



2000

**Family Law—Petitions to Change a Minor Child's Surname:  
Arkansas Supreme Court Adopts "Clearly Erroneous" Standard of  
Review and Establishes Six-Factor Test. *Huffman v. Fisher*, 337  
Ark. 58, 987 S.W.2d 269 (1999).**

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FAMILY LAW—PETITIONS TO CHANGE A MINOR CHILD’S SURNAME: ARKANSAS SUPREME COURT ADOPTS “CLEARLY ERRONEOUS” STANDARD OF REVIEW AND ESTABLISHES SIX-FACTOR TEST. *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999).

## I. INTRODUCTION

In *Huffman v. Fisher*,<sup>1</sup> the Arkansas Supreme Court changed the standard of review for cases in which a parent petitions to change a minor child’s surname.<sup>2</sup> Until *Huffman*, Arkansas appellate courts employed an abuse-of-discretion standard when reviewing trial court surname-assignment decisions, which trial judges must base upon the minor child’s best interests.<sup>3</sup> In *Huffman*, the court admitted that case law had not given trial courts adequate guidelines for properly applying the “best interest rationale.”<sup>4</sup> To remedy this problem, the *Huffman* court established six factors to guide trial courts when determining a child’s best interests.<sup>5</sup> The court also adopted a clearly erroneous standard of review for surname-assignment cases.<sup>6</sup> The *Huffman* court undoubtedly hoped that, in addition to clarifying the best interest rationale, these measures would prevent trial courts from determining a child’s best interests in a mechanical manner, thus ensuring flexibility in trial-level applications of that rationale.

This note recounts the facts underlying *Huffman*. It also discusses the surname’s development in general and, in particular, the development of surname-assignment law in Arkansas. Finally, this note examines the reasoning that the *Huffman* court employed and examines *Huffman*’s significance.

## II. FACTS

On May 18, 1996, Kara Huffman (“Kara”)<sup>7</sup> gave birth to Jacob Austen Huffman (“Jacob”).<sup>8</sup> Shortly thereafter, Arkansas’s Office of

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1. 337 Ark. 58, 987 S.W.2d 269 (1999).

2. *See id.* at 69, 987 S.W.2d at 274.

3. *See id.* at 66, 987 S.W.2d at 273. This principle is often labeled the “best interest rationale.”

4. *See id.* at 68, 987 S.W.2d at 274.

5. *See id.*, 987 S.W.2d at 274.

6. *See id.* at 68-69, 987 S.W.2d at 274.

7. Author’s Note: This note discusses several individuals sharing common last names. To avoid confusion, the note refers to parties and witnesses by their first names.

8. *See* Appellant’s Brief at 7, *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999) (No. 98-1315). Kara was 16 years old when she gave birth to Jacob. *See id.* at 5. Author’s Note: Although the opinion states that Jacob’s middle name is “Austen,”

Child Support Enforcement filed a child support action on behalf of Kara against Jacob's father, John Nicholas Fisher ("Nick").<sup>9</sup> Subsequently, Nick filed a third-party complaint against Kara and the Arkansas Department of Health, requesting that Jacob's surname be changed from "Huffman" to "Fisher."<sup>10</sup>

At trial, Nick admitted that he had not paid any child support since Jacob was born and that he had encouraged Kara to have an abortion.<sup>11</sup> However, Nick testified that he wanted Jacob to bear his surname because he was raised bearing his father's surname.<sup>12</sup> Nick stated his belief that the surname "Fisher" would be a better label for Jacob than the surname "Huffman," adding that, hopefully, Nick and his family would play a role in raising Jacob.<sup>13</sup>

Nick's uncle, Roger Fisher ("Roger"), testified that Nick was a fine person and indicated that Jacob should bear the surname "Fisher."<sup>14</sup> Roger admitted that he could not think of any advantages or disadvantages to bearing the name "Huffman" as opposed to "Fisher."<sup>15</sup> Echoing Roger's sentiments that Jacob should bear the "Fisher" name, Nick's father, William M. Fisher, Sr. ("William"), spoke of a situation in which Nick would have to explain why his son bore a different surname than he did, labeling this scenario as awkward.<sup>16</sup> William explicitly stated that Jacob should bear the surname "Fisher."<sup>17</sup>

Kara testified that Nick did not provide her any emotional support after he discovered that her parents knew of her pregnancy.<sup>18</sup> Kara also testified that she gave Jacob the surname "Huffman" because she would raise Jacob and because Jacob would be associated with her his entire life.<sup>19</sup> Furthermore, Kara stated that she would retain the surname

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the Appellant's Brief states that it is "Auston."

9. *See id.* Nick was 18 years old when Jacob was born. *See id.* As of the date that the abstract was written, Nick and Kara were not married and had never been married. *See id.* at 7. Author's Note: Because the opinion refers to John Nicholas Fisher as "Nick," this note will do the same.

10. *See id.* Nick named the Department of Health as a party to the complaint because it was the agency with which Kara filed Jacob's birth certificate. *See id.*

11. *See id.* at 25.

12. *See id.* at 26.

13. *See id.*

14. *See Appellant's Brief at 27, Huffman (No. 98-1315).*

15. *See id.*

16. *See id.* at 32.

