

1988

Kathleen Hamby and the utah State Department of Social Services v. Gail Jacobson : Brief of Appellant

Utah Supreme Court

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Recommended Citation

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BRIEF

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DOCKET NO. 880026-CA State of Utah
Supreme Court

Kathleen Hamby, and the State of Utah,
by and through Utah State Department of
Social Services,

Appellants,

--vs.--

Case No. 860188

Gail Jacobson,

Respondent.

88-0026-CA

On Appeal from an Order and Ruling of the Fourth Judicial District
Court, Utah County, Judge Ray M. Harding, Presiding, in the divorce
action of Kathleen Jacobson, and the State of Utah, by and through
Utah State Department of Social Services vs. Gail Jacobson, No. 67,957

Brief and Addendum of Appellant

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COURT C

October 4, 1988

Mary T. Noonan
Clerk of Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

Re: Kathleen Hamby and
the State of Utah v.
Gail Jacobson, No.880026-A

Dear Ms. Noonan:

Pursuant to Rule 24(j) Citation of Supplemental Authorities, I am submitting the following authorities:

1. A copy of Rule 405-1-5, Name of Child, Utah Bureau of Vital Statistics, and a copy of a letter dated February 19, 1988 from John E. Brockert, Director, Bureau of Vital Records making reference to the same.

The rules are discussed in the Appellant's Reply Brief, page 9a, and would be included in the Addendum of the same. The rules are also discussed in Ms. Hamby's Brief. The enclosed would have been included on page 4 of the same. The rules are discussed at page 41 of Ms. Hamby's Brief. The revised rules would have been included in the Addendum to the Appellant's principal brief.

2. Nellis v. Pressman, 282 A. 2d 539 (D.C. App. 1971)

Nellis v. Pressman is cited in the article, "The Right of Women To Name Their Children," which is included in the Addendum of Appellant's initial brief, but not in the text. At oral argument it was referred to with respect to the recognition of the custodial parent's right to select the name(s) of children when the custodial parent is the ex-husband. On page 547 of the decision, it is written:

"The impasses continued and on June 17, 1968 he brought an action in the Court of General Sessions asking that permanent custody of the children be awarded to him...In this posture of the case it was scarcely necessary to put the mother on notice again that he was protesting her discontinuance of the use of his name by the children, for if he had succeeded in obtaining custody of them he obviously would have remedied the matter himself." (emphasis added).

Also mentioned in oral argument was the passage in Nellis v. Pressman on page 545 wherein the Court said:

"We can only doubt that what the father apparently hoped to

achieve by way of an injunction--assurance of a good and lasting relationship with his children--is in the power of any court to give."

3. On page A-11 of Ms. Hamby's Reply brief, the Respondent's attorney articulated his position with respect to the male right to name marital children:

"Mr. Taylor: The child before the Court, because the support for the child before the Court and the legitimacy of the child, I think the child has been legitimized by the parents and by acknowledgment of both parties, that the child is, at the child's age, in that event it's just as if the child was born and conceived after wedlock. So if she chooses to call the child Hamby, I don't think that that would preclude the Court from ordering at this time that this is common law right to have the child to bear his name if he's going to be ordered to support and be determined to be the father of the child..." (emphasis added).

Further, at page A-28 of the Addendum of Ms. Hamby's Reply brief, the transcript of the lower court reads:

"Mr. Taylor: ...it's generally recognized that the father who is ordinarily the objecting party has a protectable interest in having his child bear the paternal surname in accordance with the usual custom, even though the mother may have been awarded the custody of the child..."

And, further, on page A-30 of the Addendum to the Reply brief, the Court articulated its acceptance of a paternal right:

"The Court:...that is this man is going to be ordered to support the child, acknowledge paternity, accept the responsibility for the child, be given the right to visitation and all of the normal things that the father has, that merely because the child was born prior to wedlock should not preclude the Court from ordering that that child bear this man's surname, because he's going to have all of the burden of responsibility." (emphasis added)

At page A-32, the Court again articulated its understanding of the "common law" as reason to name the child with the paternal name:

"The Court...And the child to be born would have the, under the common law, would normally be known as Jacobson."

The transcript came up in oral argument in connection with the reasons for the lower court's actions.

4. In re Kidder, A. 2d (Me. 1988).

This case discusses the issue of naming in a joint custody situation. Counsel for Respondent brought up the issue in oral argument. In the Addendum of Ms. Hamby's initial brief, at page 147 (footnote 222) and at page 113 (footnote 59) the issue is addressed.

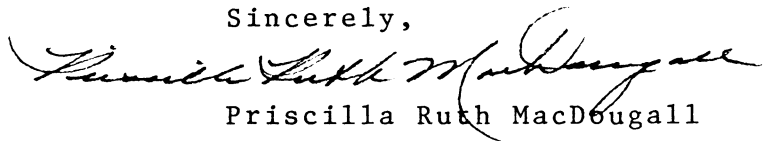
5. Fla. Stat. sec. 382.013 (1987) and letter dated March 16, 1988 to me from Richard T. Downes, Vital Records Administrator for the State of Florida.

This new statute was mentioned in oral argument with reference to the presumption that the custodial parent name children pursuant to their best interests.

I am sending you an original and five copies of this letter and enclosures. By this letter I am certifying that I am also sending copies of the same to all counsel involved, Mssrs. Taylor, Wardle and Gamon, and the Corporon and Williams law firm.

Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Priscilla Ruth MacDougall", written in dark ink.

Priscilla Ruth MacDougall

cc: Kathleen Hamby
Corporon and Williams
Ray Gamon
Richard Taylor
Lynn Wardle



Norman H. Bangerter
Governor

Suzanne Dandoy, M.D., M.P.H.
Executive Director

February 19, 1988

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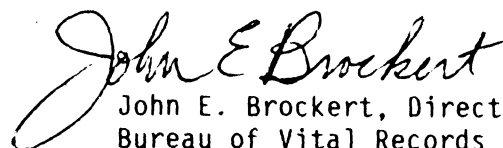
Dear Ms. MacDougall:

This is in response to your letter of February 10, 1988. The proposed guideline regarding naming of children has been incorporated in the revised vital statistics rules, which became effective March 17, 1987. The rule reads as follows: "A newborn child's name should be recorded on the birth certificate as determined by it's parents. If the parents disagree on a child's name and they have never married each other or are separated or divorced, the custodial parent shall determine the child's name. If the parents are married to each other and cannot agree on a child's name, it may be left blank on the birth certificate and added later by an Affidavit to Amend a Record or by court order."

When adding the name by affidavit, we try to obtain the affidavit of both parents. However, if one of the parents is deceased or has deserted the custodial parent, we do allow the affidavit to be signed by some other knowledgeable person.

If I can be of further assistance, please let me know.

Sincerely,


John E. Brockert, Director
Bureau of Vital Records
(801) 538-6186

The State Registrar shall delegate such duties and responsibilities for the local registrars as is deemed necessary to insure the efficient operation of the system of vital statistics. These may include, but are not limited to, the following:

(a) The receipt and processing of birth, death, and spontaneous fetal death records. This includes the receipt of these records from the person responsible for filing the record, checking it for accuracy and completeness, making a local copy, and forwarding the original to the State Registrar at least once a week.

(b) Issuance of certified copies of birth, death, and fetal death certificates after receiving written authorization from the State Registrar. The records from which the certified copies are issued shall be the local copy of the original certificate. All forms and procedures used to issue the copies shall be provided or approved by the State Registrar.

(c) Issuance of burial-transit and disinterment permits and other designated forms as prescribed by regulation or direction of the State Registrar.

(d) Acting as the agent of the State Registrar in their designated area and providing assistance to physicians, hospitals, funeral directors, and others in matters related to the system of vital statistics. The State Registrar, with the approval of the Department, shall determine the responsibilities and duties of each office independently.

R405-1-5 Name of Child

A new born child's name should be recorded on the birth certificate as determined by its' parents. If the parents disagree on the child's name and they have never married each other or are separated or divorced, the custodial parent shall determine the child's name. If the parents are married to each other and cannot agree on the child's name, it may be left blank on the birth certificate and added later by an Affidavit to Amend a Record or by court order.

KEY: Vital Statistics, Standards, Appointment to Office, Custody of Children
1987

26-2-3
26-2-4

R405-2 INFANTS OF UNKNOWN PARENTAGE; FOUNDLING REGISTRATION

R405-2-1 The report for an infant of unknown parentage shall be registered on a foundling certificate of live birth and shall, unless more definitive information is available:

(a) Show the date and place of finding

(b) Show the signature and title of the custodian in lieu of the attendant during delivery.

If the child is identified and a certificate of birth is found or obtained, the foundling certificate shall be placed in a sealed file and shall not be open to inspection, except on the order of a court.

KEY: Vital Statistics, Custody of Children
1987

26-2-6



STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

March 16, 1988

Ms. Priscilla Ruth MacDougall
Attorney at Law
346 Kent Lane
Madison, Wisconsin 53713

Dear Ms. MacDougall:

Mr. Boorde has asked me to reply to your letter of March 9.

Enclosed are copies of 382.013 Florida Statutes and an excerpt from our handbook about disagreements on the naming of children on birth records.

We will not accept a birth record without a surname except for foundlings, and we handle disagreements as specified in the enclosure.

We enclose a printout of 1986 (our first) most popular given names, but we haven't done anything about surnames.

Please let us know if we can be of further service.

Sincerely,

Richard T. Downes
Vital Records Administrator
Office of Vital Statistics
(904) 359-6920

RTD

Enclosures: 3

382.013 Certificate of birth; registration.—

(1) A certificate of birth for each live birth which occurs in this state shall be registered within 5 days after such birth with the local registrar of the district in which the birth occurred and shall be filed by the state office if it has been completed and registered in accordance with this section.

(2) If a birth occurs in an institution or en route thereto, the physician, midwife, or person in attendance during or immediately after the delivery shall provide the person in charge of the institution or his designated representative the medical information required by the certificate, within 48 hours after the birth. The person in charge of the institution or his designated representative shall obtain the other information required by the certificate and shall prepare the certificate, certify to the facts of birth, and register the certificate with the local registrar.

(3) If a birth occurs outside an institution and the child is not taken to an institution immediately after delivery, the certificate shall be prepared and registered within 5 days by one of the following persons in the indicated order of priority:

(a) The physician or midwife in attendance during or immediately after the birth or, in the absence of such a person;

(b) Any other person in attendance during or immediately after the birth or, in the absence of such a person;

(c) The father or the mother or, in the absence of the father and the inability of the mother, the person in charge of the premises where the birth occurred.

(4) If a birth occurs on a moving conveyance and the child is first removed from the conveyance in this state, the birth shall be registered in this state, and the place to which the child is first removed shall be considered the place of birth. The birth certificate shall be registered in accordance with subsection (2) or subsection (3), whichever is applicable.

(5)(a) If the mother is married at the time of birth, the mother and the father as entered on the birth certificate shall select the given names and surname of the child if both parents will have custody of the child; otherwise the parent who will have custody shall select the given names and surname of the child.

(b) If the mother is not married at the time of birth, the person who will have custody of the child shall select the given names and surname of the child.

(6)(a) If the mother is married at the time of birth, the name of her husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction.

(b) If the mother is not married at the time of birth, the name of the father shall not be entered on the certificate of birth without the consenting affidavit of the mother and the person to be named as the father, unless paternity is determined by a court of competent jurisdiction.

(c) In 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. If the court fails to specify a surname for the child, then the surname shall be entered in accordance with paragraph (5)(a) or paragraph (5)(b), whichever is applicable.

(d) If the father is not named on the certificate of birth, no other information about the father shall be entered on the certificate.

(7) At least one of the parents of the child shall attest to the accuracy of the personal data entered on the certificate in time to permit the registration of the certificate within the 5 days prescribed herein.

History.—s. 13, ch. 6892, 1915; AGS 2083; CGL 3283; s. 1, ch. 77-319; s. 150, ch. 79-400; s. 11, ch. 87-387.

Note.—Former s. 382.16.

In cases where the mother and father have joint custody of the child and disagree on the selection of a surname, the surname elected by the father and surname selected by the mother shall both be entered on the certificate, separated by a hyphen, with the elected names entered in alphabetic order. The surname so elected may be amended before the child's seventh birthday by payment of the required fee and by a joint written agreement of both parents submitted to the department listing the agreed upon surname, or upon request of a parent subsequently awarded sole parental responsibility of the child by a court of competent jurisdiction. Changes of the surname after the seventh birthday will require the same documentation as other surname changes.

