because it was not *impossible* for Bronner to set up its own home-delivery scheme. The Court held, therefore, that a refusal to contract like Mediaprint's did not constitute an abuse of dominant position.

The ruling of the Court in *Bronner* deserves nothing but praise. The decision in *Magill* (above) sparked the debate on whether the Court was ready to support a new form of interventionism in EC competition policy that would force successful firms to share their facilities with their competitors. Moreover, the years that followed the judgment of the Court of First Instance saw the Commission applying the newly-found principle with some enthusiasm (*B&I Line plc* v. *Sealink Harbours Ltd.*, above; Commission Decision 94/19 of 21 December 1993, *Sea Containers* v. *Stena Sealink*, [1994] O.J. L15/8). The issue becomes even more acute when an intellectual property right is involved given that, in a sense, the idea or information protected by any such right could frequently be considered as an "essential facility". The *Bronner* judgment is important on three counts. First, the Court has confirmed that a refusal to deal by a dominant company does not *per se* constitute an abuse. This is consistent with the case law on refusal to supply (*Commercial Solvents*, above) and on refusal to license (Case 238/87 *Volvo* v. *Veng* [1988] E.C.R. 6211). Additional circumstances, such as the intention to eliminate competition, need to be present. Secondly, the Court has laid down clear limits to the application of the "essential facilities" doctrine in EC competition law. Thus only when the facility owned by the dominant company is *indispensable to* and *impossible to replicate by* a competitor would an unjustified refusal to grant access to it be rendered abusive. In doing so, the Court has struck a careful balance between the need to protect incentives to investment and property rights of large firms and the demands of a competitive economy. Finally, it has, in an incidental manner (see paragraphs 39–41 of the judgment), elucidated the nature of *Magill* as an exceptional case (see also Case T-504/93 *Tiercé Ladbroke* v. *Commission* [1997] E.C.R. II-923) and not one where the Court set out to upset the fragile equilibrium between the existence and the exercise of intellectual property rights.

ALBERTINA ALBORS-LLORENS

IN THE NAME OF THE FATHER?

WHERE, following divorce, a mother remarries, it is not uncommon for her to wish to change the surname of the children to that of the stepfather. In these cases the jurisprudence of the courts has established over a substantial period of time that a parent may not unilaterally change the name of a child but that, if the matter is brought before the court, the question of a proposed change must be determined on the basis of the welfare principle. The Children Act 1989 (section 13) had made this explicit where a

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residence order was in place but, surprisingly, some had questioned whether the automatic prohibition had survived the Children Act in the much larger number of cases where no such order is made. The direct issue before the House of Lords in *Dawson* v. *Wearmouth* [1999] 1 F.L.R. 1167 was whether the Court of Appeal had correctly exercised its discretion in allowing an appeal by a mother against the judge's decision to sanction a change of name. In unanimously holding that it had, the House must be taken to have tacitly affirmed the above principles, which will govern the situation in the absence of a court order (for a review of the authorities see the commentary on the Court of Appeal's decision by Jonathan Herring at [1998] C.L.J. 266).

But *Dawson* v. *Wearmouth* was not the typical case. Here the mother had two children by her then husband, Tony Wearmouth, and everyone continued to use the surname Wearmouth following the divorce. Then she had a further child, Alexander, by Mark Dawson with whom she cohabited for approximately eighteen months. This relationship failed shortly after the birth of Alexander and the mother, without consulting Mr. Dawson, registered the child with the surname Wearmouth. Mr. Dawson objected to this and, along with his application for the name to be changed to his own, he successfully sought an order giving him parental responsibility and allowing him contact with the child. The Court of Appeal, as noted above, held that the judge had erred in also ordering a change of name from Wearmouth to Dawson.

The House of Lords held that the Court of Appeal had applied the correct principle—that, in order to justify a name change, there must be positive evidence to show that this would be an improvement from the point of view of the child's welfare. In this case the mother's choice of the surname used by herself and by Alexander's half-siblings was logical enough and there were no countervailing considerations strong enough to warrant a change. But the speeches are hardly a ringing endorsement of the Court of Appeal's approach to the matter. Lords Jauncey and Hobhouse, while not feeling strongly enough to dissent, felt obliged to say that they thought that too great an emphasis may have been placed by the Court of Appeal on the fact of registration of a particular name and that insufficient weight may have been given to the significance of linking the child and the natural father through a common surname. Lord Jauncey would also not have dismissed so readily counsel's argument that the mother had chosen not her "maiden" name but "one which signified a factually incorrect nexus between the child and her ex-husband". In his view, "the surname is … a biological label which tells the world at large that the blood of the name flows in its veins", and the child here had, after all, "not a drop of Wearmouth blood in his veins".

