BEHIND THE NAME

Oana-Nicoleta Retea, PhD Student, University of Craiova

Abstract: The name is a complex notion which concerns one's family and private life, constituting a way of personal identification and a family relationship. Analysis of the structure and functions of names of persons, causes near and distant past and wecan reveal information concerning important aspects. The function of a name as a means to individualize a person has resulted in that private law and public law aspects are inter-twined. Nowadays the name of the person and the problems imposed by its use are covered by specific provisions of each state. The social, individual and family interest are all joined by name. Each of these interests are legitimate and an excess of one of them threatens the existence of the others. Humans cannot be outside the legal life at no time.

Key words: ***right to a name, identification attribute, person, unique system name, patronymic name.***

How a Name Became the Right to a Name

The name is a complex notion whose birth, historically speaking, represents primarily the result of a long usage, as any element related to language.In the distant past, carrying, choosing, changing the name for primitive populations was determined by the people's faith in the power of the name. According to a conception of that period, the name was identified with the life of the person who wore it, the power of the name consisting in the name itself. To the ancient Egyptian, the name (ren) was held as being part of the individual elements with the soul (ba) and the alter ego (ka)[1] which do not die once with the body.

In addition, it was believed that the name can replace the person and the mere presence of the name replaces the presence of the person, and one who knows the name of a person gains power over that person.As a result, the name had to be kept secret and is should be known only by parents and in the public the person had a different name. It is considered that the existence of a person after death depended on keeping secret his name, fact which can be considered as the one that had given birth to the custom - to give the child the name of an ancestor [2]. The perpetuation of the name of the deceased was regarded as a great tribute to him and was practiced not only by peoples who believed in reincarnation.

The name was one of the basic means of magic, having particular importance. The mere pronunciation of the name in a certain manner by the wizard, turn the name into a malevolent force focused on the bearer, and could even cause the death of the bearer. Keeping secret the name was widespread in the past. Even today, when asked the name, Bedouin invariably respond: "Servant of Allah!" [3]. In this fabulous world, any major changes in an individual's life had to be reflected by name, being considered the origin of the name change. The name change was not caused only by negative events in a person's life, resorting to the name change as a remedy, in order to cure a disease the bearer was suffering from. For example, the sick child was given a foreign person on the window and his name was changed

in order to not be recognized by the "demon"[4] of the desease- costum practiced also by Romanian people.

In ancient Greece, the assignmet system for the names was simple, people having a "unique" [5] name, such as: Solon, Demosthenes, Aristotle, Plato. The same system is used by the Hebrew and Egyptian people. Instead, the Roman name was composed of three elements: nomen (was common for members of the same tribe), praenomen (a personal name used in the family) and cognomen (the nickname). After the fall of the Roman Empire, the use of this system was abandoned and replaced by the patronymic name system.

In Romania, there was the unique and non-transferable name system, at the beginning, people simply called John, Peter. Later, it became more difficult the people's individualization almost those who wore the same name, so they started to use phrases such as John, the son of George. The first law governing an individual whole name issue is the "special" Law from March, 1895, which offers concrete solutions for different situations. So it came to indicate lineage by appending suffixes such as: -escu, -eanu, who determined names such as : Ionescu, Petrescu. These names are the result, in principle, of the development of culture in schools and churches [6]. Legal literature has proposed several definitions, of which we retain the one that states that the name is "that attribute of the physical person which consists in the human right to be individualized, within the family and society, by the words set out in the law, in this meaning "[7]. Such a definition presents the failure to not reveal the essential quality of the name, that of being a personal non-patrimonial right, from the class of identification attributes. The name becomes a legal concept, its structure and rules of assigning are the subject of the regulations, and not the name itself.

Legal Nature of the Right to a Name

The personality rights ,being rights without material expression, will present common characteristics to those belonging to the class of civil subjective rights, known as attributes of the person: the right to a name (denomination), right of domicile (residence) and the right to a certain civil status. But personality rights cannot be treated merely as an extension of individual attributes, there is a difference of principle. What is essential is that throughout its existence a person must have a name, a home and a civil status. Individual attributes are both rights and duties for the holder [8].