17. *See id.*

18. *See id.* at 36.

19. *See id.*

"Huffman" after marriage if the retention would be in Jacob's best interests.<sup>20</sup>

After trial, the chancellor issued a letter opinion stating that Jacob should bear his father's surname in accordance with the norm in the locale.<sup>21</sup> In support of his ruling, the chancellor wrote that if Jacob did not bear the name "Fisher," the child would have to explain to his peers why his surname was different from his father's surname.<sup>22</sup> Furthermore, the chancellor stated that if Jacob retained the surname "Huffman," he risked having a surname different from either parent should Kara marry and assume her husband's surname.<sup>23</sup>

A six-judge panel of the Arkansas Court of Appeals upheld the ruling in a three-to-three decision.<sup>24</sup> The court stated that the chancellor clearly considered the full range of factors inherent in determining Jacob's best interests and that the chancellor considered the unique circumstances of the case.<sup>25</sup> The court then announced its inability to conclude that the chancellor abused his discretion in deciding that Jacob should bear his father's surname.<sup>26</sup>

In a four-to-three decision, the Arkansas Supreme Court reversed the chancellor's decision and remanded the case.<sup>27</sup> In doing so, the court established six factors that chancellors must consider in determining a child's best interests and abandoned years of precedent by adopting a clearly erroneous standard of review for surname-assignment cases.<sup>28</sup>

### III. BACKGROUND

A name is a symbol that defines its bearer's identity.<sup>29</sup> A name reflects the reputation built by its bearer and may be a source of pride

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20. See Appellant's Brief at 36-37, *Huffman* (No. 98-1315).

21. See Letter Opinion from Judge Bentley E. Story, Cross County Chancery Court, to Tom B. Smith & Robert Ford, Attorneys at Law 6 (June 2, 1997).

22. See *id.*

23. See *id.*

24. See *Huffman v. Fisher*, 63 Ark. App. 174, 182, 976 S.W.2d 401, 405 (1998), *rev'd*, 337 Ark. 58, 987 S.W.2d 269 (1999). Because the appellate court reached a tie vote in deciding the case, under Arkansas law the trial court's decision was affirmed. See ARK. CODE ANN. § 16-12-113 (Michie 1994).

25. See *Huffman*, 63 Ark. App. at 181, 976 S.W.2d at 405.

26. See *id.* at 182, 976 S.W.2d at 405.

27. See *Huffman*, 337 Ark. at 71, 987 S.W.2d at 275.

28. See *id.* at 68, 69, 987 S.W.2d at 274. See also *id.* at 71, 987 S.W.2d at 275 (Glaze, J., dissenting).

29. See Esther Suarez, Note, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 233 (1997).

and personal integrity.<sup>30</sup> This section traces the surname's development from tenth-century England to twentieth-century Arkansas.

### A. The Surname's Development in General

Until the tenth century, people in England knew each other only by their Christian, or "first," names.<sup>31</sup> However, an increasing population rendered this practice an inadequate method of identifying individuals.<sup>32</sup> The surname emerged as a descriptive word to place after an individual's Christian name.<sup>33</sup> The customs associated with surnames in fourteenth-century England were different, and often more flexible, than such customs in modern times.<sup>34</sup> Some individuals, for instance, would change surnames several times during their lives, and spouses often assumed different surnames.<sup>35</sup> Additionally, husbands sometimes assumed their wives' surnames, and children born to prominent or wealthy women commonly assumed their mothers' surnames.<sup>36</sup>

Later, the medieval property system, which bestowed all marital property rights upon the husband, and the institution of primogeniture<sup>37</sup> transformed the surname into a hereditary label, partly because an heir's ability to inherit property depended upon that heir's retention of the surname associated with the property.<sup>38</sup> Henry VIII's Parish Registry

30. *See id.*

31. *See id.* During the first half of the Middle Ages, the term "name" denoted an individual's first name. *See* Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 5 (1992).

32. *See* Suarez, *supra* note 29, at 233.

33. *See* Suarez, *supra* note 29, at 233. These early English surnames described individuals with reference to their father's Christian name (Matthew, son of David, would become "Matthew Davidson"), their occupation (John, a baker, would become "John Baker"), and the location of their residence (Henry, who lived on a hill, would become "Henry Hill"). *See* Suarez, *supra* note 29, at 233.

34. *See* Malone v. Sullivan, 605 P.2d 447, 448 (Ariz. 1980).

35. *See id.* (citing Comment, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, 32 MD. L. REV. 409 (1973)).

36. *See id.* (citing Julia C. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U. L.Q. 779, 781). According to Lamber, a husband might assume his wife's surname if an inheritance came through the wife's family. *See* Lamber, *supra*, at 781.

37. *Black's Law Dictionary* defines primogeniture as "[t]he common-law right of the firstborn son to inherit his ancestor's estate, usu[ally] to the exclusion of his younger siblings." BLACK'S LAW DICTIONARY 1210 (7th ed. 1999).