In cases where the mother and father have joint custody of the child and disagree on the selection of given names, the given names on the certificate shall not be entered until a joint written agreement between both parents is submitted to the department listing the agreed upon given names or selection of given names is made by a parent who is awarded sole parental responsibility of the child by a court of competent jurisdiction.

Parties to the Proceeding in the Trial Court

1. Kathleen Hamby.

Known for a brief time by the name Jacobson, Appellant Kathleen Hamby's divorce action in the trial court was entitled: Kathleen Jacobson, and the State of Utah, by and through Utah State Department of Social Services, Case No. 67,957 (Fourth Judicial District Court, Utah County).

2. State of Utah Department of Social Services.

The Utah Department of Social Services moved to become a party plaintiff in the trial court proceedings because the Respondent Gail Jacobson owed the State money for child support. The Department is named in the caption but has not as yet participated in the instant appeal.

3. Gail Jacobson.

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Issues Presented for Review

1. Whether the trial court had jurisdiction pursuant to its authority over the care, custody and control of children conferred by Title 30, Chapter 3 of the Utah Code (particularly U.C.A., 30-3-5 and 30-3-10) to determine the surnames of 1) the child born prior to Ms. Hamby's marriage to Mr. Jacobson, and 2) the child born subsequent to Ms. Hamby's divorce from Mr. Jacobson.

The trial court's ruling on this issue is confusing. The court entertained jurisdiction in March, 1985 to determine the surname of the child not yet born at the time of divorce but declined at that time to change the surname of the child born prior to the marriage. The judge told the parties that he would entertain name change "applications" from both of them if filed within 30 days of the birth of the child to be born following the divorce. The applications thus filed, however, did not comply with the statutory requirements of Utah's name change statute, U.S.C. 42-1-1--42-1-3. In the case of the newborn child who had not been a resident of the county for a year as required by such statute, the name change statute could not be applicable.

The Appellant Kathleen Hamby believes that the trial court had jurisdiction to determine the names of both her infant children in March, 1985 as well as after the birth of her child in April, 1985 pursuant to its continuing jurisdiction over the care, custody and control of children pursuant to a divorce action.

1. Whether the trial court erred in ordering that both of the children in Ms. Hamby's custody should bear the paternal surname rather than the name Ms. Hamby, as custodial parent, determined to be in the children's best interests--her own--in view of the evidence of record, the legal rights, privileges and responsibilities of the custodial parent, and the mandates of equal protection and due process guaranteed by the Constitution and laws of the State of Utah and the United States?

Ms. Hamby appealed the decision of the trial court because she believes the trial court erred egregiously.

Determinative Constitutional Provisions, Statutes, Rules and Regulations

Constitutional Provisions-Utah

Article I, section 1 [Inherent and inalienable rights]

All men have the inherent and inalienable right to enjoy and defend their lives and liberties: to acquire, possess and protest property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Article I, section 2 [All political power inherent in the people]

All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Article I, section 7 [Due process of law]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, section 27 [Fundamental Rights]

Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

Constitutional Provision-United States

Amendment XIV, section 1 [Citizenship defined; privileges of citizens]

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

U.C.A. 30-3-5. Disposition of property-Maintenance and health care of parties and children-Court to have continuing jurisdiction--Custody and visitation-Termination of alimony.

1) When a decree of divorce is rendered, the court may include in it such orders in relation to the children, property and parties, and the maintenance and health care of the parties, as may be equitable. The court shall include in every decree of divorce an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children. If coverage is available at a reasonable cost, the court may also include an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for those children. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support, maintenance, and health and dental care, or the distribution of the property as shall be reasonable and necessary. Visitation rights of parents, grandparents, and other relatives shall take into consideration the welfare of the child.

U.C.A. 30-3-10. Custody of children.

In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise...

U.C.A. 42-1-1 to 3. Chapter 1. Change of Name.

U.C.A. 42-1-. By petition to district court-Contents.

Any natural person, desiring to change his name, may file a petition therefor in the district court of the county where he resides, setting forth:

- 1) The cause for which the change of name is sought.
- 2) The name proposed.
- 3) That he has been a bona fide resident of the county for the year immediately prior to the filing of the petition.

42-1-2. Notice of hearing-Order of change.

The court shall order what, if any, notice shall be given of the hearing, and after the giving of such notice, if any, may order the change of name as requested, upon proof in open court of the allegations of the petition and that there exists proper cause for granting the same.

42-1-3. Effect of proceedings.

Such proceedings shall in no manner affect any legal action or proceeding then pending, or any right, title or interest whatsoever.

Rules and Regulations

Guidelines for Reporting Name of Father and Surname of Child on the Birth Certificate (revised October 5, 1981) by the Bureau of Health Statistics, Utah Department of Health.

Surname of Child.

The surname to be given the child should be determined by the parents.

A. When the mother is married it is usual for the child to receive the surname of the husband(father). However, some recent immigrants into the United States and some subcultures within the nation have customs of assigning surnames which vary from the standard American tradition. The surname given the child should be determined by both parents. It clearly is not mandatory that the child have the father's surname. When the parents disagree as to the child's surname, the sole consideration should be the best interests of the child. This may be best determined by a court of competent jurisdiction.

Therefore, if the parents (husband and wife) are in disagreement regarding the surname of the child, it should be left blank on the birth certificate. It can be added later when the parents reach agreement by an affidavit to amend a record or if necessary, by court order.

B. When the child's mother is not married, she has considerable latitude in the name she gives the child. Even if the father is not named on the birth certificate, the mother may give the child a surname different than her own surname. Additionally, the mother may name the father on the birth certificate (by Acknowledgment of Paternity) and give the child a surname different than the father's.

C. The parents should be advised that by giving the child a different surname than that of the father, the birth certificate may appear to some persons as a birth which occurred out of wedlock.

Statement of the Case

Nature of the Case, Course of the Proceedings and Disposition in the Trial Court

This case involves the right of a divorced woman, awarded and entrusted with the sole custody of her two infant children of her dissolved marriage, to determine the names of her children consistent with their best interests, and the right of the children to bear names which are in their best interests.

It also involves the threshold jurisdictional question of whether a divorce court has jurisdiction to determine the names of children pursuant to its continuing jurisdiction over the care and custody of children.

The case concerns the naming of two children, one born in 1983 prior to Appellant Kathleen Hamby's brief marriage to Gail Jacobson, who was given her name, and one born in 1985, two days following her divorce from Mr. Jacobson on the grounds of mental cruelty. The stipulation between the parties respecting the various matters of child custody, property distribution, etc., included a provision:

The minor child of the parties, Kelly, does not currently bear defendant's last name, Jacobson. Plaintiff desires that status to continue for Kelly and also to apply to the expected minor child. Defendant desires that both children bear his name, Jacobson. This is the only issue remaining over which the parties are in dispute and over which a hearing in Open Court is desired." R. 31 (No. 10).

A hearing was held on March 14, 1985 respecting this issue at which time former counsel for Ms. Hamby objected to the Court taking jurisdiction to change the name of the child born in 1983. The Fourth Judicial District Court, Judge J. Robert Bullock presiding, assumed jurisdiction to determine the name of the child to be born and ordered that such child bear the name of the father because a marital child¹ "under the common law, would normally

be known" by the father's surname.

The Court further ordered that the child born prior to the marriage continue to bear the mother's surname unless and until the parties brought the issue of naming to him following the birth of the second child. The Court reserved jurisdiction to hear the names issue but otherwise issued a final divorce decree on April 11, 1985. In doing so he said he would entertain "applications" for name changes from both parties following the birth of the 1985 child.

Within 30 days of the birth of the child Ms. Hamby petitioned for a change of his name pursuant to this order, and her ex-husband countered with a (late) application for a name change of the two year old. The Fourth Judicial District Court, Judge Ray M. Harding now presiding, ruled that both children should bear the father's surname.

The case is before the Utah Supreme Court on appeal by Ms. Hamby of that decision.

1

The terms "marital" and "nonmarital" are used herein instead of "legitimate" or "illegitimate" which denote good or base societal status as determined by males. See Footnote No. 1, p.91 of MacDougall, "The Right of Women To Name Their Children," 3 J. L. and Ineq. 91(1985) reproduced in the Addendum.

Statement of the Facts

Approximately eleven years ago the Appellant Kathleen Hamby gave birth to her first child. She gave the child, a boy, the surname which she shared with her husband, the child's father, Hamby.

She was later divorced from the father of her first child. The dates of her marriage to and divorce from her first husband do not appear in the Record of this case. Ms. Hamby has sole custody of her firstborn.

On June 14, 1983 Ms. Hamby gave birth to a child fathered by the Respondent Gail Jacobson. She gave the child the same surname as herself and her first child, Hamby. R. 127.

On November 29 of that year, 1983, Ms. Hamby married Mr. Jacobson. The following October she separated from him and filed for divorce by a complaint and amended complaint dated October 29, 1984 against him on the grounds of mental cruelty. R. 7,10.

By a Motion for Joinder of Party Plaintiff dated January 14, 1985 (R. 13) the State of Utah, Department of Social Services, asked to become a party to the divorce action because Ms. Hamby had been receiving public assistance. The motion was granted on February 7, 1985. R. 25. By date of February 13, 1985 the State of Utah filed a complaint in the case against Mr. Jacobson alleging that the defendant has failed to support his children as required by U.C.A. 78-45-3² and asking that the defendant be required to pay back and on-going child support. R. 27.

The Record in this case also includes a Writ of Garnishment from the State of Utah to the Sunshine Mining Company dated July 29, 1985 and a Garnishee Writ of Execution from the State of Utah to

² See Roberts v. Roberts, 592 P. 2d 597 (Utah 1979) and Mecham v. Mecham, 570 P. 2d 123 (Utah 1977) respecting the right of the Department to seek reimbursement of funds paid for child support.

the Sheriff or Constable of Utah County respecting the Sunshine Mining Company dated August 8, 1985. R. 54, 58.

During the ten-eleven months that Ms. Hamby lived with Mr. Jacobson in marriage she used the surname Jacobson. Upon separating from her ex-husband she reverted to her pre-marriage name which she intends to use the rest of her natural life.³

A divorce was granted to Ms. Hamby on the grounds of mental cruelty on April 11, 1985. R. 114. The decree provided for her to formally resume her pre-marriage name. R. 116.

3

In her Affidavit in Support of Motion for Change of Title of Action to the Supreme Court of Utah, Ms. Hamby stated that she used the surname Jacobson for less than a year. Since October 20, 1984 when she separated from Mr. Jacobson, she has used the surname Hamby which she intends to do for the remainder of her natural life. These facts are otherwise not part of the Record in the case. The parties stipulated to the change of title on the basis of Ms. Hamby's affidavit.

In ordering that the child born following Ms. Hamby's divorce should bear the paternal name, the trial court stated as a reason for his ruling that "Hamby is not the mother's maiden name." R. 102.

This distinction is misguided as discussed, infra. Ms. Hamby considers Hamby her name just as Mr. Jacobson presumably considers Jacobson his name irrespective of where he acquired it, by birth or change of name while a minor or as an adult. Ms. Hamby assumed the surname Hamby during a prior marriage, has used it for years, and, as she stated in her affidavit to the Supreme Court, "I consider it my name and I never intend to use any other surname than Hamby for the remainder of my natural life."

As written in the Center for a Woman's Own Name, 1975 Supplement to Booklet For Women Who Wish To Determine Their Own Names After Marriage 6 (1975):

"It is the position of the Center For A Woman's Own Name that the name(s) a woman chooses to use is her own name. It may be the name given her at birth, a name assumed during childhood, assumed at marriage, assumed at a previous marriage, a hyphenated name or a name made up by herself at any time."

The term "maiden" name or "married" name is not used herein except in reference to the trial court's usage of the term. It refers to the name a woman uses just prior to her first marriage when she presumably is a "maiden." Identifying a woman by her sexual and marital status is inappropriate. The terms "own" name, or simply "name" are used instead, or the antiquated terms are used within quotes.

Two days after her divorce was granted Ms. Hamby gave birth to her third son, a child fathered by Mr. Jacobson.

The divorce decree issued by Judge R. Robert Bullock ordered, with respect to the children's names:

11. The surname of the minor child, Kelly, shall remain Hamby at this time. If Defendant desires that name to be changed to Jacobson then he may file a Petition for change of name in this matter within 30 days after the birth of the minor child expected in April, 1985. Plaintiff may respond and/or object to any such Petition thus filed.