As discussed in the French doctrine, the name would be for the bearer, the subject of a genuine right of ownership [9]. Each would be the owner of his name. The idea of the patronymic name property can be seen as a vestige of the feudal system in which the surname often represented the name of the lands. Element of personality, the name is not a heritage value and cannot be considered as a heritage good, susceptible of property [10]. The ownership right implies a relation between a thing and a person, this right of ownership being, according to the definition, exclusive and individual. Analyzing the situation of co-ownership by joint tenancy, we can see that the property is owned by several people but none of them has exclusive use of the property. As a result, reporting these principles to the right of ownership of the name, we find that the surname is assigned to the whole family, with situations where there are more than one family with the same surname, without being linked between them. In addition, the owner of the property right has also the right of alienation or

use of the property, which demonstrates once again that the name is not susceptible of ownership.

Every human being, as bearer of civil subjective rights and civil liabilities should be individualized in the legal relationships in which they participate. The name, as an element or means of identifying physical persons in civil right, contributes to determining the status of the individual holder of rights and obligations in a legal relation. Humans cannot be outside the legal life at no time, the individualisation of the physical person being "a permanent, general, social and personal necessity" [11].

The name structure is established by Article 83 of the new Civil Code which provides: "The name consists of a surname and forename". In addition, art. 1 paragraph (1) of Government Decree no. 41/2003 (published in the Official Gazette no. 68 of 02.02.2003) [12] repeats the same idea and develops it in the provisions regarding the acquisition and change of individuals' names administratively . Family connections are the ones that determine that part of the name called "surname", often used in everyday speech as the expression "family name". It is acquired according to the law, without possibility of any manifestations of voluntary choice. As an exception, a limited manifestation of voluntarism is allowed when the child's parents do not share the same name. In this case, the child will bear the name agreed by the parents, that may be the surname of one of them or their surnames combined. If parents cannot agree, the court of guardianship will decide according to Article 18, paragraph (3) of Law no. 119/1996 on civil status papers, republished in 2012, in the Official Gazette no. 339 of18 May.

Voluntarism is manifested as far as assigning the forename by the parents is concerned, designated in common speech as "Christian name". Assigning the forename is voluntary, meaning that the parents are the ones who choose their child's forename. However, the law allows, under certain conditions, limited intervention of the public authority in this area. Thus, according to art. 84 para. (2) second sentence of the new Civil Code, "the registrar must prohibit the registration of indecent, ridiculous forenames which are likely to affect the public order and the morality or interests of the child, as appropriate" [13].

The binary structure of the name was also provided by Article 12 para. (2) of Decree no. 31/1954, which had the same wording as that of art. 83 of the new Civil Code. Therefore, from the perspective of civil law, the name represents the reunion of two non-patrimonial civil subjective rights of an individual, the right to a surname and the right to a forename. Thus, unjustifiably, the component elements of the only right recognized as such by law, the right to a name, reached the status of independent rights. The wording of the provisions of Article 82 of the new Civil Code (text with the same wording as that of Article 12 para. (2) of Decree no. 31/1954, which states that "everyone has the right to an established name or to a name acquired according to the law") in conjunction with those of the art. 83 of the new Civil Code, allows no other interpretation than the one according to which the surname and forename are just components of a single right: the right to a name[14].

Characteristics of the Right to a Name

Firstly, the name being considered an element of the individual's capacity of use, therefore presents the legal characters of this capacity. As a consequence, given that the name

is recognized as aptitude, by law, and on the other hand, the conditions of acquisition, modification or assignation of the name are determined by law, we can talk about the legality of the name. The generality of the name is explained by a variety of abstract skills such as : possibility for the child to acquire a name by law, possibility for the individual to change the name due to various modifications that may occur in marital status, etc. The legal regime of the name is the same for all people regardless of religion, sex, or other similar criteria and hence equality of the name. A physical person can not give up his name, nor can he alienate it, therefore the name is inalienable. In addition, any individual can not be deprived of the use or exercise of the right to a name, any possible restrictions can intervene only in the cases and under the conditions provided by law, the name being also intangible. Universality of the name aims the fact that all people have the right to a name but also that the name is what distinguishes individuals regardless of time or location [15].

Moreover, since the name is making part from the non-patrimonial civil subjective rights, presents their specific characters. Like any other non-patrimonial personal right, the right to a name is an absolute right. The main consequence of belonging to the category of absolute rights is represented by the opposability *erga omnes* of the right to a name, which means that the obligation not to violate it comes to all other legal subjects.