38. *See* Gubernat v. Deremer, 657 A.2d 856, 861 (N.J. 1995) (quoting Richard H. Thornton, Note, *The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303, 305). According to Thornton, "surnames began to serve as hereditary family names, partly because the

System (PRS) also helped to transform the surname into a hereditary label.<sup>39</sup> Under the PRS, which governed the recording of births, deaths, and marriages,<sup>40</sup> each parish maintained records for its inhabitants.<sup>41</sup> The PRS prompted each family member to identify himself or herself by the father's name for recording purposes.<sup>42</sup> Additionally, the government assigned the father's surname to each married couple's child.<sup>43</sup>

When colonists departed England for North America, they took with them the custom of the hereditary surname.<sup>44</sup> These colonists retained the English law of primogeniture,<sup>45</sup> and many of the males fervently hoped to father sons who would inherit their property and perpetuate the family name.<sup>46</sup>

Cases decided as recently as the 1900s indicate that some courts viewed inheritance of the paternal surname as not merely tradition, but

inheritance of property was often contingent upon an heir's retention of the surname associated with that property." Thornton, *supra*, at 305. *Gubernat* is perhaps the nation's most infamous surname-assignment case. Three days after the New Jersey Supreme Court ruled that Alan Gubernat's son would bear the surname "Deremer," Gubernat killed the child before committing suicide. See Merle H. Weiner, "We Are Family": Valuing Associationalism in Disputes over Children's Surnames, 75 N.C. L. REV. 1625, 1627 (1997). Weiner's article indicates that this tragedy resulted from Gubernat's displeasure with the court's decision. See *id.* at 1627-28. However, Gubernat's lawyer, James Richardson, stated that although Gubernat was disappointed, he was "not disconsolate, despairing or enraged." Paula Span, *Killing Ends Fight over Child's Name; Officials Say Father Shot Son, Self After Court Ruled for Mother*, WASH. POST, May 16, 1995, at A1, available in 1995 WL 2094008.

39. See *Gubernat*, 657 A.2d at 861.

40. See *id.* (citing *In re Shipley*, 205 N.Y.S.2d 581, 586 (N.Y. Sup. Ct. 1960)).

41. See *id.*

42. See *id.* at 861-62 (quoting several commentators in support of this assertion).

43. See *id.* at 862 (quoting Chereña Pacheco, *supra* note 31, at 7). A different custom applied to a child of unmarried parents; reflecting a then-prevalent legal theory that such a child had no parents, the child obtained a surname through reputation only. See Alan M. Grosman, *Parental Disputes over the Surname of a Child*, N.J. LAW., May 1997, at 26-27. Hence, many illegitimate children were identified using the custodial mother's surname. See *id.*

44. See *Gubernat*, 657 A.2d at 862.

45. See *id.* at 863 (citing GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 46 (1991)). For a definition of "primogeniture," see *supra* note 37.

46. See *Gubernat*, 657 A.2d at 863 (quoting WOOD, *supra* note 45, at 46). Wood states:

Most New England farmers, and perhaps most others too, thought mainly of providing for their families and rarely justified their acquisitiveness in any other terms than the needs of their families. What they principally wanted out of life was sons to whom they could pass on their land and who would continue the family name.

WOOD, *supra* note 45, at 46.

the father's right.<sup>47</sup> These courts used various terms to describe this right, including "natural" and "fundamental."<sup>48</sup> However, this view is no longer prevalent. Recent surname-assignment law developments in Arkansas reflect those in other states, insofar as these developments have resulted in widespread implementation of the best interest rationale.

## B. The Development of Surname-Assignment Law in Arkansas

*Clinton v. Morrow*<sup>49</sup> is perhaps Arkansas's earliest surname-assignment case. In *Clinton*, the Arkansas Supreme Court first articulated the abuse-of-discretion standard, announcing that the decision to change a minor's surname is in the chancellor's discretion.<sup>50</sup> However, the court added that the chancellor should use caution in exercising this discretion in light of a father's desire that his children bear his name.<sup>51</sup> According to the court, the chancellor should not sanction the children's use of the stepfather's surname in lieu of the father's surname unless the use would be in the children's best interests.<sup>52</sup>

More than twenty-five years later, the Arkansas Supreme Court revisited the surname-assignment question in *Carroll v. Johnson*.<sup>53</sup> In *Carroll*, Suzanne Marie Carroll filed separate ex parte petitions requesting that the trial court change her children's surnames to "Carroll."<sup>54</sup> After the court granted each of the petitions, the children's father, Samuel Johnson, filed a motion in each proceeding requesting

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47. See, e.g., *Gubernat*, 657 A.2d at 865 (quoting and citing cases and commentators addressing the notion that inheritance of the paternal surname is the father's right).

48. See, e.g., *Carroll v. Johnson*, 263 Ark. 280, 284, 565 S.W.2d 10, 13 (1978) (listing the various terms and citing the cases in which those terms were used). This attitude may have stemmed, at least in part, from an assumption that a healthy father-child relationship hinged on both sharing a common surname. See generally Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 How. L.J. 227, 234 (1992) ("Courts expressed the belief that a change of name could weaken, if not sever, the father-child bond.").

49. 220 Ark. 377, 247 S.W.2d 1015 (1952).

