STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 21, 2016

Opinion No. 16-38

Names on Birth Certificates

Question 1

Does Tenn. Code Ann. § 68-3-305, which restricts the surnames that may be placed on a child's birth certificate at the time of the child's birth, violate the First Amendment to the U.S. Constitution?

Opinion 1

No. To the extent that Tenn. Code Ann. § 68-3-305 implicates a parent's freedom of expression, it is best understood as a regulation of private speech occurring in a limited public forum or nonpublic forum. Under applicable U.S. Supreme Court precedent, such regulations are permissible under the First Amendment as long as they are viewpoint-neutral and reasonable in light of the purpose of the forum. Because Tenn. Code Ann. § 68-3-305 is viewpoint-neutral and reasonable in light of the purpose served by birth certificates in Tennessee, it does not violate the First Amendment.

ANALYSIS

By statute, the State of Tennessee limits the surnames that may be placed on a child's birth certificate at the time of the child's birth. *See* Tenn. Code Ann. § 68-3-305.[1] If the "mother was married at the time of either conception or birth, or anytime between conception and birth, to the natural father of the child," then the child's surname must be either "[t]he surname of the natural father" or "[t]he surname of the natural father in combination with either the mother's surname or the mother's maiden surname." *Id.* §§ 68-3-305(a)(1), 68-3-305(a)(1)(A)-(B). But if both parents agree, they may instead use the "mother's surname, mother's maiden surname, or any combination of those two (2) surnames." *Id.* § 68-3-305(a)(2).[2]

If the mother was "not married at the time of either conception or birth or between conception and birth," then the child's surname must be either "[t]he surname of the mother," "[t]he mother's maiden surname," or "[a]ny combination of [those] surnames." *Id.* §§ 68-3-305(b)(1), 68-3-305(b)(1)(A)-(C). The legal surname of the child's father may also be used, but

[1] There are no statutory limits on the first or middle names that may be placed on a child's birth certificate.

[2] Within the first year after the child's birth, moreover, the parents may agree to change the surname on the birth certificate to either "[t]he surname of the natural father," "[t]he surname of the mother," "[t]he mother's maiden name," or "[a]ny combination of [those] surnames." *Id.* § 68-4-305(a)(4)(A)-(D).

only if "an original, sworn acknowledgement signed by both the mother and the biological father of a child . . . is submitted to the office of vital records." *Id.* § 68-3-305(b)(2)(A).[3]

In all other cases, the child's surname must be either "[t]he surname of the mother," "[t]he mother's maiden surname," or "[a]ny combination of [those] surnames." *Id.* § 68-3-305(d)(1)-(3).

The Tennessee Court of Appeals has explained that the statutory framework just described does not restrict "the parents' ultimate choice of their child's surname" because it does not prevent one or both parents from later petitioning a court to change the child's surname. *In re Dowling*, No. 01A01-9706-PB-00268, 1998 WL 13067, at *3 (Tenn. Ct. App. Jan. 16, 1998). The parent or parents petitioning for the name change must prove that the new name is in the child's best interests. *Id.*; *see also Barabas v. Rogers*, 868 S.W.2d 283, 287 (Tenn. Ct. App. 1993). If the court orders the name change, the registrar is required to "amend the birth certificate to show the new name." Tenn. Code Ann. § 68-3-203(c).

We are unaware of any judicial decision—in Tennessee or elsewhere—addressing whether a law like Tenn. Code Ann. § 68-3-305 limiting the surnames that may be placed on a child's birth certificate violates the First Amendment to the U.S. Constitution.[4] Given this lack of judicial authority, this Office cannot predict with any certainty how a court would answer that question. For the reasons explained below, however, we conclude that Tenn. Code Ann. § 68-3-305 would likely be upheld.

To determine whether Tenn. Code Ann. § 68-3-305 violates the First Amendment in limiting the surnames that may be placed on a child's birth certificate, we must first consider whether choosing a surname for one's child constitutes expression that is protected by the First Amendment. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). No court has directly addressed that particular question, but it is well settled that the First Amendment protects any medium of communication that is expressive, including not only written or spoken words but also music, art, and symbols. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003). Although names undoubtedly serve important non-expressive purposes, such as identification and facilitation of communication, parents often choose a particular name for a child to express a message. *See, e.g.*, Julia Shear Kushner, Comment, *The Right to Control One's Name*, 57 UCLA L. Rev. 313, 323-24 (2009). Thus, a court would likely conclude that, at

[3] Unmarried parents may also submit the sworn acknowledgment and change the child's surname to that of the biological father "any time prior to the child's nineteenth birthday." *Id.* § 68-4-305(a)(4)(A)-(D).

