, the affidavits, court order, and original birth certificate are sealed pursuant to subsection (b), and no record of the action will be made by the court pursuant to subsection (c). From the language of K.S.A. 38-1120, we believe that the legislature intended to create a procedure for reconciling a child's birth certificate with the facts that were known or should have been known at the time the certificate was issued, but not to change the certificate to reflect facts which did not exist at the time of issuance.

Various jurisdictions have construed statutes regarding a minor's change of name. See Annot., 92 A.L.R.3d 1091, 1098-99 (1979). In general, statutes requiring that both parents, if living, join in the petition to change the minor's name have been construed to require both parent's consent as a necessary prerequisite. Annot., at 1099. The cases appearing in the annotation construe generally require both parent's consent, if living.

The Kansas statute in question is not strictly a change-of-name statute. It does require both parent's participation, but the requirement is not modified by the "if living" stipulation as in other jurisdictions. Even though differences appear, the

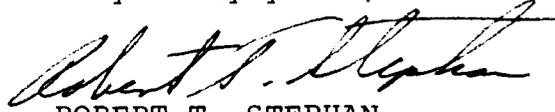
annotated cases do support the notion that parents have some interest in a child's surname. The nature of that interest has not been uniformly defined. Some courts have related the child's surname to the parent and child bond, which heightens a parent's interest in the surname. See, e.g., Application of Tubbs, 620 P.2d 384, 387 (Okla. 1980); Carroll v. Johnson, 565 S.W.3d 10, 13 (Ark. 1978). Our court has not directly settled the issue. However, in In re Application to Change Name, 10 Kan. App.2d 625, 628 (1985), the court indicated in dictum that a parent's interest in a child's surname is one which our courts will seek to preserve.

Instances may arise when the purposes outlined above must be achieved, but one parent is not available due to death or lack of acknowledgment. We believe that K.S.A. 38-1130 does not preclude the single parent from using the procedure outlined therein. The legislature has announced an intent that "words importing the plural number only may be applied to one person or thing." K.S.A. 1987 Supp. 77-201, Third. However, caution must be used in such a construction so that the purpose of the statute is not broadened, other procedures are not circumvented, and interests of the absent parent are not affected. For example, an amendment by a single mother to add the name of a non-consenting father to the birth certificate as a means to establish the paternity of the father would be an overbroad application of K.S.A. 38-1130, and would conflict with the procedures for determining parentage. However, the same single parent may wish to correct her and the child's last name, but is beyond the 90 day period for doing so under the provisions of K.S.A. 28-17-20(a). As long as the correction does not involve protectable interests of the other parent, then the spirit of the statute may allow the single parent to proceed alone.

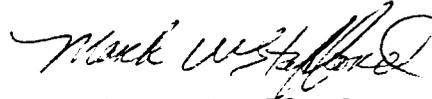
In conclusion, it is our opinion that the procedure for amending a birth certificate to add or correct the name of a parent or to change the name of a child to that of a parent, is intended to reconcile a birth certificate with facts which existed at the time the certificate was issued. The statute generally requires participation of both parents in the proceeding. However, on a case-by-case basis, an individual who is a single parent because of death or lack of acknowledgment by the other parent may proceed under that section if doing so does not broaden application of the

statute, conflict with other statutes, or infringe on the interest of the absent parent.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Mark W. Stafford
Assistant Attorney General

RTS:JLM:MWS:jm