50. See *id.* at 383, 247 S.W.2d at 1018. The court implied that it would reverse a decision produced by an abuse of this discretion. See *id.* at 384, 247 S.W.2d at 1018 ("We cannot say that his action amounted to an abuse of discretion.").

51. See *id.*, 247 S.W.2d at 1018. The court refers to this desire as "the natural and commendable desire of the father to have his children bear and perpetuate his name . . ." *Id.*, 247 S.W.2d at 1018.

52. See *id.*, 247 S.W.2d at 1018.

53. 263 Ark. 280, 565 S.W.2d 10 (1978).

54. See *id.* at 282, 565 S.W.2d at 12.

that the court set aside the order previously entered.<sup>55</sup> Johnson claimed that entry of the orders absent notice to him violated his due process rights under both the United States and Arkansas Constitutions.<sup>56</sup>

On appeal, the Arkansas Supreme Court upheld the trial court's decision to set aside the orders, rejecting the notion that Johnson did not have standing to challenge the orders and was not entitled to notice in the matter.<sup>57</sup> Reaffirming the *Clinton* holding, the *Carroll* court stated that fathers have a protected interest in their children's name and that the judiciary should not interfere with the customary manner of parental-surname succession unless the child's best interests warranted such interference.<sup>58</sup>

Ten years later, *Stamps v. Rawlins*<sup>59</sup> presented the court with a question concerning the legislature's role in surname assignment.<sup>60</sup> In *Stamps*, the appellant challenged the validity of a surname change, claiming that the chancellor's orders were inconsistent with the requirements of section 9-2-101 of the Arkansas Code.<sup>61</sup> The court acknowledged that the change was inconsistent with the statute's requirements but ruled that the change was a valid procedure nonetheless.<sup>62</sup> According to the court, section 9-2-101 did not repeal a chancellor's common-law power to change a minor's surname in accordance with the minor's best interests.<sup>63</sup> Furthermore, the court stated, the statute was supplementary to common law and merely provided another method of effectuating a name change.<sup>64</sup>

Much like *Stamps*, *McCullough v. Henderson*<sup>65</sup> addressed the issue of whether a statute deprived chancellors of their common-law power to

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55. *See id.*, 565 S.W.2d at 12.

56. *See id.*, 565 S.W.2d at 12.

57. *See id.* at 284, 291, 565 S.W.2d at 13, 17.

58. *See id.* at 284-86, 565 S.W.2d at 13-14.

59. 297 Ark. 370, 761 S.W.2d 933 (1988).

60. *See id.* at 373, 761 S.W.2d at 935.

61. *See id.*, 761 S.W.2d at 935. This statute established a formal procedure for obtaining a name change. *See id.*, 761 S.W.2d at 935 (describing generally ARK. CODE ANN. § 9-2-101 (Michie Repl. 1987)). The court did not explain the precise manner by which the name change deviated from the statute's requirements.

62. *See id.*, 761 S.W.2d at 935.

63. *See id.*, 761 S.W.2d at 935 (citing *Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952)). The court also cites *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978). Author's Note: This note does not address this point in its discussion of *Clinton* and *Carroll* because *Stamps*, unlike *Clinton* or *Carroll*, states explicitly that a statute establishing a name-change procedure does not repeal a chancellor's power to effectuate a name change.

64. *See Stamps*, 297 Ark. at 373, 761 S.W.2d at 935.

65. 304 Ark. 689, 804 S.W.2d 368 (1991).

change a minor's surname.<sup>66</sup> In this case, Mitchell Ray Henderson petitioned a chancellor to change his son's surname from the mother's name, "McCullough," to "Henderson."<sup>67</sup> Citing Arkansas Code section 20-18-401(e)(3)'s requirement that the father's name and child's surname be entered on the child's birth certificate, the chancellor granted the petition.<sup>68</sup> On appeal, the Arkansas Supreme Court rejected the chancellor's conclusion that the statute required children to bear their fathers' surnames.<sup>69</sup> According to the court, section 20-18-401(e)(3) merely required that the father's full name and the child's surname both be recorded on the child's birth certificate. Thus, the statute did not deprive chancellors of their common-law power to grant surname changes in accordance with the child's best interests.<sup>70</sup>

A year later, in *Reaves v. Herman*,<sup>71</sup> the court reaffirmed both the *McCullough* holding and previous holdings which mandated that the child's best interests control surname-assignment cases.<sup>72</sup> In *Reaves*, Chad Reaves, through his father, Steven Charles Reaves, petitioned the chancellor to change his child's name from "Herman," the mother's name and the name that the child had borne since birth, to "Reaves."<sup>73</sup> The chancellor denied the petition, and the Arkansas Supreme Court affirmed, stating that such a denial did not constitute an abuse of discretion absent compelling facts indicating that such a change would be in the child's best interests.<sup>74</sup>

*Mathews v. Oglesby*<sup>75</sup> is one of Arkansas's most recent appellate surname-assignment cases. *Mathews* arose when Rodney Oglesby filed a petition that, among other things, asked the chancellor to change his

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66. See *id.* at 690-92, 804 S.W.2d at 368-69.