12. The minor child expected in April 1985 shall bear the surname Jacobson. If plaintiff desires that name to be changed to Hamby then she may file a Petition for change of name in within 30 days after the birth of said child. Defendant may respond and/or object to any such petition thus filed.

An evidentiary hearing on the children's names was held before the judge on March 14, 1985. Mr. Jacobson did not contest the divorce or the award of sole custody of the two children to Ms. Hamby. He did not appear at the hearing.

Prior to the hearing the parties had stipulated that the only issue remaining between the parties was that of the children's names and had asked the Court to hear the issue.

Mr. Jacobson did not attend the evidentiary hearing of March 14, 1985, according to his lawyer because a job came through. At the hearing it came out that since Ms. Hamby had separated from Mr. Jacobson in October, 1984, he had had no association with the child born in 1983. R. 140.

Ms. Hamby testified that Mr. Jacobson was verbally and physically abusive "to all of the children in our home," that he is a drunk ("He's drunk more often than he's sober") and that he "wouldn't work." R. 127, She testified that Mr. Jacobson had hit the baby born before the marriage, causing the child to lose the upward motion in his left eye. R. 128. She mentioned that he had a reputation in the community in which she lives for being a drinker

and fighter in town. T. 133-134.

Ms. Hamby testified that, as custodial parent of her children, she felt she should make the decisions respecting their names while the children are young. At the time of the hearing, her first child was 10 years old and bore the name Hamby; her second child, who was almost two years old, bore the name Hamby; she wished her third child, who was not yet born, to also bear the family name. She testified that she wanted the children to bear her name for their benefit:

"Yes. I have a lot of reasons. The main one is for, are for the benefit of the children. If the children don't have the same last name in the family I feel that it makes more insecurity, less family closeness. Mr. Jacobson has put me in a position now to raise three children by myself, because it's his choice not to be a husband that I can stay with. And when I have to raise three children I need the best circumstances to raise those kids under that's possible; and I feel that having my whole family have the same last name brings the family closer together, there will be a lot less questions brought up at an earlier date for those little babies. They won't be wondering why their name is different until they are old enough to discuss it. R. 131-132.

Ms. Hamby further testified that as the children get older "if they make the decision that they want their father's name, if he has been coming around and seeing them and being a father to them. I would never object to my children having their own way when they are old enough to make a decision like that." R. 141-142.

Ms. Hamby's conclusion that the family unit which she heads should bear the same surname came as a result of a great deal of thought and her own life experience. She spoke with several people about it and reflected on her personal experience of having grown up in a household with different names following divorce.

"I was, also, raised in a broken home with a different last name and saw the affects[sic] of it. Even when you are happy in a broken home, when you come home with a child as a friend and you introduce your mother with a different name, your friend asks you: why does your mother have a different name, is she really your mother, or things like that. And, so that kids begin to wonder who their mother and father is.

And I feel that it's just the security on the children. It's not an issue here I'm not here to argue about to hurt Gail Jacobson or anything also. His name does carry around stigma." R. 133.

As Ms. Hamby summarized her position with respect to her right, as a matter of her childrearing responsibilities, to determine her children's names while they are young:

Q: But you want to make that decision for them now?

A. Yes, I do. I have custody of them, and I'm their mother. R. 141.

Following Ms. Hamby's testimony, a school psychologist, Gaylor Lester Downing, testified that in his opinion family identity is somewhat disrupted if the family unit living together following a divorce has two different surnames:

"For example, I've worked with one boy whose parents are divorced, and he will go through periods when he's more happy with his dad so he'll take on his dad's name, and there will be some problems there, and so he'll go more in with his mom and he'll take his mom's name. And it will create uncertainty in his own mind as to who he is and where he is and what he ought to be doing. Because attached to that name is also the values that go along with the parent who also has that name." R. 146.

Mr. Downing, in answer to a question posed by Mr. Jacobson's counsel, responded:

Q: You are certainly not advocating in all circumstances that the name of the father be changed to that of the mother in case of a divorce, are you?

A. I think it should always be considered on an individual basis. R. 146.

At the hearing Mr. Jacobson's counsel contended that a man has a right under the common law to have children he sires bear his name unless there be demonstrated an overriding benefit to the contrary, and that if the man has legal responsibility to a nonmarital child that he should have the right to name the child. R. 149.

Mr. Jacobson was ordered to pay \$80 a month for each child pursuant to the stipulation of the parties. The State of Utah

appeared at the hearing by its counsel Ray E. Gammon and stated that as of that date Mr. Jacobson had paid back money he owed the State for child support. R. 149.

On May 13, 1985 Ms. Hamby petitioned the Fourth Judicial District Court pursuant to its ruling, for a change of surname of the child born on April 13, 1985 (Kevin). On May 21, 1985 the Respondent petitioned for a change of name for the child born on June 14, 1983 (Kelly). Ms. Hamby objected to the untimely filing of her ex-husband's petition, but the Court heard both petitions and decided the issue as to both children's names in favor of Ms. Hamby's ex-husband.

The matter was decided by Judge Ray M. Harding on the evidence presented to Judge Bullock on March 14, 1985, an unwritten stipulation,⁴ and briefs of the parties.

Ms. Hamby made this appeal to the Supreme Court of Utah.

4

The Reply Memorandum of Gail Jacobson (R. 96) refers to a pre-trial stipulation "that if called the father (Jacobson) would say the interest of the children are best served if they bear his name and that the mother (Hamby) would testify otherwise." No written stipulation appears in the file or record to the knowledge of the Appellant. Judge Harding referred to matters raised at the evidentiary hearing on March 14, 1985 as well as to facts not adduced anywhere in the Record of this case.

Summary of Argument

The trial court's imposition on the custodial parent of its own judgment that the two infant children in her custody should bear the surname of the noncustodial parent constitutes gross and reversible error.

As more and more women do not change their surnames because of marriage and/or revert to their pre-marriage names when they divorce at the same time as courts and legislatures have all but abolished the tender years presumption as an absolute legal standard by which to award custody of children, courts across the nation are being faced with the situation of custodial mothers seeking to name their children in their custody with their own names, hyphenated names, or other surnames which differ from the patronymic.

This case is typical of those coming before trial courts today. It is, consequently, a case which the Supreme Court of Utah should examine closely in order to render the requisite guidelines to lower courts faced with disputes between custodial and noncustodial parents of newborns and infant children.

Where children are infants or very young--and in their mother's custody--in contrast to where children are older, were originally given their fathers' names which their mothers also used, and lived in a family unit with both parents for a substantial period of time--a growing number are ruling in favor of the custodial mother's choice of name.

Most courts recognize the jurisdiction of divorce courts to determine disputes between custodial and noncustodial parents over the naming of marital children. The Appellant in this case believes that the trial courts of Utah have the jurisdiction

pursuant to U.C.A. 30-3-5 and 30-3-10. Appellant would like clarification on this point from the Supreme Court of Utah.

The trial court erred in not recognizing the presumption that a custodial parent acts in his/her children's best interests in all matters of childrearing, including the naming of children, absent proof to the contrary, and in failing to put this burden on the noncustodial father to prove that Ms. Hamby was abusing her custodial parental responsibilities.

In ruling as it did the trial court failed to discard as a relic of days past the now legally impermissible superior right of men over women to name marital children which was established in the cases of older children originally given their fathers' surname and which has, even under the caselaw thus developed, no applicability to cases involving newborn or infant children.

The trial court's stated reasons for finding for the father are contrary to the evidence and are based on legally impermissible or incorrect criteria.

The trial court should be reversed with instructions to the trial court to recognize the right of the custodial parent of newborn or infant or very young children to name the children in his/her custody consistent with California Supreme Court Justice Mosk's concurring opinion in the case of In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980).

I. Introduction and Historical Perspective on the Common Law of Names and the Right of Women To Name Themselves and Their Children

The instant case is typical of cases occurring in trial courts across the nation. As a logical outgrowth of the efforts of women in this century and last to secure for themselves and their daughters and granddaughters the common law right to determine one's own name, women who are custodial parents of marital children no longer accept that heretofore virtually unfettered right of men to impose their surnames on marital children irrespective of the children's best interests.

It used to be so "simple." In yesterday Ms. Hamby would have retained the surname Jacobson, which she used for a period of less than a year, following her divorce and the children in her custody would have done likewise.

The Court is referred to the article by Ms. Hamby's counsel, "The Right of Women To Name Their Children," 3 Journal of Law and Inequality 91(1985) which is included in the Addendum to this brief, and respectfully requested to read it. Ms. Hamby's case arises in the context of the movement towards equality in the area of naming children which the article discusses.

In yesteryear women abandoned their "maiden" names upon marrying and assumed their spouses' surnames as their own. They often called themselves "Mrs." plus their husbands' full names, although, with some exceptions, for most legal purposes a married woman's name was her own first (given) name and her chosen surname as was and is the case with men.

In yesteryear, when women had children, the children were given the family name, the surname of both of their parents. When divorce became permissible, and then common, women reverted to their "maiden" names if they had no children from the marriage and retained their "married" names if they did. Women who had children out of marriage--called "bastards" at old common law--traditionally called them by their "maiden" names although, technically, a "bastard" did not have any name by birth alone. S/he had to earn one by reputation.

Most men retained the family names they were born with throughout life, but a sizeable number changed their surnames for any of a number of reasons, including to Americanize them. Slaves took on names upon emancipation. Wives and children changed their names when the head of the family did.

Although the foregoing was the custom, it was not the common law. In fact, at old English common law, which has been adopted by all states except Louisiana, it was not unusually uncommon for women of property not to change their family names upon marriage or to retain them for some but not all purposes. Men adopted their wives' names on occasion. Marital children sometimes took their mothers' names, Thomas Littleton, the son of Elizabeth Littleton and Thomas Westcott being prime examples of the same. Under the common law names are established by usage, not statute or court decree, and can be changed at will without judicial proceedings. Pursuant to the common law, married women change their names by usage, by assuming their husbands' names after marriage. The most common example of a common law name change is that of a woman voluntarily assuming her spouse's name upon marriage.

"When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage." Husband and Wife. Assumption by Wife of Husband's Name, 22 Halsbury's Laws of England, Sec. 1018 at 633 (4th ed. 1979).

Upon remarriage a woman could, and sometimes, did, retain the surname she acquired during her prior marriage even over the objection of the ex-husband. See, e.g., Cowley v. Cowley, 1901 A.C. 450, the case most frequently cited for this point. See also, Wood v. Detroit Edison, 409 Mich. 279, 294 N.W. 2d 571 (1980); Welcker v. Welcker, 342 So. 2d 251 (La. App. 1977).

For discussions of the common law of names, see, in addition to the article included in the Addendum, Lamber, "A Married Woman's Surname: Is Custom Law? 1973 Wash. U.L. Q. 779 (1973); Daum, "The Right of Married Women To Assert Their Own Surnames," 8 U. Mich. J. L. Ref. 63 (1974) and Comment, "Married Women and The Name Game," 11 Rich.L. Rev. 121 (1976). Numerous articles on the law have appeared in recent years. In addition to the foregoing and those cited in the Addendum article, see the list of law review commentary in MacDougall, "Women's, Men's and Children's Names: An Outline and Bibliography," 7 Fam. L. Rep. 4013 (March 17, 1981).

It was in the mid nineteenth century when the issue of the right of a married woman to use her own name came to the fore as a feminist issue in the United States with the example of Lucy Stone, prominent orator and leader in the feminist and abolitionist movements, who did not change her surname when she married Henry B. Blackwell in 1885. In the early twentieth century, women facing strong prejudice on the part of society against women using their

own names, organized as the Lucy Stone League. Together with the National Woman's Party they brought numerous actions, including a successful challenge to the Passport Office, to secure married women the right to their own identities consistent with their common law right to choose their own names.

The Lucy Stoners, however, did not take on the issue of naming children and the issue of a woman's right to name herself did not arise frequently until the early 1970s. With the rebirth of the feminist movement, vast numbers of women were met with societal resistance as agencies were inundated across the land with married women seeking to vote, run for office, drive, register their cars, purchase property, attend educational institutions, obtain professional licenses or employment, etc., etc., etc. Courts were flooded with cases of married or divorcing women seeking to statutorily change their surnames. Legislatures started to repeal divorce name change provisions which deprived divorce courts of jurisdiction to change women's names pursuant to divorces if they had children. See, e.g. In re Harris, 236 S.E. 2d 426 (W. Va. 1977) wherein the West Virginia Supreme Court recognized the right of a divorced woman with children to change her name pursuant to the state's general name change statute despite the divorce name change statute prohibiting her from doing so pursuant to her divorce.