The inalienability of the name consists in the fact that no individual can give up or alienate his name. Even in cases where, by law, the name is transmitted by filiation, adoption or marriage, it is noted that there is no alienation because the holder continues to retain his name. The right to a name is indefeasible both extinctively – it is not lost by lack of use - and acquisitively - no matter how long a person would use a name, that person will not be able to acquire it illegally. Personality of the name implies that this right is closely related to the human person and it can only be exercised personally and not by proxy, except minor representation in the administrative procedure of name modification. [16] The right to a name is also an indistinguishable subjective right, not the subject of enforcement. The universality of the name implies that any individual has the right to an established name or a name acquired according to the law(art. 82 of the new Civil Code). This character is also expressed in art. 7 pt. 1 of the Convention on the Rights of the Child which provides that "the child shall be registered immediately after birth and shall have *the right to a name* from this point forward ...".

To all these previously mentioned characteristics, we add a specific feature which is the unity of the name. This is the specific nature of the right to a name which implies that, although it is composed of two elements (forename and surname), it individualizes the same person, composing “a whole, a unity” [17]. Not to mistake the unity of the name for the uniqueness of the name which implies that a person cannot use multiple alternative names (surname and forename) but can have only one legal name.

Main Actions of the Right to a Name

The name means a family membership, for which the legislator has considered its attribution to depend on the filiation. By filiation we understand the ratio of the progeny of a child and each of his parents.It takes two forms: filiation to the mother (maternity) and affiliation towards father (paternity).Filiation can be in marriage and outside marriage.Kinship

is the link which is based on one from another lineage of people or that more people have a common ancestor; there is a natural kinship which is based on the blood tie between two or more people and a civil relationship arising from adoption [18].

Article 84 para. (1)of the new Civil Code provides that the acquisition of the surname is an effect of filiation so that the child will be assigned after birth, the family name carried by the parent or parents to whom has been established the filiation without any posibility to opt for.Exceptionally, acquiring the name takes place in administratively course when is missing a filiation known, therefore, the principle that dominates the matter is that the acquisition of the name is determined by the filiation [19].

The new Civil Code introduces a new hypothesis putting the issue of a new type of filiation namely that resulting from medically assisted human reproduction with third party donor or surrogate mother; in this case, by a fiction of law (as in the case of filiation from adoption), the Civil Code provides for the application of the rules from natural filiation[20]. Article 441 has noted that the above process does not cause any connection of filiation between the child and the donor and art. 443 para.(1) states that nobody can contest to the filiation of the child for reasons of medically assisted reproduction, neither the child born can object to his filiation. Para.(2) of the same article provides the exception, namely, when the mother's husband has the right to contest the paternity of the child unless consented to medically assisted reproduction with third party donor.

Therefore, the method of establishing the filiation of a person determines how he will acquire the name and the name can contribute to prove the filiation since it is a constituent of the state possession (the state possession is compound of three elements– *nomen, tractatus* şi *fama),*which can demonstrate the filiation.Depending on how the child's filiation has been established there are three hypotheses of acquiring the surname:the case of the child from marriage,the child out of marriage and the one with unknown parents [21].

According to art. 449 of the new Civil Code,there are two situations: one in which the parents have a common surname and other in which they have distinct surnames.Therefore, according to the first paragrapf of the quoted provision, the child from marriage takes common surname of his parents". Parents have a common family name if when they married they declared, as far as possible according with the limits of art. 282 of the new Civil Code, that they will wear during the marriage a common name, which may be the name of one of them or their names reunited. In this cases the child acquires the surname as an exclusive effect of filiation. This situation is often encountered in practice and it is in harmony with the Romanian Family traditions [22]. If the child's parents have chosen different family names - either for preservation of theier names before marriage, or to preserve the name of one spouse, and the other to wear theier names reunited- the child's name will be established according to art. 449 para. (2) of the new Civil Code [the old art.62 para.(2)of the Family Code] which provides that the name „is established by parental consent and declared, once with the birth of the child, to the Civil Service. If the parents can not agree on the name of theier baby, it will decide the guardianship court."

In resolving the problem of the child's name outside marriage, there are two rules that apply depending on the method used to establish filiation to both parents, so: simultaneously or successively. The first rule is considering chronological order, therefore the child will

acquire the name of his parent to whom the filiation is established first. Usually, the mother [23] is the one that generally recognizes first the child, as maternity outcomes from the fact of birth. Subsequent establishment of filiation and to the other parent gives the child the possibility to award the name of the latter[art. 450 para. (2) of the new Civil Code], what arises the issue of changing the surname of the child and not the problem of its acquisition. The situation staies the same whether the filiation to the second parent will be established by voluntary or by judicial recognition [24]. If the child's filiation established only to one parent, whose filiation is then established and to the other parent, by an application of the principle of equal rights between children born out of wedlock and children of the marriage (art. 448 the new Civil Code), the last name will be established in the same manner with the surname of the child from the marriage with parents with different family names [25].