67. See *id.* at 690, 804 S.W.2d at 368.

68. See *id.* at 690-91, 804 S.W.2d at 368-69. Specifically, this statute states that "[i]n any case in which paternity of a child is determined by a court of competent jurisdiction, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court." ARK. CODE ANN. § 20-18-401(e)(3) (Michie Supp. 1989).

69. See *McCullough*, 304 Ark. at 691, 804 S.W.2d at 369.

70. See *id.*, 804 S.W.2d at 369 (quoting *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988)). The court quotes *Stamps* in support of its statement that the involved statute did not repeal chancellors' common-law power to effectuate name changes. See *id.*, 804 S.W.2d at 369.

71. 309 Ark. 370, 830 S.W.2d 860 (1992).

72. See *id.* at 372-73, 830 S.W.2d at 861.

73. See *id.* at 371, 830 S.W.2d at 860.

74. See *id.* at 371-73, 830 S.W.2d at 860-61.

75. 59 Ark. App. 127, 952 S.W.2d 684 (1997).

child's surname to "Oglesby."<sup>76</sup> Basing her decision on only one factor, the child's age, the chancellor granted this request.<sup>77</sup>

Reversing the decision and remanding the case, the court of appeals stated that such a mechanical application of the best interest rationale precluded adequate consideration of the full range of factors inherent in determining a child's best interests.<sup>78</sup> Additionally, the court reaffirmed its preference for flexibility in surname-assignment decisions, rejecting the appellant's request for a presumption in favor of the surname chosen by the custodial parent.<sup>79</sup>

*Huffman* is another recent surname-assignment case heard by an Arkansas appellate court. In *Huffman*, the Arkansas Supreme Court resumed the *Mathews* court's quest for flexibility in trial-level applications of the best interest rationale, implementing measures intended both to achieve this goal and to clarify the factors that trial courts must consider in determining a child's best interests.<sup>80</sup> The next section will discuss both these measures and the rationale that the *Huffman* court employed in reaching its decision.

#### IV. REASONING

##### A. The Majority Opinion

In *Huffman v. Fisher*,<sup>81</sup> the Arkansas Supreme Court adopted a clearly erroneous standard of review for cases in which a parent petitions to change a minor child's surname, replacing the abuse-of-discretion standard previously employed in such cases.<sup>82</sup> The court also established factors that judges must consider in determining a child's best interests.<sup>83</sup>

After recounting the facts and procedural history of the case, the court began to explain its reasoning by briefly tracing the surname's

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76. See *id.* at 128, 952 S.W.2d at 685.

77. See *id.* at 130, 952 S.W.2d at 685-86. According to the court's opinion, the chancellor stated that "[i]t has been this Court's policy to change the last name to that of the father unless it is a situation where the child is, let's say, ten or eleven years old, been in school for a number of years, everybody knows that child by that last name." *Id.*, 952 S.W.2d at 685.

78. See *id.* at 130-31, 952 S.W.2d at 686.

79. See *id.* at 131, 952 S.W.2d at 686.

80. See *Huffman*, 337 Ark. at 68-69, 987 S.W.2d at 274.

81. 337 Ark. 58, 987 S.W.2d 269 (1999).

82. See *id.* at 69, 987 S.W.2d at 274. See also *id.* at 71, 987 S.W.2d at 275 (Glaze, J., dissenting).

83. See *id.* at 68, 987 S.W.2d at 274.

history.<sup>84</sup> Concluding this overview, the court noted that the General Assembly has eliminated gender-based considerations formerly used in determining parental rights, instead aligning such determinations with the child's best interests.<sup>85</sup>

The court then examined two cases involving improper trial-level applications of the best interest rationale.<sup>86</sup> The court first focused on *McCullough v. Henderson*,<sup>87</sup> in which the trial court interpreted section 20-18-401(e)(3) of the Arkansas Code as requiring it to assign a child the father's surname.<sup>88</sup> Rejecting this interpretation, the court indicated its unwillingness to construe the statute in a rigid manner.<sup>89</sup>

The court then examined *Mathews v. Oglesby*,<sup>90</sup> in which the Arkansas Court of Appeals reversed a decision to change a child's surname, which his mother gave him at birth, to that of his father.<sup>91</sup> Excluding other factors from consideration, the chancellor based this decision solely upon the child's age, and the Arkansas Court of Appeals stated that such a mechanical application of the best interest rationale

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84. See *id.* at 63-65, 987 S.W.2d at 271-72.

85. See *id.* at 66, 987 S.W.2d at 273 (citing ARK. CODE ANN. § 9-13-101 (Michie 1998)).

86. See *id.* at 66-68, 987 S.W.2d at 273-74.

87. 304 Ark. 689, 804 S.W.2d 368 (1991).

88. See *Huffman*, 337 Ark. at 66, 987 S.W.2d at 273 (discussing *McCullough v. Henderson*, 304 Ark. 689, 804 S.W.2d 368 (1991)). For the text of Arkansas Code Annotated section 20-18-401(e)(3), see *supra* note 68. In interpreting this statute, the *McCullough* court stated:

While we agree with the chancellor that the word "shall" renders the provision mandatory, we do not read the statute as directing that the surname of the child should necessarily become that of the father. We think the statute merely states that the full name of the father and the surname of the child shall be entered on the birth certificate "in accordance with the finding and order of the court." Nothing in the language suggests the two must be the same.