A whole body of law and legal commentary, some of which has been cited, supra, developed over the issue and today every state in the country recognizes that married women--and divorced women--have the right to not change their names at marriage or divorce and/or to change them while married or at or after divorce irrespective of whether they have children in their custody.

The names issue turned to the naming of children. In 1970 only North Carolina and Hawaii had statutes requiring newborn marital children to bear the paternal name on their birth certificates. Both of these statutes were invalidated as unconstitutional restraints on parents' liberty to rear their children. Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979); O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981). See discussion, infra, respecting the fact that the selection of a child's surname is a constitutionally protected childrearing right.

Three other states passed similar laws in the 1970s. In Sydney v. Pingree, 564 F. Supp. 412 (S.D. Fla. 1982), Florida's statute was invalidated. Louisiana and New Hampshire repealed and revised their statutes, New Hampshire adopting as a standard for resolving disputes over newborn's names, the right of the custodial parent to select the name. N.H.Rev. Stat. Ann., sec. 126.6-A(I)(a)(1984).

State courts affirmed that under the common law the State makes no requirement as to how minors should be named. In the country's most inclusive case on the common law of names--it involved married women's names, children's names, divorced women's names, etc.--the Massachusetts Supreme Court wrote that the common law principle of freedom of choice in the matter of names "extends to the name chosen by a married couple for their child." Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 190, 366 N.E. 2d 717, 722(1977). See also Doe v. Dunning, 87 Wash. 2d 30, 549 P. 2d 1 (1976).

Attorneys general and state registrars of vital statistics reaffirmed that parents could name their children as they pleased absent an express statute to the contrary.

With the right of parents in agreement to name their children as they pleased, litigation developed in the area of parental disputes over children's names following divorce. Disputes between remarried women seeking to give their older children the surnames of their new husbands are well known to the courts. The language quoted in cases to the effect that the male has a "time-honored right" or "natural right" or that there is a "preference" for the male name, and that a child's name will ^{rarely} be changed over the objection of the natural father all comes from this kind of traditional case:

1. Woman assumes husband's surname at marriage.
2. Husband and Wife have children who are given the family name.
3. Husband and Wife live together in a family unit with the children, all using the same last name.
4. Husband and Wife divorce, Wife gets custody of the children and retains the family name along with the children.
5. Wife remarries and assumes her new husband's surname.
6. Wife seeks to change the children's names to her new marital name.
7. Ex-Husband objects and courts protect his right to insist that the children continue to use his name which they were given at birth and have borne all their lives instead of permitting the children to adopt the stepfather's name, provided that Ex-Husband is not guilty of gross misconduct or has abandoned the children to the extent that they could be adopted from him.

Disputes of this kind still occur regularly, but a new kind of case has arisen as a result of the new freedom women have in realizing their common law right to name themselves and their children. Women who have not remarried--or who have remarried and not changed their names--have sought to name the children in their custody with their names, usually to have the family unit share the same name or part of a hyphenated name.

Ms. Hamby is representative of this new kind of case. The courts are beginning to respond to the obvious need for a new way of reviewing parental disputes in light of the law which has developed over the past decade and a half. The women such as Ms. Hamby are not seeking to change the names of children to stepfathers' names. Further, a growing number are seeking assistance from the courts when their children are newborns, infants or very young. Often, such as in Ms. Hamby's case, the children have not lived with their biological fathers at all or only for a short time.

In Jacobs v. Jacobs, 309 N.W. 2d 303 (Minn. 1981) the Minnesota Supreme Court articulated a distinction between disputes involving older and younger children, drawing on a distinction made in the 1975 case of Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277 (1975), a case which had involved a custodial mother seeking to hyphenate her older children's names. In Jacobs, and its companion case, In re Saxton, 309 N.W. 2d 298 (Minn. 1981) the court articulated:

"We have recognized that neither parent has a superior right to determine the initial surname of their child. No preference is accorded to either the paternal or maternal surname...When one parent seeks to change the surname of a child, the other has standing to object and the resolution of the dispute hinges on the best interests of the child...Due deference is given, however, to the fact the child has borne a given surname for an extended period of time." p. 302.

The Court then found against the mother and her two children, 7 and 9 who wished to bear a hyphenated name of both parents, while stating that the children's interests would be well served by use of either the mother's choice of name--the hyphenated name--or the father's insistence on his name.

A review of the cases decided during the past few years demonstrates the willingness of courts to decide in favor of custodial mothers when the children are newborn or very young. Indeed, given

the virtual impossibility of deciding which name, as opposed to which parent should decide the name, should be given a child who is a newborn, an infant, or very young (pre-kindergarten can be used as a cut-off date, or three to five years), the custodial parent presumption is becoming the obvious solution to the issue.

In his scholarly and most practical concurring opinion in the case of In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980), California Supreme Court Justice Mosk articulated the "custodial parent presumption" whereby courts should expressly defer to the judgment of the custodial parent with respect to naming children as an incident of childrearing:

"The principle that the custodial parent should be given the choice of a newborn child's surname has been codified by the Pennsylvania Legislature. (Pa. Code, tit. 28, sec. 1.7(b) (1975). And as one commentator noted, 'since the court awards custody on the basis of the child's best interest, it can be argued that the custodial parent is acting in the child's best interest when he or she changes its. name.' (Comment, Surname Alternatives in Pennsylvania (1977) 82 Dick. L. Rev. 101, 115-116). Thus it would seem that a parent deemed fit to have custody ordinarily should be deemed fit to select a name that accords with the child's best interest." p. 585.

Other portions of Justice Mosk's opinion are set forth throughout this brief.

Thus, Kathleen Hamby appeals to the Supreme Court of Utah for the benefit of this presumption with respect to her decision that it is in her two infant children's best interests that they bear the same surname that she and the fourth member of her household, her eleven year old child, bear.

II. The trial court had jurisdiction pursuant to its continuing authority over the care, custody and control of children conferred by Title 30, Chapter 3 of the Utah Code, to resolve the dispute between Kathleen Hamby and Gail Jacobson over the naming of the two children as part of the divorce action.

As set forth in the Statement of the Case, supra, the jurisdictional issue arose in the trial court during the March, 1985 hearing. Although the parties had stipulated that the name was the only unresolved issue in the divorce, Ms. Hamby's former attorney questioned the trial court's authority to change the name of the child born prior to Ms. Hamby's marriage to Mr. Jacobson. The District Court handled the matter by asking the parties to file applications for changes of name within thirty days of the birth of the child expected in April, 1985. He ordered the divorce subject to the names issue being resolved at a later date. R.152.

Utah's name change statute, U.C.A. 42-1-1 to 42-1-3, requires that a person seeking a name change be a resident of the county for a year prior to filing for the name change. This provision would likewise apply to an adult seeking to change the name of a minor. Compare In re Fletcher, 486 A. 2d 627 (Ct. 1984) and In re Staros, 280 N.W. 2d 409 (Iowa 1979).

Pursuant to this statute neither parent could have sought a name change for Kevin, born two days following the divorce, for a year.

As evidenced by the bountiful caselaw on naming children, the overwhelming majority of courts do accept as part of their jurisdiction over the care, custody and control of children, jurisdiction to resolve disputes between parents over their children's names. See the compilation of cases in Annot., Rights and Remedies of Parents Inter Se With Respect To The Names of Their Children, 92 A.L.R. 3d 1091 (1979); MacDougall, "The Right of Women To Name Their Children," Footnote No. 161, p. 135. Contra, Hurta v. Hurta, 25 Wash. App. 85 95, 605 P. 2d 1278 (1978).

In Jacobs v. Jacobs, 309 N.W. 2d 303 (Minn. 1981), the companion case to In re Saxton, 309 N.W. 2d 298 (Minn. 1981) the Minnesota Supreme Court, in a case similar the the instant one in the sense that it involved an infant born to the parties after their divorce, disposed of the jurisdictional issue in an initial footnote:

"We do not decide at what point a trial court loses jurisdiction to change a child's surname through modification of a divorce decree. Since the child was not provided for in the original decree, the trial court had the authority to change the child's name in the context of a petition to amend the divorce decree." p. 304.

In In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980) Justice Rose Bird in her concurring opinion expressed her concerns:

"I am concerned about the lack of a clear jurisdictional basis for the trial court's modification of a child's name in the course of a dissolution of marriage...I recognize that many courts have apparently assumed the existence of such jurisdiction in a proceeding to dissolve a marriage." p. 586.

This issue is raised on appeal because of the peculiar posture of this case and the statewide ramifications of the Supreme Court's determination on it. The parties all submitted to the jurisdiction of the court and the trial judge entertained the issue. Utah's statutes give trial courts continuing jurisdiction over the "custody

of their children and their support, maintenance, and health and dental care..." Custody is awarded by a trial court's considering "the best interests of the child and the past conduct and demonstrated moral standards of each of the parties." U.C.A. 33-3-5; 33-3-10. Consistent with the recognition by courts across the nation that naming is an incident of childrearing, and of the decades-long practice of the nation's courts outside of Ohio until very recently, it should be clear that the trial court did have jurisdiction to determine the children's names both before and after Kevin was born on April 13, 1985.

An Illinois court summarized the basis of a divorce court's jurisdiction over naming children in the regularly cited case of Solomon v. Solomon, 5 Ill. App. 2d 297, 125 N.E. 2d 675 (1955):

"If the matter of a change of name of a minor child of divorced parents is a matter incidental to the custody of the child, and we hold that it is, then the court had the jurisdiction to entertain the motion and to enter the order involved in this appeal." p. 678.

Solomon contains a good discussion of the issue. In efforts to avoid jurisdiction over controversial naming matters, courts could easily avoid a genuine, ongoing matter of a child's best interests by simply avoiding jurisdiction.

Because the Supreme Court's decision in this case will impact on procedures in trial courts in Utah, the Court is urged to address the jurisdictional issue by reaffirming the trial court's jurisdiction to determine disputes between custodial and noncustodial parents respecting their children's names.

The distinction between what is a determination of a child's name and a change of the same becomes blurred when newborn, infant of very young children are involved. Divorce courts are courts of

equity. "Child custody proceedings are and should be equitable in the highest degree," Rice v. Rice, 564 P. 2d 305,306(Utah 1977).

The trial courts of Utah clearly have jurisdiction to determine children's names in disputes between parents over the initial naming of children or changing their names when they are older.

III. The selection of newborn, infant or very young children's surnames is a constitutionally protected childrearing decision which properly rests with the parent(s) entrusted with the care, custody and control of the child(ren) pursuant to an award of custody on the basis of the children's best interests.

At the same time that women were seeing recognition of their right to name themselves and participate in the naming of their marital children, men were seeing their right to be awarded custody recognized by states across the nation. The "tender years presumption" has been abolished as a means for determining custody. See Freed and Foster, "Divorce in the Fifty States: An Overview," 18 Fam. L. Q. 369 (1985):

"In custody law, the 'tender years' doctrine has lost ground and is rejected or relegated to a role of 'tiebreaker' in most states. Moreover, an increase is observable in a number of awards of joint custody (for the most part where parents have so provided by agreement), and also in the number of custody awards to a father." pp. 434-435.

In Utah, the tender years doctrine was specifically repealed by an amendment to U.C.A. 30-3-13 in 1977. The Supreme Court of Utah has several times articulated that children should be entrusted to a parent's custody pursuant to the children's best interests and not the parent's sex. Nilson v. Nilson, 652 P. 2d 1323 (Utah 1982); Jorgensen v. Jorgensen, 599 P. 2d 510 (Utah 1979). As The Supreme Court wrote in 1978, in Bingham and Bingham, 575 P. 2d 703 (Utah 1978):

"under the modern trend of social thinking away from former fixed rigidities, toward equality of the sexes and greater flexibility in considering the qualifications of the parents on an individual basis, that presumption is subordinate to the higher rule that the paramount concern in such cases is the best interest and welfare of the child." at 704.

In Nilson, supra, the Supreme Court, citing Lembach v. Cox, 639 P. 2d 197 (Utah 1981) with approval, stated that:

"According to the rule as explained in Lembach, however, a judicial preference for the mother could become operative only if the evidence was that all other things were equal between the parents." at 1324.