What the above reservations perhaps illustrate is that in truth this dispute was rooted not in the proposed change of name (the more typical post-

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divorce scenario) but in the mother's initial choice of name and the legal procedures which govern registration. As is well known, the father of a child born out of wedlock initially lacks parental responsibility (and thus what may be seen as the complete legal status of parenthood), and the need for a change in the law has been hotly debated for the last two decades. What is perhaps less commonly appreciated is that the statutory duty to register the birth of the child, arising under the Births and Deaths Registration Act 1953 as amended, rests with the mother alone and that the Registrar is effectively precluded from entering the name of any person as the father otherwise than with the mother's co-operation and consent. In essence what this means is that, short of going to court, someone in the position of Mark Dawson has no legal mechanism for independently acknowledging or recognising his paternity or expressing officially any view regarding the child's name. This lack of any right to have an input into the choice of name is really just a symptom of the wider lack of parental status. The position in England contrasts sharply with that in many other countries, especially civil law jurisdictions, which do provide mechanisms for acknowledgment or recognition of a child. Thus, on one view, the name issue is inextricably linked to this question of the child's wider legal relationship with the man claiming to be his genetic father. If this is accepted, the stance taken by the House of Lords that the issues raised by this case were entirely a matter of the child's welfare, and did not provoke consideration of a parent's "rights", may well call for re-evaluation with the implementation of the Human Rights Act 1998 and the dawn of the new millennium.

There now seems to be general judicial agreement that the selection and change of a child's name is a "profound issue" but precious little agreement in society on what are the appropriate choices. In a more egalitarian, less patriarchal society in which the traditional dynastic reasons for children bearing their fathers' (or more accurately their presumed fathers') names have been significantly eroded, there is perhaps good reason for believing that the father's name should not necessarily be the automatic choice. Mothers are, after all, overwhelmingly the primary carers of children and a recent opinion poll, revealed on the BBC's *Newsnight* programme of 27 July 1999, produced the surprising statistic that a majority of both men and women polled thought that it was more appropriate for children to derive their surnames from their mothers. We may, however, question how effective this would be in a society in which married and divorced mothers, like the mother in *Dawson* v. *Wearmouth*, continue to opt in large numbers to be known by their husbands' and ex-husbands' surnames. It may also be argued that with the very high incidence of marriage breakdown, the tradition of selecting the father's name has assumed a new significance. In many cases, sadly, the only link between the divorced father and his child may be the symbolic connection preserved by the com-

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mon surname. Perhaps the answer, in these days of supposed gender-neutral parenthood, is for children to take the names of *both* parents. Yet the reality is, as with so much of modern family law, that a universally acceptable solution is elusive, if not impossible, because of the sheer diversity of family practices. Moreover, for the law to be prescriptive about the choice of names would itself be a fundamental departure from the traditional English approach.

There is however one issue concerned with the nomenclature used in relation to children on which it might be hoped to achieve something approaching universal acceptance. This is that it is no longer acceptable to refer to a child such as Alexander as "illegitimate". It is therefore disappointing, to put it no higher, that two of the Law Lords found it necessary to do so in this case. And this too, it may be argued, is a matter of "rights".

ANDREW BAINHAM

JUDICIAL PATERNALISM AND PRIVATE ORDERING ON DIVORCE

IT is axiomatic that divorcing spouses cannot by agreement oust the jurisdiction of the court to award ancillary relief: *Hyman* v. *Hyman* [1929] A.C. 601. Finality can only be achieved by obtaining the sanction of the court in the form of a consent order, invoking a procedure which requires full disclosure of all material factors so that the court can exercise its own discretion on the basis of the information put before it: Matrimonial Causes Act 1973, s.33A; *Livesey* v. *Jenkins* [1985] A.C. 424. But out-of-court agreements made by the parties are not without significance. Far from it, they will be treated as a very important consideration should the court subsequently be asked by one of the parties to make an award of ancillary relief, and will not usually be departed from unless there are good and substantial grounds for concluding that injustice will be done by holding the parties to their terms: *Edgar* v. *Edgar* [1980] 1 W.L.R. 1410. Presumptive enforceability has been criticised as "the worst of both worlds", as the parties must go to court to determine whether the agreement they have reached is legally binding: *Pounds* v. *Pounds* [1994] 1 F.L.R. 775, 791, *per* Hoffmann L.J. Either the agreement should bind, or it should be wholly disregarded.

In *Xydhias* v. *Xydhias* [1999] 1 F.L.R. 683, the Court of Appeal, led by Thorpe L.J., gave the *Edgar* principles another twist. The context was negotiations between divorcing spouses, conducted with the assistance of solicitors and counsel on both sides. A few days before the hearing date, substantive agreement had been reached, such that the parties told the court that the matter had been settled, and the date was accordingly vacated. Resolution of the dispute then came to grief on points of detail, notably the timetable for payment of the agreed lump sum. The question arose whether an agreement had been reached which should, according to *Edgar*, be

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