*McCullough*, 304 Ark. at 691, 804 S.W.2d at 369.

89. See *Huffman*, 337 Ark. at 66-67, 987 S.W.2d at 273 (quoting *McCullough*, 304 Ark. at 691, 804 S.W.2d at 369). The *McCullough* court stated, "[w]e believe a rule which makes the result automatic would be neither prudent nor consistent with the established traditions of the law, hence, we are unwilling to adopt a construction of the statute which produces rigidity, where such an interpretation is decidedly less than self-evident." *McCullough*, 304 Ark. at 691, 804 S.W.2d at 369. Immediately after examining *McCullough*, the *Huffman* court discussed *Reaves v. Herman*, 309 Ark. 370, 830 S.W.2d 860 (1992), citing it in support of the *McCullough* holding. See *Huffman*, 337 Ark. at 67, 987 S.W.2d at 273-74.

90. 59 Ark. App. 127, 952 S.W.2d 684 (1997).

91. See *Huffman*, 337 Ark. at 68, 987 S.W.2d at 274 (discussing *Mathews v. Oglesby*, 59 Ark. App. 127, 952 S.W.2d 684 (1997)).

precluded the consideration of other factors inherent in determining a child's best interests.<sup>92</sup>

The *Huffman* court stated that although it had adopted the best interest rationale in earlier cases, it had yet to establish adequate guidelines by which trial courts could apply the best interest rationale in light of the factors inherent in determining a child's best interests.<sup>93</sup> Thus, the court announced that in determining a child's best interests, trial courts should consider at least the following six factors: (1) the child's preference; (2) the effect of a surname change on the child's relationship with each parent; (3) the length of time that the child has borne a given surname; (4) the degree of community respect associated with the surnames involved; (5) the social difficulties that the child may encounter in bearing each surname; and (6) the presence of any parental misconduct or neglect.<sup>94</sup> The court also held that, for a surname-change petition to succeed, the moving party must demonstrate that such a change is in the child's best interests.<sup>95</sup>

The court then announced that when a chancellor makes a full inquiry of the implication of the requisite factors and makes a determination with due regard to the child's best interests, the appellate court would affirm that ruling unless clearly erroneous.<sup>96</sup> In making this announcement, the court abandoned the abuse-of-discretion standard formerly used in deciding surname-assignment cases.<sup>97</sup>

Next, the court referred to the chancellor's letter opinion, which stated that the child would suffer less embarrassment and humiliation in adolescence if he assumed his father's surname.<sup>98</sup> The court stated that the chancellor based his finding almost solely on his perception of the norm in the locale.<sup>99</sup> The court concluded that because the record revealed no evidence with respect to the norm in the locale and because the chancellor did not take judicial notice of the norm in the locale, the chancellor must have improperly based his finding on his own opinion

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92. See *id.*, 987 S.W.2d at 274 (quoting *Mathews*, 59 Ark. App. at 130, 952 S.W.2d at 685).

93. See *id.*, 987 S.W.2d at 274.

94. See *id.*, 987 S.W.2d at 274 (citing several cases from other jurisdictions).

95. See *id.* at 69, 987 S.W.2d at 274.

96. See *id.*, 987 S.W.2d at 274. The court stated, "[a] finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Id.*, 987 S.W.2d at 274 (citing *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986)).

97. See *Huffman*, 337 Ark. at 71, 987 S.W.2d at 275 (Glaze, J., dissenting).

98. See *id.* at 69, 987 S.W.2d at 274.

99. See *id.*, 987 S.W.2d at 274.

or observations.<sup>100</sup> Furthermore, the court stated that although evidence relating to the norm in the locale may be relevant in determining whether bearing a certain surname will result in harassment or embarrassment, the norm in the locale itself is not among the factors to be considered in determining a child's best interests.<sup>101</sup>

Lastly, the court reaffirmed its preference for a flexible application of the best interest rationale by rejecting the appellant's second point on appeal, which requested the court adopt a presumption in favor of the custodial parent's surname preference.<sup>102</sup> The court stated that such a rigid resolution would not serve the involved children's best interests, adding that surname-assignment decisions would be individualized determinations based on an application of the six factors.<sup>103</sup>

## B. Justice Glaze's Dissenting Opinion

In his dissenting opinion, Justice Glaze observed that the majority opinion changed the standard of review in surname-assignment cases, adding that precedent had given chancellors broad discretion in assigning surnames.<sup>104</sup> Justice Glaze noted that the majority implemented this change without expressly overruling earlier cases that held otherwise.<sup>105</sup>

According to Justice Glaze, the court's employment of the clearly erroneous standard, as opposed to an abuse-of-discretion standard, deprived chancellors of the discretion previously given to them by case

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100. See *id.*, 987 S.W.2d at 274-75. Citing Arkansas Rule of Evidence 605, the court stated, "[i]t is well-settled that a judge cannot be both a witness and a judge in one proceeding." *Id.*, 987 S.W.2d at 275. Rule 605 states, "[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." ARK. R. EVID. 605.