Once the decision has been made as to which parent shall have custody of children of a marriage, the custodial parent assumes full responsibility for the care, custody and control of the children in all aspects of their lives, including what they eat, where they go to school, what religion they will be reared in if any, etc. subject to the control of the court if a modification of custody is sought due to changed circumstances, or abuse or neglect. While joint custody does not seem to be prohibited in Utah, the statutes do not expressly provide for it.

Ms. Hamby was awarded sole custody of the children she bore prior to and subsequent to her marriage to Gail Jacobson and is entrusted with determining their upbringing pursuant to their best interests.

A. The selection of a child's name is a constitutionally protected childrearing decision.

In awarding custody to the parent who will act in the best interests of the child(ren) courts entrust the custodial parent with the rights of childrearing which have been protected by the due process clause of the Fourteenth Amendment to the United States Constitution by the Supreme Court of the United States. Santosky v. Kramer, 466 U.S. 745, 102 S. Ct. 1388 (1982); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972); Smith v. Organization of Foster Families, 431 U.S. 816, 97 S. Ct. 2094 (1977); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923); Prince v. Massachusetts 321 U.S. 159, 64 S. Ct. 438 (1944); Dike v. School Board of Orange County, 650 F. 2d 783 (5th Cir. 1981).

In Wisconsin v. Yoder the U.S. Supreme Court upheld the right of parents to raise their children in accordance with their (Amish) religious beliefs, stating that parents' primary authority over their children's upbringing is "established beyond debate as an enduring American tradition." In Pierce v. Society of Sisters the Court relied on the Fourteenth Amendment as guaranteeing the liberty of parents to educate their children in private schools and striking down a statute requiring public school attendance. In Meyer v. Nebraska the Court upheld the liberty right of parents to have their children taught foreign languages in face of a statute prohibiting the teaching of anything but English to school children. The Court said that the parental role in directing their children's upbringing was "essential."

The Supreme Court of Utah has just as strongly affirmed the primary right of parents to rear their children absent abuse or neglect which would call the State into the situation pursuant to U.C.A. 78-3a-48. In re Castillo, 632 P. 2d 855 (Utah 1981); State in re Walter B., 577 P. 2d 119 (Utah 1978). In In re J.P., 648 P. 2d 1364 (Utah 198), citing the above cases and others of the U.S. Supreme Court, the Supreme Court of Utah referred to Article I, sections 2, 25 and 27, as a basis for the liberty right of parents to rear their children under Utah's Constitution, and with language as strong as that of the U.S. Supreme Court, stated inter alia:

"The integrity of the family and the parents' inherent right and authority to rear their own children have been recognized as fundamental axioms of Anglo-American culture, presupposed by all our social, political, and legal institutions...this Court has stated that the parent's right, as well as duty, to care for a child 'may be termed

natural, as well as legal and more.' Mill v. Brown, 31 Utah 473, 483, 88 P. 2609, 613(1907)." at 1373.

Naming one's children has long been recognized as a primary childrearing function which has in recent years been recognized as a liberty right protected by the due process clause of the Fourteenth Amendment to the U.S. Constitution by several federal district courts.

The Attorney General of Connecticut articulated this child-rearing right in 1975:

"The natural parents, or parent, as the case may be, have legal responsibility for the children which may be terminated only after certain procedures and findings are followed and made...Until such time, the parents have their prerogatives as well as the responsibilities and duties which devolve upon them. One of the prerogatives is naming the child." Op. Atty. Gen. Conn. 5 (Jan. 23, 1975).

See also L.A.M. v. State, 547 P. 2d 827, 832 (Alaska 1976); Parks v. Francis Administrator, 50 Vt. 626 (1878); D'Ambrosio v. Rizzo, 81 Mass. App. 1539, 425 N.E. 2d 369 (1981); Hosmer v. Hosmer, 611 S.W. 2d 32 (Ma. App. 1981); Gardner v. Denison, 217 Mass. 492, 105 N.E. 359 (1914); Eaton v. Libby, 165 Mass. 218, 42 N.E. 1127 (1896) for illustration of judicial recognition of naming as a childrearing function.

As the Massachusetts Supreme Court stated in Secretary of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 366 N.E. 2d 717 (1977):

"[T]he common principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child." at 725.

And, citing the U.S. Supreme Court precedent cited above, the Massachusetts Court stated that:

"Parents' claim to authority in their own household to direct the rearing of their children is basic to the structure

of society; the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder...There has unquestionably been a widespread custom in this country to give a child the surname of its father...Consistently with what we have said above, we think this has been a matter of parental choice rather than a matter of law. We once assumed that 'the right to name a child belongs to its parents, and ultimately to its father.' at 723,725.

Several recent cases have specifically ruled on the issue of parents' right to name their children. In Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979) the federal district court stated that parents have a "common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right from arbitrary state action." In a case involving a couple wanting to fuse their surnames, Jech and Befurt, to give their child the surname "Jebef," the court characterized the naming of one's child as one of the "blessings of liberty" under the U.S. Constitution. 466 F. Supp. 714, 719 (1979).

The Hawaiian court invalidated the state statute requiring a marital child to bear its father's name. Following the decision the Legislature amended the statute.

In a similar case in North Carolina, in O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981), a federal district court invalidated the state statute requiring marital children to be given their fathers' surnames on their birth certificates. The case involved three married couples. One couple wished to name their son in the Swedish tradition, by combining the father's first name, Arne, with the suffix "son" to create "Arneson." The two other couples wanted to give their child a hyphenated combination of both parents' names, one in accordance with Spanish tradition and the other as an expression of the equality between the sexes.

The North Carolina court found that the statute "impinge[d] upon decisions affecting family life, procreation, and childrearing; areas of human experience which the Supreme Court has long held must be accorded special protection." 523 F. Supp. at 496.

And in Sydney v. Pingree, 564 F. Supp. 412 (S.D.Fla. 1982) a Florida federal district court followed Jech and O'Brien in striking down a similar statute as an unconstitutional intrusion on the parents' "constitutionally protected right to choose the name of their child."

See also Doe v. Hancock County Board of Health, 436 N.E. 2d 791 (Ind. 1982) (Hunter, J. dissenting).

That selection of children's names is a parental, childrearing right is self apparent. When parents separate, when they disagree over their children's names after separation or divorce, the courts get involved. By awarding the care, custody and control of a child to the custodial parent--the same care, custody and control which is constitutionally protected--courts entrust the parent with the educational, psychological and religious upbringing of the child. This includes deciding what names are in the child(ren)'s best interests.

- B. In a dispute between a custodial and noncustodial parent over the naming of newborn or very young children, the custodial parent's decision should be rebuttably presumed valid as being in the best interests of the children consistent with the concurring opinion of Justice Mosk in In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980).

If the father of a marital child in the mother's custody does not object to the child's bearing a name other than his, the case may not reach a court. The law protects both parents as against the State from intrusion into their right to name their

children as they please. In practice, a great many parental disputes get settled as part of a divorce settlement. In practice, also, many women are asked to forfeit child support in exchange for the fathers not hassling them about the name they select for the children.

The courts lack a guiding principle by which to decide the cases beyond the general "best interests of the child" recitation. Justice Mosk, in his concurring opinion in the 1980 California Supreme Court case of In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980), a case involving a child born to the custodial mother during the pendency of divorce proceedings, articulated a presumption in favor of the custodial parent consistent with that parent's responsibility of the care, custody and control of the child:

"Since the law has long recognized the ability and right of the parent with custody to choose among the innumerable alternative courses involving the child's welfare, I can see no rational reason to deny that parent a similar right to select the name with which the child will be more comfortable.

Thus I would recognize a presumption that the parent with custody--whether custody was assumed without conflict, by agreement or by court order--has acted in the child's best interest in selecting the name. The selection may be the original name, or a name change for a child of tender years. The presumption, however, would be rebuttable. Just as the noncustodial parent can seek a corrective court order if the child's health, education or control are deleteriously affected by the abuse of custodial care, so the selection of name can be contested on the ground that it is not in the child's best interest. The burden, however, would be on the noncustodial parent to establish the intrusion on the child's best interest." at 584.

Justice Mosk's opinion has been accepted favorably by law review commentary. See Foggan, "Parents' Selection of Children's Surname," 51 Geo. Wash. L. Rev. 583 (1983); Comment, "No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes

The Paternal From The Parental Right To Name A Child," 58 N.D.L. Rev. 793 (1982). The early law review article written in the state of Utah, Note, "The Controversy Over Children's Surnames: Familiar Autonomy, Equal Protection and the Child's Best Interests," 1979 Utah L. Rev. 303, suggested the presumption as a possible means of resolving disputes, but did not thoroughly consider it. It was suggested in Comment, "Surname Alternatives in Pennsylvania," 82 Dick. L. Rev. 101 (1977).

As more and more men receive custody and the courts continue to acknowledgment women's rights in the area of naming their children, the custodial parent presumption will most likely become recognized as the logical means for resolving disputes generally. The Utah Supreme Court, however, does not need to, in this case, adopt a custodial parent presumption as a means of resolving all disputes between parents over naming their children. There is a vast difference between changing the name of an older who has used its noncustodial parent's name since birth and determining the name for a child during the first few years of its life.

The legislatures of two states have expressly adopted the custodial parent presumption statutorily as a means of recording births when parents are in disagreement. Similar proposals have been introduced in Kentucky and Florida. N.H. Rev. Stat. Ann. sec. 126-6-A(I)(a) (1984) reads that "The choice of surname rests with the parent who has actual custody following birth"). See to same effect, sec. 69. 14(1)(f)(1)B), Wis. Stat.

A published regulation in Pennsylvania , 28 Pa. Admin. Code, sec. 1.7(b) reads that "If the parents are divorced or separated at the time of the child's birth, the choice of surname rests with the parent who has custody of the newborn children" and has been in effect since 1975. It was interpreted in the recent case of In re Schidlmeier by Koslof, 496 A. 2d 1249 (Pa. Super. 1985). The non-custodial father attempted to change the name of the child who was born following the parents' separation when the mother had custody. The child was then 18 months.

The administrative regulation was upheld as a valid record keeping measure. Although the Superior Court would not articulate the presumption as a standard for resolving all postbirth disputes over children's surnames, it held that the father had the burden of "coming forward with evidence that the name change he requested would be in Jessica's best interest." at 1254.

The Pennsylvania court essentially turned around the burden of proof usually imposed on women who seek to change older children's names. Given that a sex neutral method of first naming the child was operative, the court did not need to reinforce the presumption by stating it. The change in the burden of proof accomplished the same thing.

In Utah the State Bureau of Health Statistics of the Department of Health has not yet adopted a provision for registering births in cases where the parents are in disagreement. Its Guidelines for Reporting Name of Father and Surname of Child on the Birth Certificate(revised October 5, 1981) do expressly recognize that marital children do not need to bear their fathers' surnames, but the Guidelines leave to the courts the determination of the "Best interests of the child."

In determining the "best interests of the child" the Court should employ the custodial parent presumption. Different people could debate for hours, days, weeks and months about what name a child should have. Reasonable people could/will differ. The choice, to be reviewed by the courts by putting the burden of proof on the noncustodial parent to rebut it, belongs to the parent entrusted with the care, custody, control and upbringing of the child(ren).

Not only is the custodial parent presumption consistent with sound public policy to eliminate discrimination on the basis of gender, it is sound because it will discourage attempts of non-custodial parents to disrupt the award of custody by seeking modifications of divorce decrees to change child support obligations and children's names.

Most importantly, the custodial parent presumption is founded on the premise that the child's best interests will be served by entrusting the naming function to the parent whom the court has determined is best suited to act in the child's best interests.

IV. The trial court should be reversed because its findings of fact and conclusions of law (Ruling and Order) are contrary to the evidence, assume facts not in evidence, and reflect a presumption for the paternal name and a superior right of men over women to name marital children irrespective of who is entrusted with the care, custody and control of the children, in violation of the Constitutions of the United States and Utah and Utah's statutory scheme to guarantee equal rights to women in all aspects of private and public life.

A. The trial court's reasons are erroneous in fact and law.

The trial court, in its effort to find any and all rationale by which to justify letting the father impose the paternal name on the children, made several errors of fact and law.

First, the court erroneously presumed that upon marriage a woman's name automatically becomes that of her husband as a matter of law in reasoning that "Were plaintiff to remarry Kevin and Kelly would again have a surname other than that of at least one of their custodial parents!" There is no evidence in the trial record that Ms. Hamby would change her name again. Indeed, she has told the Supreme Court, in her affidavit to change to the title of the action, that she never intends to change her name again.