[4] To the extent that similar laws have been challenged, it has generally been on the theory that the laws infringe a fundamental liberty interest of the parent that is protected by the Due Process Clause of the Fourteenth Amendment. While some earlier cases invalidated surname restrictions under rational basis review, without deciding whether a parent has a fundamental right to name his or her child, *see, e.g.*, *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1982); *O'Brien v. Tilson*, 523 F. Supp. 494, 496-97 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714, 719-20 (D. Hawaii 1979), more recent cases have upheld surname restrictions under rational basis review after holding that any right of a parent to name his or her child is *not* fundamental, *see, e.g.*, *Henne v. Wright*, 904 F.2d 1208, 1213-14 (8th Cir. 1990); *Brill v. Hedges*, 783 F. Supp. 333, 337 (S.D. Ohio 1991). The Tennessee Court of Appeals has opined, albeit in dicta, that Tenn. Code Ann. § 68-3-305 does not violate the Due Process Clause of the Fourteenth Amendment because, as noted above, it does not limit "parents' ultimate choice of surname for their child." *In re Dowling*, 1998 WL 13067 at *3.

least in some instances, choosing a surname for one's child is an expressive activity that is protected by the First Amendment.

Next, we must consider whether and to what extent Tenn. Code Ann. § 68-3-305 restricts a parent's ability to choose a surname for his or her child. As explained above, the statute provides that the surname placed on a child's birth certificate at the time of the child's birth must be the mother's current or maiden surname, the father's surname, or a combination of those surnames. However, the statute does not prevent parents from referring to their child by a different surname in other settings, and it does not prevent parents from later filing a petition in court to change their child's surname. *See Dowling*, 1998 WL 13067, at *1-3. It follows that, to the extent the statute infringes on a parent's protected expression, it does so only by limiting what a parent may express on the child's birth certificate at the time of the child's birth.

In Tennessee, a birth certificate is a "vital record" that is intended to "aid the public health of the state, and furnish and preserve evidence affecting personal and property rights of the individual citizen." Tenn. Code Ann. § 68-3-201. A regulation promulgated by the Department of Health provides that "[a]ll forms, certificates, and reports used in the system of vital records are the property of the Department of Public Health." Tenn. Comp. R. & Regs. § 1200-07.01.01. A birth certificate, then, is government property in much the same way as a government building. Because a birth certificate is government property, Tenn. Code Ann. § 68-3-305 is properly understood as a regulation of private speech occurring on government property.[5]

The U.S. Supreme Court has afforded private speech occurring on government property different levels of protection depending on the forum in which the speech occurs. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) ("We have previously used what we have called 'forum analysis' to evaluate government restrictions on purely private speech that occurs on government property."); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469-70 (2009). Speech that occurs in a "traditional public forum," such as a street or park that "by long tradition . . . has been devoted to assembly or debate," may be restricted based on its content only if the restrictions are "narrowly drawn to serve a compelling interest." *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001) (internal quotation marks and alteration omitted). On the other hand, speech that occurs in a "limited public forum," which exists when the government "has reserved a forum for certain groups or for the discussion of certain topics," or a "nonpublic forum," which exists when the government is managing its own internal operations, may be restricted based on its content as long as the restrictions are viewpoint-neutral and reasonable in light of the purpose served by the forum. *Walker*, 135 S. Ct. at 2251-52 (internal quotation marks and alteration omitted); *Summum*, 55 U.S. at 470; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

[5] The U.S. Supreme Court recently held that the messages displayed on Texas's specialty license plates constituted "government speech" rather than private speech. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248-50 (2015). That holding rested in large part on the Court's conclusion that the messages Texas accepted for its specialty license plate program were "meant to convey and ha[d] the effect of conveying a government message." *Id.* at 2250 (internal quotation marks omitted). While one could conceivably argue that information listed on a birth certificate also constitutes "government speech," we do not think that the State of Tennessee intends to convey or in fact conveys any message by recording a child's name on a birth certificate. Instead, to the extent a child's name is expressive in nature, it is the expression of the parents, not of the State.

At most, the State of Tennessee has created only a limited public forum or nonpublic forum in allowing parents to select the surname that appears on their child's birth certificate. *See, e.g.*, *Redmond v. The Jockey Club*, 244 F. App'x 663, 665 (6th Cir. 2007) (concluding that the thoroughbred naming registry operated by the Jockey Club on behalf of the Kentucky Horse Racing Authority was "at most a limited public forum" (internal quotation marks omitted)). The restrictions imposed by Tenn. Code Ann. § 68-3-305 would therefore be upheld as long as they are viewpoint-neutral and reasonable in light of the purpose served by birth certificates.

The restrictions imposed under the statute are viewpoint-neutral and reasonable given the purpose of birth certificates in Tennessee. Requiring parents to select as a surname the mother's current or maiden surname, the father's surname, or a combination of those surnames does not discriminate against a particular viewpoint. And the requirement that a child initially receive a surname that bears a connection to at least one of the child's parents is reasonable in light of the birth certificate's purpose to "aid the public health" and "furnish and preserve evidence affecting personal and property rights of the individual citizen." Tenn. Code Ann. § 68-3-201. Indeed, the Tennessee Court of Appeals has observed that Tenn. Code Ann. § 68-3-305 reflects many of the "customs and common law principles" regarding surnames that originally developed as a means of protecting property rights and parental rights. *Barabas*, 868 S.W.2d at 287.

Because the surname restrictions established by Tenn. Code Ann. § 68-3-305 are viewpoint-neutral and reasonable, the statute would likely be upheld against a First Amendment challenge.

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