101. See *Huffman*, 337 Ark. at 70, 987 S.W.2d at 275.

102. See *id.*, 987 S.W.2d at 275.

103. See *id.*, 987 S.W.2d at 275. The court stated:

Likewise, we decline to [adopt a presumption in favor of the custodial parent's surname choice] in this case, on the grounds that such an inflexible resolution will not serve the best interests of the children involved. An individualized determination by the chancellor of the specific facts and relationships through thoughtful and careful consideration of the factors outlined above is required to resolve the question.

*Id.*, 987 S.W.2d at 275.

104. See *id.* at 71, 987 S.W.2d at 275 (Glaze, J., dissenting) (citing cases in support of this assertion). Chief Justice Arnold and Justice Corbin joined in this dissenting opinion. See *id.* at 71, 987 S.W.2d at 275, 277 (Glaze, J., dissenting).

105. See *id.*, 987 S.W.2d at 275 (Glaze, J., dissenting).

law.<sup>106</sup> Under the former abuse-of-discretion standard, an appellate court would uphold a chancellor's decision unless that decision was arbitrary or groundless.<sup>107</sup> Under the clearly erroneous standard, a chancellor's decision faced reversal even if not arbitrary or groundless.<sup>108</sup>

Justice Glaze acknowledged the six-factor inquiry's potential helpfulness but indicated that the factor application did not require appellate courts to employ the clearly erroneous standard upon review.<sup>109</sup> Supporting this assertion, Justice Glaze noted that, in previous cases, factor applications coexisted with the abuse-of-discretion standard.<sup>110</sup> Finally, Justice Glaze indicated that in the absence of a request for a change in standards, such a change was procedurally barred.<sup>111</sup>

## V. SIGNIFICANCE

The measures that the *Huffman* court implemented, namely the clearly erroneous standard and six-factor analysis, have the potential to add flexibility to applications of the best interest rationale. Ironically, the six-factor analysis that the court adopted to clarify the means of ascertaining a child's best interests<sup>112</sup> is itself in need of clarification.

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106. See *id.* at 72, 987 S.W.2d at 276 (Glaze, J., dissenting).

107. See *Huffman*, 337 Ark. at 71, 987 S.W.2d at 276 (Glaze, J., dissenting).

108. See *id.* at 72, 987 S.W.2d at 276 (Glaze, J., dissenting).

109. See *id.* at 73, 987 S.W.2d at 276 (Glaze, J., dissenting).

110. See *id.*, 987 S.W.2d at 276 (Glaze, J., dissenting). Justice Glaze cited *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993), which stated that chancellors consider factors when exercising discretion in awarding alimony. See *Huffman*, 337 Ark. at 73, 987 S.W.2d at 276 (Glaze, J., dissenting). Justice Glaze also cited *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), which indicated that recognized factors should guide trial courts in determining attorneys' fees and that appellate courts will not set aside such fees absent an abuse of discretion. See *Huffman*, 337 Ark. at 73, 987 S.W.2d at 276 (Glaze, J., dissenting).

111. See *Huffman*, 337 Ark. at 73, 987 S.W.2d at 276-77 (Glaze, J., dissenting). The dissent stated that "[t]he majority's decision to change the abuse-of-discretion standard in this case is entirely unnecessary, and in fact is procedurally barred, since *no one* has asked that the clearly erroneous standard be adopted in surname cases." *Id.*, 987 S.W.2d at 276-77 (Glaze, J., dissenting). Justice Glaze cited *Parrish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), for the proposition that precedent governs until it mandates an intolerably unjust result. See *Huffman*, 337 Ark. at 73, 987 S.W.2d at 277 (Glaze, J., dissenting). Justice Glaze also cited *Cottrell v. Cottrell*, 332 Ark. 352, 965 S.W.2d 129 (1998), for the proposition that an argument not made at trial cannot be raised for the first time on appeal. See *Huffman*, 337 Ark. at 73, 987 S.W.2d at 277 (Glaze, J., dissenting).

112. See *Huffman*, 337 Ark. at 68-69, 987 S.W.2d at 274. Specifically, the court stated that it "[had] not provided sufficient guidelines to trial courts on 'the full panoply

The manner in which future decisions interpret this analysis may determine whether *Huffman* will in fact add flexibility to the surname-assignment rulings.

At first glance, the court's decision ensures such flexibility. By requiring chancellors to consider six factors in determining a child's best interests, the court prevents trial judges from reaching decisions based on mechanical methods that disregard each child's unique situation. Additionally, the clearly erroneous standard allows appellate courts to more easily reverse decisions inconsistent with the proper application of the six-factor analysis.

However, ambiguities in *Huffman*'s majority opinion provide ample opportunities for future appellate surname-assignment decisions to nullify any flexibility that *Huffman* may have created. In establishing the six-factor test, the court announced that chancellors must consider at least the six named factors in determining a child's best interests.<sup>113</sup> The phrase "at least" implies that chancellors *must* consider the established factors and *may* consider any others that they think are relevant to ascertaining each child's best interests. This formulation of the factor-analysis requirement thus seems consistent with the goal of adding flexibility to trial-level applications of the best interest rationale.