The law is clear that a woman is not required to assume her husband's surname as a matter of law. See Halsbury's Laws of England, supra, and State v. Taylor, 415 So. 2d 1043 (Ala. 1982) and cases, laws and attorney general opinions cited in MacDougall, "The Right of Women To Name Their Children," included in the Addendum, Footnote 9.

Second, the trial court erroneously presumed that a child's bearing a surname which differs from that of its father if another child bears the father's name implies illegitimacy as a matter of fact or law.

Several courts have ruled that a name does not imply birth status. See Doe v. Dunning, 87 Wash. 2d 50, 549 P. 2d 1 (1976).

MacDougall, supra, pp. 152-154. The statement of the judge makes no more sense than were he to apply the same standard to Ms. Hamby, that one or more of her children, by the same father or not, were born out of marriage. Besides using an impermissible criteria--birth status--for determining a child's name (see O'Brien v. Tilson, 523 F. Supp. 494 (E.D.N.C. 1981); Doe v. Hancock County Board of Health, 436 N.E. 2d 791 (Ind. 1982), the law permits couples to name their children as they fit, even with different last names. As but one example of this admittedly not common practice is the couple in New Hampshire who named one child, born in California, with one hyphenated name and the other one, born in New Hampshire, with an entirely different hyphenated name. See MacDougall, supra, Footnote 109.

Third, the trial court erroneously concluded that the children should bear Ms. Hamby's ex-husband's surname because the name Ms. Hamby has determined is best for her children, Hamby, "is not the mother's maiden name."

Hamby is Kathleen Hamby's surname. It is her name irrespective of where she originally acquired it. She has born it for years except for the period of less than a year when she used the surname Jacobson. The issue in this case is what is best for the children. Children are not cattle, to be branded by an owner's name.

Fourth, the trial court erroneously concluded that because "the children are too young to be accustomed to the surname Hamby" it is a reason to defer to Ms. Hamby's ex-husband's desire that the children bear his surname.

As discussed, supra, the deference to the name longer used as a criteria for deciding what name a child should use arose in the Saxton and Jacobs cases. The rationale was that if a child has born a

paternal name for a long while, that the name should be deferred to. If the children are newborn, as in Jacobs, then the same criteria would not operate to entrench the paternal naming custom in the law. The trial court misused the standard. The same reasoning would apply to the fact that the children are too young to be accustomed to Mr. Jacobson's name, or any other name.

Fifth, the trial court erroneously found, despite any evidence remotely to such effect, that if the children bear their father's name at this time that they "will always be identified with at least one natural parent by being known by the surname Jacobson." Mr. Jacobson might himself change his name sometime. Another court may determine that the children are better off with a name other than Jacobson. There is absolutely no evidence of record that the children are not identified to their mother by the name Hamby which she and the household uses.

Sixth, there is absolutely no evidence in the record of this case to support the trial court's conclusion that "The father-child relationship will be strengthened by the children bearing the name Jacobson while not harming the mother-child relationship." This kind of language derives from the cases involving older children whose mothers seek to change their names to stepfathers' names. As a judicial presumption it is ridiculous. As a factual determination, it has no basis in the record.

Seventh, the trial court erroneously found, contrary to the clear and uncontradicted evidence in the record, and without any explanation, that "there is no embarrassment of inconvenience associated with an explanation of why their mother's surname is different since divorce is a common occurrence." Ms. Hamby testified about her own experience in this regard.

Eighth, the trial court erroneously found, contrary to the clear and uncontradicted evidence in the record, and without any explanation, that "there is no embarrassment because of defendant's alleged bad reputation." To the contrary, there is no evidence that there is not embarrassment.

Further, the court ignored Ms. Hamby's testimony that the father had not even visited the newborn child at the time of the hearing.

The trial court in this case went all out to justify in some way a finding for the father. He put the burden of proving why the father's name should not be imposed on the children on the mother. His predecessor had (incorrectly) ordered that the child born after the divorce bear the paternal name as a matter of common law. Ms. Hamby was required to rebut this erroneous statement of the common law and the law of Utah and every court which has dealt with the issue: at birth neither parent has a superior right to name a child because of his/her gender and the operating rule of the Utah Department of Health that a newborn does not have to bear the paternal name. See Jacobs v. Jacobs, Laks v. Laks, Cohee v. Cohee, 210 Neb. 855, 317 N.W. 2d 381 (1982).

By imposing the paternal name on the marital children in this case contrary to the judgment of the children's custodial parent, the trial court impermissibly discriminated against Ms. Hamby on the basis of sex in violation of Article I, sections 1,2,7, and 27, and Utah's statutory scheme to guarantee equal rights to women. U.C.A. 30-5-2 guarantees that men can procure divorces on the same basis as men. U.C.A. 30-3-10 provides for either parent to receive custody. Discrimination in employment is prohibited. U.C.A. 34-35-6. The Legislature has established a Governor's Commission on the Status of Women to address the concerns of women. U.C.A. 63-47-1

to 63-47-5.

The United States Supreme Court, in a long line of cases beginning with Reed v. Reed, 404 U.S. 70, 92 S. Ct. 251 (1971) has made it clear that classifications based on sex cannot withstand constitutional scrutiny if they reflect "the traditional baggage of sexual stereotypes." Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102 (1979). A requirement that marital children bear the paternal name or the name of the father's choice, creates an impermissible classification on the basis of sex contrary to the standard set forth by United States Supreme Court precedent: in order for a gender-based discrimination to be valid it must serve important governmental objectives and the means employed must be substantially related to the achievement of such objectives. See Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976); Stanton v. Stanton, 421 U.S. 7, 95 S. Ct. 1373 (1975); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973); Kirchberg v. Feenstra, 450 U.S. 455, 101 S. Ct. 1195 (1981); Mississippi University For Women v. Hogan, 458 U.S. 718 (1982).

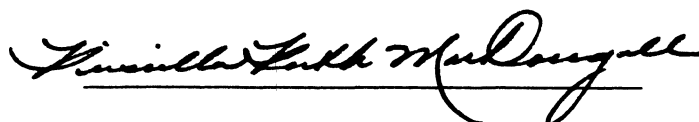
If a trial court decision such as the instant one is allowed to stand, it will be a clear message to women in Utah that they do not any enforceable legal right to name their children on an equal basis to men.

Conclusion

For the reasons stated herein the Appellant Kathleen Hamby asks that the Order and Ruling of the Fourth Judicial District Court be reversed and her two children fathered by her ex-husband be given her surname, Hamby. The Appellant also requests that in its Order to such effect, the Supreme Court of Utah give clear direction to trial courts of the state for a method for resolving disputes between custodial and noncustodial parents of newborn, infant or very young children consistent with the custodial parent's authority to direct the upbringing of children in accordance with their best interests.

Dated this 18 day of June, 1986.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kimella L. M. Duggan", is written over a horizontal line.

ADDENDUM

Page

Kathleen Jacobson and the State of Utah, by and through Utah State Department of Social Services vs. Gail Jacobson, Case No. 67,957 (Fourth Judicial District Court, Utah County, March 10, 1986) (Order).....	A-1
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8 IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
9 STATE OF UTAH
10 -----

11 KATHLEEN JACOBSON,
12 AND THE STATE OF UTAH
13 by and through Utah State
14 Dept. of Social Services,

Plaintiffs,

vs.

GAIL JACOBSON,

Defendant.

ORDER

Civil No. 67,957

15 This matter came on for hearing October 24, 1985 before
16 the Honorable Ray M. Harding upon plaintiff's petition to change
17 the surname of Kevin Jacobson to Kevin Hamby and upon defendant's
18 petition to change the surname of Kelly Hamby to Kelly Jacobson.

19 The Court heard profers of testimony from plaintiff and
20 defendant and counsel for the parties stipulated that the Court
21 may consider the petitions before it upon such profers and upon
22 memoranda to be filed. The parties filed the memoranda and the
23 Court having considered the same it is therefore

ORDERED, ADJUDGED AND DECREED as follows:

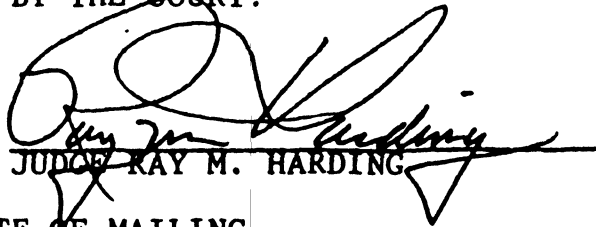
1. Kevin D. Jacobson born April 13, 1984 shall

1 continue to bear the surname of defendant Gail Jacobson.

2 2. Kelly Hamby born June 14, 1983 shall bear the
3 surname of Jacobson and shall be known as Kelly Jacobson.

4 DATED this 10th day of March, 1986.

5 BY THE COURT:

6 
7
8 JUDGE RAY M. HARDING

9 CERTIFICATE OF MAILING

10 I hereby certify I mailed a true and correct copy of
11 the foregoing to Mr. Donald E. Elkins, Attorney at Law, 60 East
12 100 South No. 200, Provo, UT 84601, postage prepaid on the 28th
13 day of February, 1986.

14 
15 Secretary

16 -2-

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

MAR -6 11 28

JL

KATHLEEN JACOBSON,)	Case Number	67957
Plaintiffs,)		
vs.)	RULING	
GAIL JACOBSON,)		
Defendant.)		

Having considered the memoranda and argument of the parties, and having taken the matter under advisement, the court hereby grants defendant's petition and denies plaintiff's petition. The court finds that it is in the best interest of the parties minor children, Kelly Lynn & Kevin D., to be known by the surname Jacobson.

The court bases this ruling on the following reasons:

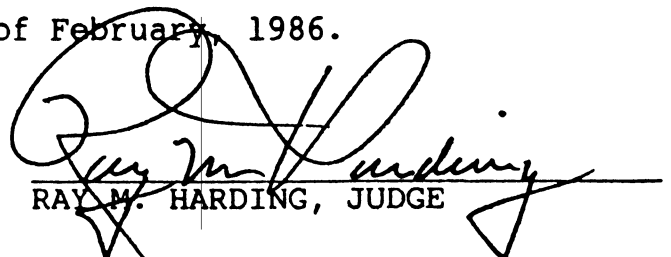
1) the father-child relationship will be strengthened by the children bearing the name Jacobson while not harming the mother-child relationship, 2) there is no embarrassment or inconvenience associated with an explanation of why their mother's surname is different since divorce is a common occurrence, 3) the children are too young to be accustomed to the surname Hamby, 4) Hamby is not the mother's maiden name, 5) there is no embarrassment because of defendant's alleged bad reputation, and 6) the children will always be identified with at least one natural parent by being known as Jacobson.

The court finds unpersuasive plaintiff's arguments that it would be beneficial for Kevin and Kelly to be known by Hamby as their mother and stepsister are. Were custody to change, Kevin and Kelly would be faced with the same situation plaintiff now seeks to avoid. Furthermore, were plaintiff to remarry Kevin and Kelly would again have a surname other than that of at least one of their custodial parents. Of paramount concern to the court is the fact that Kevin and Kelly should both bear the same name to avoid any implications of illegitimacy which might arise if asked why brothers of the same natural father have different last names.

Finally, the court notes that the law provides that the children may petition for a name change if they so desire when they are old enough to make an intelligent decision.

Defendant's counsel to prepare an appropriate order.

DATED this 21st day of February, 1986.



RAY M. HARDING, JUDGE

cc: Richard M. Taylor
Donald E. Elkins

KATHLEEN JACOBSON, Plaintiff
Appearing Pro Se
Box 188
Goshen, Utah 84663
Telephone (801) 667-9966

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH

KATHLEEN JACOBSON, and the State
of Utah, by and through Utah State
Dept. of Social Services,

Plaintiffs,

-vs-

GAIL JACOBSON,

Defendants.

NOTICE OF APPEAL

Civil No. 67,957

Plaintiff KATHLEEN JACOBSON, appearing pro se, hereby gives notice to all concerned parties that she will appeal that ORDER entered herein on March 10, 1986 in the office of the Clerk of the above-entitled Court which said ORDER determined the surnames by which the minor children of the plaintiff KATHLEEN JACOBSON and the defendant GAIL JACOBSON shall be legally known. Such appeal is to the Supreme Court of the State of Utah.

