Opinion No. 54-5886

January 7, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Gerald R. Clark, M.D. State Health Director State Department of Public Health Santa Fe, New Mexico

*{*319}* Receipt is acknowledged of your letter dated December 11, 1953, together with a copy of your regulations concerning procedure in the filing of illegitimate birth certificates by your Department.

You request our opinion with regard to the following questions:

1. Q. If a child is born to a woman who is married but whose statement indicates that the husband is not the father of the child, must the child bear the name of the husband and father information be shown?

A. Generally, a child, at birth, can be given any name the mother desires. However, if she is still married, her husband is presumed to be the father, and only he can refute the fact through court procedure. Therefore, in my opinion, birth certificates of a child born in lawful wedlock should be filed under the husband's name regardless of the fact that *{*320}* the husband and wife are separated, so long as they are not divorced. Any questions that might arise in the suit whereby it might be sought to show different paternity would be matters for the court to decide and should not be determined beforehand by the person fillout the certificate. (See Opinion No. 4372.)

2. Q. If a child is born to a woman who is married but whose statement indicates that the husband is not the father of the child, must the child bear the maiden name of the mother with no father information shown?

A. See answer to question No. 1.

3. Q. If a child is born to a woman who is married but whose statement indicates that the husband is not the father of the child, may the mother exercise a choice between her maiden name and her married name for the child?

A. Yes. (See answer to question No. 1) Mother has right to use any name she wants as rule found in 65 CJS 19, reads as follows:

"In the absence of statutory restriction, one may lawfully change his name without resort to any legal proceedings, where it does not interfere with the rights of others and is not done for a fraudulent purpose."

4. Q. Do we concur with Opinion No. 4372 which is enclosed, if (a) the mother has for several years been separated, but not divorced from her husband?

A. Yes. We agree with general presumption that child born in lawful wedlock is legitimate, and that it requires court action to remove this presumption.

5. Q. (b) If the husband has been confined to an institution over a number of years?

A. Yes. (See Answer to question No. 4).

6. Q. In case of a divorced woman who has not reclaimed her maiden name, (a) must her child be given her married name?

A. No. General rule found in 65 CJS 19, reads as follows:

"In the absence of statutory restriction one may lawfully change his name without resort to any legal proceedings, where it does not interfere with the rights of others and is not done for a fraudulent purpose."

7. Q. In case of a divorced woman who has not reclaimed her maiden name, (b) must child use her maiden name?

A. No. for reasons given in question No. 6. However, father information should be shown in your records.

8. Q. In case of a divorced woman who has not reclaimed her maiden name, (c) may the mother exercise a choice in the entry of the name?

*{*321}* A. Yes. For the same reasons as given in answers to questions Nos. 1 and 6 of this opinion.

As a further answer to all of these questions, only a court of competent jurisdiction has the authority to decide whether a child born in lawful wedlock is illegitimate. You also state that if from any of the cases cited, we believe that the mother may not exercise a choice of name, whether in our opinion we repudiate the December 1938 decision of Frank H. Patton, Attorney General. First, I want to cay that this decision was merely a memorandum or verbal opinion given by Mr. Patton and was not an official opinion. We agree with the conclusion arrived at in this memorandum that the parents can give the child any name they choose.

We regret that following such a policy might be detrimental to the objectives of a registration system by making it impossible for a citizen to identify himself and to have a true record of his parentage, but that is the interpretation of the law as we see it.

Under Item 1 of your regulation which you enclosed (Corrections of Original Certificates on File), on the last page, evidence of paternity of a child born out of wedlock, when no

subsequent marriage of the parents occurs, is achieved by attaching an affidavit to the original record. This affidavit constitutes a statement of paternity signed by the putative father. Also, if a father subsequently marries the mother of an illegitimate child and makes an affidavit that he is the father, it is an admission of record that he is the father.

You further state that as a matter of fact the above procedure is not actually followed. Rather, for some years you have handled such cases in the same way as is outlined on page 1 (Legitimation by Subsequent Marriage), Item 1 -- ie., the original record is sealed along with the statement of paternity and is replaced in your files by an amended certificate showing father information and giving the child the father's name. Your experience is that this latter system protects the interests of the child, whereas the use of a Correction Affidavit attached to the original emphasizes the fact of illegitimate birth. It is our opinion that in doing what you state the procedure is that you are following the reasons given in Opinion No. 4372 which is our interpretation of the law. In other words your regulation is consistent with our interpretation of the law.

Trusting that this fully answers your inquiries, I remain

By: Hilario Rubio

Assist. Attorney General