Such a formulation is, however, apparently incorrect. Near the end of the majority opinion, the court flatly announces that in and of itself, the norm in the locale is not among the factors to be considered in determining a child's best interests.<sup>114</sup> This proclamation suggests that chancellors *may not* consider additional factors in determining a child's best interests and thus conflicts with the implication arising from the court's mandate that chancellors consider "at least" the established factors.

If flexibility in the rationale is to realize its full potential,<sup>115</sup> then the statement implying that chancellors may consider additional factors must prevail. However, the opinion's language suggests that such consideration is unlikely to occur. While the court uses the term "at least" only once in conjunction with the factor-analysis requirement, it

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of factors inherent in determining the best interest of a child,' so as to promote uniformity in the application of the law." *Id.* at 68, 987 S.W.2d at 274.

113. *See id.* at 68, 987 S.W.2d at 274.

114. *See id.* at 70, 987 S.W.2d at 275.

115. In fact, the court may wish to prevent flexibility in the rationale from realizing its full potential. Although not heavily emphasizing the point, the court did mention that it wished "to promote uniformity in the application of the law." *Id.* at 68, 987 S.W.2d at 274. By incorporating a large amount of flexibility into trial-level applications of the rationale, the court would possibly counteract this "uniformity" goal.

devotes an entire paragraph to its announcement that the norm in the locale is not to be considered. Seemingly, therefore, the court intends that chancellors consider only the established factors, use of the phrase "at least" apparently being an oversight.

In this respect, the court's position is inconsistent with the development of flexible best interest rationale applications.<sup>116</sup> Yet, the opinion does not entirely preclude consideration of the norm in the locale. According to the court, evidence relating to the norm in the locale may be relevant in determining whether bearing a particular surname will result in the child being embarrassed or harassed.<sup>117</sup> This statement suggests that chancellors may consider additional factors, but only insofar as they relate to one of the established six. As such, chancellors may have to perform "mental gymnastics" if they wish to consider additional factors, for they must determine a means by which to relate those additional factors to one of the established six.

By not assigning relative weights to the established factors, the court acted in a manner consistent with its "flexibility" goal. However, this omission provides future appellate courts with an opportunity to reduce such flexibility, for the opinion does not preclude these courts from assigning the factors inflexible relative weights.

In conclusion, the Arkansas Supreme Court may have not yet completed the work that it began in *Huffman*. If the court decides to continue striving for flexibility in applications of the best interest rationale, it may wish to clarify the ambiguities present in the *Huffman* opinion in a manner consistent with this goal. Specifically, the court may wish to allow chancellors to consider additional factors without having to relate them to one of the established six. The court might also

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116. Arguably, by precluding the consideration of additional factors, the court promotes uniformity in trial-level applications of the best interest rationale because it requires all chancellors to consider *only* the established six factors. However, such a limitation may unnecessarily sacrifice flexibility for uniformity. Even absent the implication that chancellors can consider only the established factors, the factor-analysis requirement ensures a certain amount of uniformity because it mandates that whatever other factors a chancellor may consider, he or she must consider the established six.

117. See *Huffman*, 337 Ark. at 70, 987 S.W.2d at 275.

consider announcing that each factor's relative weight varies as dictated by the circumstances of each individual case.<sup>118</sup>

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118. Although this note focuses on the assignment of traditional surnames, courts in other jurisdictions have resolved surname-assignment disputes by assigning children "dual" surnames consisting of each parent's surname separated by a hyphen. See Richard J. Lussier, *Delaney v. Appeal from Probate: When Is a Dual Surname in the Best Interest of the Child?*, 9 CONN. PROB. L.J. 161, 167 (1994). Lussier states that assignment of a dual surname is in a child's best interest "where a loving relationship between the non-custodial parent and the child existed and such relationship was recognized and encouraged by the custodial parent." *Id.* at 168. On the other hand, such an assignment is not in a child's best interest "where animosity between the parents was such that a dual surname would negatively affect one or both of the parents, with such negativity eventually affecting the child." *Id.* Lussier next addresses the existence of a "single bright-line point" that definitively indicates whether a dual surname is in a child's best interest. See *id.* at 168-69. Concluding that the unique nature of each child's situation precludes the existence of such a point, Lussier states as follows:

While the existence of a single bright-line point is illusory, there are several factors which may guide the court's best interest analysis. Examples include: misconduct by one of the child's parents; a parent's failure to support or maintain contact with the child; the length of time that a surname has been used for or by the child; whether the child's surname is different from the surname of the child's custodial parent; the child's reasonable preference; the effect of the surname change on the preservation and development of the child's relationship with each parent; the degree of community respect associated with the present surname and the proposed surname; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and the identification of the child as part of a family unit.

*Id.* at 169. In an interesting "side note" to this dual-surname discussion, Alan Gubernat suggested to Karen Deremer, his ex-girlfriend and the mother of his son, that they resolve their dispute by giving the child a hyphenated surname. See Laura Sessions Stepp, *The Surname Game: Tug of War over Lineage and Pride*, WASH. POST, May 30, 1995, at C5, available in 1995 WL 2096193. Deremer refused, apparently because, among other reasons, "she came to believe she was fighting for the rights of other women as well as her own." *Id.*

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