DATED this 7th day of April, 1986.

KATHLEEN JACOBSON, Plaintiff
Appearing Pro Se

MAILING CERTIFICATE

I hereby certify that I mailed a true copy of the foregoing, postage prepaid, U.S. Mail, to counsel for the defendant, RICHARD M. TAYLOR, at P. O. Box 288, Spanish Fork, Ut. 84660-0288 on the 7th day of April, 1986.

**THE RIGHT OF WOMEN
TO NAME THEIR CHILDREN**

PRISCILLA RUTH MacDOUGALL

Reprinted from
Law & Inequality: A Journal of Theory and Practice
Volume III, July 1985, Number 1
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The Right of Women to Name Their Children

Priscilla Ruth MacDougall*

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* B.A., 1965, Barnard College; J.D., 1970, University of Michigan. Staff Counsel to the Wisconsin Education Association Council since 1975. Ms. MacDougall was an Assistant Attorney General of Wisconsin between 1970-1974. She became involved in advancing the right of women to name themselves and their children upon the publicizing of the Supreme Court's affirmance in *Forbush v. Wallace* in March, 1972. Her first article, "Married Women's Common Law Right To Their Own Surnames" discussed women's past and present efforts to control their own names and the legal issues which were developing at that time. She thanks all the people who have supported her in her efforts, personally and/or professionally, since 1972. All sources cited in this article are on file with the author.

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The Right of Women to Name Their Children

Priscilla Ruth MacDougall

I. Introduction

Over the past decade important strides have been made toward recognizing the right of women to name their children. However, relentless resistance to giving up the virtually irrefutable male prerogative to name marital children¹ promises to make achievement of the right of women to name children a major feminist struggle for the next decade.

Women's growing demand to share the basic right to name children follows logically from women's successful assertion of their right to name themselves. In *Doe v. Dunning*, the country's first major case involving women's rights to name their children, the Washington Supreme Court acknowledged this in 1976 stating that "[a]s more women exercise their right to retain their own surname after marriage, the likelihood that children will be given a surname other than the paternal surname increases."²

The right of married and divorced women to choose whether or not they will use the surnames of their spouses or ex-spouses arose to the fore as a feminist issue with the erroneously litigated case of *Forbush v. Wallace* in 1972.³ In *Forbush*, the United States Supreme Court summarily affirmed an Alabama federal district court's determination that a conceded common law requirement,

1. In referring to children, the terms marital children, nonmarital children, or children born to married or unmarried parents are generally used. The old common law appellation for a nonmarital child, "bastard," has all but passed out of parlance; the term "out of wedlock" likewise is giving way; the terms "legitimate" and "legitimacy," and "illegitimate" and "illegitimacy" denote good or base societal status as determined by fathers. The rights of parents in naming their children in relation to the state and each other still relate directly to their status as married or unmarried, and to the birth status of their children as modified or not by state standards for legitimation or determination of paternity. Therefore, this article uses terms denoting the birth status of children. A nonmarital child is one born to parents who were not married to each other from the time of conception to birth. A marital child is one born to parents who were married at the time of birth or conception.

2. *Doe v. Dunning*, 87 Wash. 2d 50, 53, 549 P.2d 1, 3 (1976). "An erosion of the traditional system of adopting the husband's surname as the single and sole surname for each member of the family unit is apparent and in practice and has been recognized by the case law of many jurisdictions." *Rice v. Department of Health and Rehabil. Services, on remand* No. 80-1674 Order and Findings of Fact of Div. of Administrative Hearings, Dec. 31, 1980 at 7-8. Final order entered Jan. 13, 1981, *on remand* from 386 So. 2d 844 (Fla. Dist. Ct. App. 1980).

3. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972).

that by operation of law a woman adopts her husband's surname as her "legal name," was constitutional. The so-called common law requirement accepted by the litigants was not, however, an accurate statement of the common law. The case brought the issue to the attention of the country.

In the wake of the widely publicized *Forbush* decision, women encountered difficulties using their own surnames throughout the country. Lawsuits arose everywhere⁴ and women organized around the issue of a woman's right to control her own name.⁵

4. *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 295 A.2d 223 (1973) arose immediately and served to guide the long line of well-litigated and successful cases reaffirming the common law right of a woman not to change her name because of marriage. See Priscilla Ruth MacDougall, *Married Women's Common Law Right To their own Surnames*, 1 Women's Rts. L. Rep., Fall/Winter 1972-73, at 2. Women brought petitions for name changes in trial courts across the nation. Within a year, the appeal in *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975), which became the pivotal case on the issue, was filed in Wisconsin.

5. The Center for a Woman's Own Name developed in 1973 as a result of the appeal in *Kruzel*. Organized and directed by the writer and Terri P. Tepper, between 1973 and 1976, it took a national lead with the American Civil Liberties Union during such time in advocating the recognition of women's rights to name themselves and their children. The Center published and distributed the basic guide to the names issue, *Booklet For Women Who Wish To Determine Their Own Names After Marriage* (1974).

In 1974, while *Kruzel* was on appeal, the Olympia Brown League was organized by Suzan Hester, Fran Kaplan, Anne Brouwer and others to aid Milwaukee women directly affected by the lower court's ruling. The League, which developed a membership numbering over 200, joined the case as amicus curiae. The group was named after the country's first female ordained minister, from Racine, Wisconsin, who retained her own name in 1873 when she married John Henry Willis. See, e.g., *Kathy Harney Wins*, Newsletter of the Olympia Brown League, April, 1975.

In 1972, Massachusetts women founded Name-Change in the wake of *Forbush* and litigation in Massachusetts over women's right to use their names for voting. The group distributed a "Fact Sheet For Women Who Wish To Retain Their Own Name After Marriage" and promoted the right of women to determine their own names in that state. Letter from Diana Altman, organizer of the group, to writer (January 23, 1973).

In 1973, Michigan women organized the Committee To Encourage Richard H. Austin To Give Michigan Women Their Middle Names For The Holidays (CERHA) with Attorney Jean L. King, and led a humorous and successful campaign supporting the right of women to obtain drivers' licenses using their birth names as middle names. The campaign demanded such right on every holiday from Valentine's Day to Christmas. See *Booklet for Women Who Wish to Determine Their Own Names After Marriage* 23 (1974).

In California, the Name Choice Center distributed a fact sheet and promoted the issue with the Attorney General and the Legislature. The Center had a mailing list of over 15,000 by 1974. Letters from the group's organizer, Pat Montandon, to writer (March 25, 1974 and May 13, 1974) and to Wall Street Journal reporter Joanne Lublin (September 9, 1984).

The Women's Legal Defense Fund in Washington, D.C. established a committee on names which published and distributed a booklet on women's names for D.C. area residents. The NOW Legal Defense and Education Fund participated as amicus in *Kruzel*. Governors' commissions on the status of women supported the right of married women to have their first names listed in telephone directories. Special

The cause was not new. During the early part of the century women had organized around it as the Lucy Stone League, named for Lucy Stone, the nineteenth century abolitionist and feminist leader who did not change her name when she married Henry B. Blackwell in 1855.⁶ The League, however, expressly decided not to take on the issue of women's rights in naming children.⁷

In 1982 the Alabama Supreme Court repudiated the *Forbush* case as not accurately representing the common law or the law of Alabama.⁸ The decision thus capped a body of law developed dur-

NOW task forces dealt with the name issue, and law student, legal services, and other organizations participated in litigation. The subject became a popular topic for law review articles. See *infra* note 9. The National Conference on Women and the Law began offering workshops on women's naming rights in 1976.

Where the term "own" name is used in this article it refers to the chosen name of the woman, regardless of the origin of the name. As written in Center For A Woman's Own Name 1975 Supplement To Booklet For Women Who Wish To Determine Their Own Names After Marriage 6 (1975):

It is the position of the Center For A Woman's Own Name that the name(s) a woman chooses to use is her *own* name. It may be the name given her at birth, a name assumed during childhood, assumed at marriage, assumed at a previous marriage, a hyphenated name or a name made up by herself at any time.

During this period of feminist activity over the issue in the mid 1970s, Ellen Goodman commented

I guarantee you that the first generation of women who grow up without scribbling "Mrs. Paul Newman" all over their notebooks "just to see what it looks like" is going to think we were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.

The Name of the Game, Boston Globe, Sept. 24, 1974.

6. Under the primary leadership of Ruth Hale and Jane Grant, the Lucy Stone League and the National Woman's Party litigated the right of married women to use their own surnames with the few state and federal agencies people had to contend with in those days. This included the passport office, which since that time has recognized the right of married women to be issued passports in their own surnames. See Ruth Hale, *The First Five Years of the Lucy Stone League* (1926); Note, *Names—Married Women—Right to Retain Maiden Names*, 73 U. Pa. L. Rev. 110 (1924). The right was codified in the first Code of Federal Regulations in 1938. 22 C.F.R. § 51.20 (1938). The Lucy Stone League still exists in New York City.

7. Hale, *supra* note 6. Lucy Stone and Henry Blackwell named their distinguished daughter Alice Stone Blackwell. See Elinor Rice Hays, *Lucy Stone: One of America's First and Greatest Feminists* (1961); Alice Stone Blackwell, *Lucy Stone: Pioneer of Woman's Rights* (1930). The Lucy Stoners likewise frequently gave their children the surname of the mother as a middle name. For example, Ruth Hale and her husband Heywood Broun named their sports commentator son Heywood Hale Broun.

8. *State v. Taylor*, 415 So. 2d 1043 (Ala. 1982). The Department of Public Safety, however, only conceded in 1984, in the face of litigation, the right of an individual married woman to a driver's license in "the name of her choice." Letter from Ray Acton, department attorney, Alabama Department of Public Litigation, to Daniel L. McCleave, co-counsel in *State v. Taylor* (Nov. 1, 1984). Litigation to make the Department change its general policy and to apply this concession to all married women in Alabama has been commenced in a federal class action. Wendy A. Rockwell v. Prescott, Case No. 85-0875-XS (filed July 12, 1985, U.S. D.C. S.D.

ing the 1970s recognizing the right of women to choose their own names.⁹ Until a married or divorced woman's legal right to name

Ala.). It is incredible that the Department refuses to acknowledge the ruling of Alabama Supreme Court and it is hoped that the Attorney General will effectuate a swift resolution of the Department's recalcitrance.

9. The Alabama Supreme Court in its unanimous decision in *Taylor* followed *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975). For leading cases recognizing a woman's right to not change her name because of marriage, see also *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977); *Simmons v. O'Brien*, 201 Neb. 778, 272 N.W.2d 273 (1978).