The other rule concerns the situation of recognized children by both parents at the same time - by birth to the mother and by declaration to the Civil Service, a recognition form made once with the child's birth registration by the father. In other words, in this case, the rules of attribution of the child's family name whose parents do not have a common name are applied. The surname of the child shall be determined by agreement between the parents or, in absence of it, by decision of the guardianship court in whose jurisdiction is the place where the birth was declared, once after hearing the parents. The final decision shall be notified immediately to the Civil Service where the birth was registered [art. 449 para. (2) and (3) of the new Civil Code].

If the child has no filiation established towards any of his parents, it is possible only the administrative attribution of the surname. It is the situation of the foundling [art. 2 para. (3) of Government Decree no.41/2003],the child born of unknown parents[art.23 para. (2) of Law no. 119/1996, as amended by O.U.G. no.80/2011] ,the child left by his mother in the hospital , and her identity was not established in the time provided by law [art.11 of Law no. 272/2004 establishes a procedure to follow in the situation the child is left by his mother in the maternity hospital,whose lenght was set up at a maximum of 36 days.] Administrative atribution of the name is not conditioned of this element of civil status -filiation- so last name and first name of the child is established by the mayor's order of the village, town, city or Bucharest district in whose jurisdiction the child was found or where appropriate, his leaving was found, according to the special law provisions [art. 84 para. (3) of the new Civil Code] [26]. The law does not provide any criteria on the choice of words that will compose the child's name, which means that the operation is at the mayor's free will. However, this anonymous child can not be give a imaginary name, because a child without filiation is a child with no family and not a child wihtout name. The freedom of judgement of this body has dozens of times lead to the attribution of some laughable names, which is a solid argument, according to provisions of art. 4 of O.G. no. 41/2003, for the change of surname administratively.

Furthermore, another two operations have a great importance in this matter of the name. Firstly, changes in civil status of a person such as: changes in filiation, changes arising from adoption, changes caused by the institution of marriage, determine the change of the surname, its modification. The modification of the name is regulated in art. 84 of the new

Civil Code. Moreover, the modification of the name is not at all the same with the administrative procedure of changing the name.

The administrative change of the name, unlike the family name modification, is not supposed to replace it as a result of changes in the status of the person [27], but its replacement is based on solid grounds expressly regulated in Government Ordinance no. 41/2003 on acquiring and changing the names of individuals administratively (published in Official Gazette no. 68 of February 2, 2003) . The administrative replacement of the name occurs only on request, once again marking a limit between the change of the surname and the modification of the surname. In the case of name modification, its replacement is not conditioned by any expression of will of that person in such a direction [28]. The right to request the change of name of the individual is recognized by article 3 of O.G. No.41 /2003, which provides that: the name can be changed administratively. The statement used in the art. 3 is similar to that used in article 85 of the new Civil Code. Moreover, through the application, the person concerned may request either a change of surname and forename, or only the change of one of the two.

Conclusions

The name is attributed to the individual at the same time with his registration in the birth certificate so that the act of civil status is the title that will justify the person to wear a name and it will also prove it. So the birth certificate will have the same proving power [art. 99 para. (1)of the new Civil Code]. Moreover, the administrative name change is written, by reference, on the birth certificate, as well as on that of marriage, where it is the case [article 15 paragraph (1) of the O.G. no. 41/2003]. Therefore, any change in the name of one person should be written on the act of civil status. On the other hand, there is a close connection between the attribution, the modification or the change of the name and the status of the person, firstly, the name acquisition is determined by how the child has established the filiation. Finally, in establishing one's name contribute the parents and the public authority provided by law, whose role is subsidiary in that it ensures the observance of the law in the name's attribution and it substitutes parents only in limited circumstances governed by law. Even if the effects of the administrative change of name of a person do not extend to other family members, this operation is supposed to publicity such as each of us should take into consideration the facts, since humans cannot be outside the legal life at no time. The individualisation of the physical person is as demonstrated "a permanent, general, social and personal necessity"[29].

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