By statute, judicial opinion, state attorney general opinion, formal and informal agency directives or memoranda, or legislation, all states now recognize that women have the right to not change their names when they marry. Alabama: *State v. Taylor*, 415 So. 2d 1043 (Ala. 1982); Alaska: Op. Att'y. Gen. Alaska (May 5, 1976); Arizona: *Malone v. Sullivan*, 124 Ariz. 469, 605 P.2d 447 (1980); *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975); Arkansas: *Walker v. Jackson*, 391 F. Supp. 1395 (E.D. Ark. 1975); Op. Att'y Gen. Ark. No. 74-123 (Oct. 8, 1974); Op. Att'y Gen. Ark. No. 74-75 (April 19, 1974); California: *Weathers v. Superior Court*, 54 Cal. App. 3d 286, 126 Cal. Rptr. 547 (1976); Op. Atty Gen. Cal. (March 12, 1974); Connecticut: *Custer v. Bonadies*, 30 Conn. Supp. 385, 318 A.2d 639 (Super. Ct. 1974); Op. Att'y Gen. Conn. (Jan. 23, 1975); Delaware: Op. Att'y Gen. Del. (Aug. 7, 1974); District of Columbia: *Brown v. Brown*, 382 A.2d 1038 (D.C. 1978), *vacating* 384 A.2d 632 (D.C. 1977); Op. Corp. Counsel D.C. (1975); Florida: *In re Hooper*, 436 So. 2d 401 (Fla. Dist. Ct. App. 1983); *Pilch v. Pilch*, 447 So. 2d 989 (Fla. Dist. Ct. App. 1984); *Davis v. Roos*, 326 So. 2d 226 (Fla. Dist. Ct. App. 1976); *Marshall v. State*, 301 So. 2d 477 (Fla. Dist. Ct. App. 1974); 1976 Op. Att'y Gen. Fla. 076-66 (March 24, 1976); Georgia: Ga. Code Ann. § 19-3-33.1 (Supp. 1985); Op. Att'y Gen. Ga. No. 75-49 (June 3, 1975); Hawaii: Hawaii Rev. Stat. § 574-1 (1976); *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979); Illinois: Op. Att'y Gen. Ill. No. S-711 (Feb. 25, 1974); Op. Att'y Gen. Ill. S-695 (Feb. 13, 1974), both opinions indicating that Illinois does not follow *Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945) (country's sole case holding that a married woman takes her husband's surname as her "legal" name at common law); Indiana: *In re Hauptly*, 262 Ind. 150, 312 N.E.2d 857 (1974); Iowa: Iowa Code Ann. § 595.5 (West 1981); Op. Att'y Gen. Iowa (March 25, 1980); Kansas: Op. Att'y Gen. Kan. No. 73-47 (Feb. 1, 1973) following *Gallop v. Shanahan*, No. 120, 456 (Dist. Ct. Shawnee County, Nov. 2, 1972), noted in Note, *Constitutional Law—Equal Protection and Right of Suffrage Prohibits State From Cancelling Voter Registration of Newly Married Woman—Women Upon Marriage Do Not Necessarily Abandon Maiden Name*, 21 U. Kan. L. Rev. 588 (1972-73); Kentucky: Op. Att'y Gen. Ky. No. 77-334 (May 23, 1977); Op. Att'y Gen. Ky. No. 77-239 (April 13, 1977); Op. Att'y Gen. Ky. No. 74-902 (Dec. 26, 1974); Op. Att'y Gen. Ky. No. 74-349 (May 14, 1974); Memorandum Ky. Dept. Transportation (Oct. 30, 1981) (Kentucky Department of Transportation relinquishes position that a married woman must obtain driver's license in her husband's surname unless she has a court-ordered name "change"); Louisiana: *Pugh v. Theall*, 342 So. 2d 274 (La. Ct. App. 1977), *cert. denied* 344 So. 2d 1055 (La. 1977); *Succession of Kneipp*, 172 La. 411, 134 So. 376 (1931); *Boothe v. Papale*, No. 74-939 (E.D. La. Feb. 12, 1975) (Order granting plaintiff's Motion for Summary Judgment); La. Rev. Stat. Ann. § 40:34.A.(1)(a)(iii) (West 1984) (statute relating to naming children at birth); Maine: *In re Reben*, 342 A.2d 688 (Me. 1975); Op. Att'y Gen. Me. (April 4, 1978); Op. Atty. Gen. Me. (April 12, 1974) Maryland: *Stuart v. Board of Supervisors*, 266 Md. 440, 295 A.2d 223 (1972), noted in *The Right of a Married Woman To Use Her Birth-Given Surname For Voter Registration*, 32 Md. L. Rev. 409 (1973); *Goldin v. Goldin*, 48 Md. App. 154, 426 A.2d 410 (Ct. Spec. App. 1981); *Klein v. Klein*, 36 Md. App. 177, 373 A.2d 86 (Ct. Spec. App. 1977); Op. Att'y Gen. Md. (Jan. 20, 1983); Op. Att'y Gen. Md. (May 7, 1974); Op. Atty. Gen. Md.

herself was established, she could not expect the law to recognize

(March 30, 1974); Op. Att'y Gen. Md. (Nov. 30, 1972); Massachusetts: *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977); Mass. Ann. Laws ch. 46 § 1D (Law. Co-op. Supp. 1983); Michigan: *Jones v. Sanilac County Road Comm'n*, 128 Mich. App. 569, 342 N.W.2d 532 (1983); *Wood v. Detroit Edison*, 409 Mich. 279, 294 N.W.2d 571 (1980); *Piotrowski v. Piotrowski*, 71 Mich. App. 213, 247 N.W.2d 354 (1976); Op. Att'y Gen. Mich. No. 4834 (Oct. 2, 1974); Mich. Comp. Laws Ann. § 333.2824(1) (West 1980) (statute relating to naming children at birth); Minnesota: Minn. Stat. Ann. § 517.08 (West Supp. 1985); Missouri: *In re Natale*, 527 S.W.2d 402 (Mo. Ct. App. 1975); *Miller v. Miller*, 670 S.W.2d 591 (Mo. Ct. App. 1984); *Johnson v. Pacific Intermountain Expr. Co.*, 662 S.W.2d 237 (Mo. 1983), *cert. denied* 104 S. Ct. 2349 (1984); Montana: Op. Att'y Gen. Mon. (May 1, 1974); Nebraska: *Simmons v. O'Brien*, 201 Neb. 778, 272 N.W.2d 273 (1978); Neb. Rev. Stat. § 71-640.01 (1984) (statute relating to naming children at birth); New Hampshire: N.H. Rev. Stat. Ann. § 126.6-a (1983) (statute relating to naming children at birth); *Moskowitz v. Moskowitz*, 118 N.H. 199, 385 A.2d 120 (1978); New Jersey: *In re Lawrence*, 133 N.J. Super. 408, 337 A.2d 49 (1975); Op. Att'y Gen. N.J. No. 20-1975 (Aug. 26, 1975); New York: N.Y. Dom. Rel. Law §§ 14-a(1), 15(1), 240-a (McKinney Supp. 1985); N.Y. Civ. Rights Law §§ 64, 65 (McKinney Supp. 1985); *In re Halligan*, 46 A.D.2d 170, 361 N.Y.S.2d 458 (App. Div. 1974); North Carolina: *In re Mohlman*, 26 N.C. App. 220, 216 S.E.2d 147 (1975); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981); N.C. Gen. Stat. § 130-A-101(c) (Supp. 1983) (statute relating to naming children at birth); North Dakota: Op. Att'y Gen. N.D. (March 20, 1974); Ohio: *Krupa v. Green*, 144 Ohio App. 497, 177 N.E.2d 616 (1961); *Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977); Oklahoma: *Sneed v. Sneed*, 585 P.2d 1363 (Okla. 1978); Op. Att'y Gen. Okla. (Nov. 14, 1975); Oregon: Ore. Rev. Stat. § 106.220 (1983); Pennsylvania: Op. Att'y Gen. Pa. No. 8 (Jan. 31, 1974); Op. Att'y Gen. Pa. No. 72 (Oct. 25, 1973); Op. Att'y Gen. Pa. No. 62 (Aug. 20, 1973); Rhode Island: *Traugott v. Petit*, 122 R.I. 60, 404 A.2d 77 (1979); South Carolina: Op. Atty. Gen. S.C. (June 6, 1975); Op. Att'y Gen. S.C. (Dec. 12, 1974); South Dakota: Op. Att'y Gen. S.D. No. 77-31 (April 15, 1977) (interpreting *Ogle v. Circuit Court*, 89 S.D. 18, 227 N.W.2d 621 (1975)); Tennessee: *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975); Tenn. Code Ann. § 68-3-305 (1983) (statute relating to naming children at birth); Texas: Op. Att'y Gen. Tex. No. MW-225 (Aug. 21, 1980) (says that a married woman may vote under a hyphenated last name, of her "maiden name" and her husband's name); Op. Att'y Gen. Tex. No. H-432 (Oct. 25, 1974); *Rice v. State*, 37 Tex. Crim. 36, 38 S.W. 801 (1897); Vermont: Op. Att'y Gen. Vt. No. 179 (Feb. 4, 1974); Virginia: *In re Mille*, 218 Va. 939, 243 S.E.2d 464 (1978); *In re Strikwerda*, 216 Va. 470, 220 S.E.2d 245 (1975); Op. Att'y Gen. Va. (June 6, 1973) (re voting); Washington: *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976); Op. Att'y Gen. Wash. 507 (1927-28) (right of married woman to use husband's name even though she is not living with him); West Virginia: Op. Att'y Gen. W. Va. (April 30, 1975); Wisconsin: *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975); Op. Att'y Gen. Wis. No. 7-77 (Jan. 31, 1977); Op. Att'y Gen. Wis. (Sept. 21, 1982). The states not listed—Colorado, Idaho, Nevada, New Mexico, Utah, and Wyoming—have recognized the right of women to use their own names but have not circulated opinions, memoranda or the like to the knowledge of the writer. *E.g.*, "The [Wyoming] Motor Vehicle Division has recently allowed the use of a woman's maiden name as either a middle or last name on a driver's license and has also allowed the use of hyphenated names on driver's licenses. This was done pursuant to legal advice from this office." Kenneth G. Vines, Assistant Attorney General Wyoming, letter to author (January 16, 1980). Some states expressly prohibit discrimination against women in the granting of credit because of their surnames. *E.g.* Act of May 28, 1985, ch. 243, § 5, 1985 Minn. Laws 777 (to be codified at Minn. Stat. § 325G.041).

See also 12 C.F.R. § 202.7(b) (1982), interpreting the federal Equal Credit Opportunity Act, 15 U.S.C. § 181 (1982) (prohibits creditors from refusing to open or maintain a person's account in his or her "birth-given first name and a surname

her legal right to name her children over the objection of her husband or ex-husband.

As a woman's right to determine her own surname became recognized in the 1970s, married couples, by mutual agreement, be-

that is the applicant's birth-given surname, the spouse's surname, or a combined surname"). A requirement that a woman change her surname to that of her husband on employment records when she marries, in absence of a corresponding requirement for men violates Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-1 to 17 (1982). *Allen v. Lovejoy*, 533 F.2d 522 (6th Cir. 1977).

The law is also well established that married and divorced women have the right to change their names, statutorily or nonstatutorily, irrespective of what names the children in their custody use. *E.g.*, *In re Natale*, 527 S.W.2d 402 (Mo. Ct. App. 1975) (married woman adopting a brand new name unrelated to her husband's surname or her own prior names); *In re Hauptly*, 262 Ind. 150, 312 N.E.2d 857 (1974); *In re Erickson*, 547 S.W.2d 357 (Tex. Civ. App. 1977); *Traugost v. Petit*, 122 R.I. 60, 404 A.2d 77 (1979); *In re Banks*, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (1974); *In re Hooper*, 436 So. 2d 401 (Fla. Dist. Ct. App. 1983); *Piotrowski v. Piotrowski*, 71 Mich. App. 213, 247 N.W.2d 354 (1976); *Egner v. Egner*, 133 N.J. Super. 403, 337 A.2d 46 (1975).

An issue that needs to be litigated in the area of women's names involves the right of women to use different surnames for different purposes. The right to *not change* one's surname because of marriage is not identical to the right to retain one's premarriage surname for some purposes and to *change* it for other purposes. A woman who uses her husband's surname for any purpose may have difficulty not using it, instead of another surname, for state recordkeeping purposes. However, under the common law persons can use more than one surname. The one state attorney general who has expressly examined the issue reaffirmed the right of women to use one surname with one state agency (for example, for voting) and another surname with another state agency (such as for driving or practicing a profession). Op. Att'y Gen. Wis. No. 7-77 (Jan. 31, 1977).

The right of women to name themselves does not depend on their husbands' or ex-husbands' consent or acquiescence. Because attorneys raise the issue in pleadings and/or trial, mention of spousal consent appears in most of the name *change* cases, but notably not in the name *retention* cases of the 1970s. *See, e.g.*, *In re Strickwerda*, 216 Va. 470, 220 S.E.2d 245 (1975) (plaintiff's attorney informed author that mention of husband's agreement was deliberate tactic). Name retention cases following *Stuart v. Board of Supervisors*, 266 Md. 440, 295 A.2d 223 (1972) (antenuptial contract determined to be evidence of intent to use own name, not a requirement of Mary Emily Stuart's doing so) do not even mention spousal opinion. *See, e.g.*, *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975); *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975).

See generally Herma Hill Kay, *Sex-Based Discrimination: Text, Cases and Materials* 171-77 (2d ed. 1981); Kathleen A. Ryan Carlsson, *Surnames of Married Women And Legitimate Children*, 17 N.Y.L.F. 552 (1971); Roslyn Goodman Daum, *The Right of Married Women To Assert Their Own Surnames*, 8 U. Mich. J.L. Ref. 63 (1974); Julia Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 Wash. U.L.Q. 779 (1973); Priscilla Ruth MacDougall, *Women's, Men's, Children's Names: An Outline and Bibliography*, 7 Fam. L. Rep. (BNA) 4013-18 (March 17, 1981) and sources cited therein; Richard Thornton, *Married Women and The Name Game*, 11 Rich. L. Rev. 121 (1976). A very fine recent article espouses the value of nonjudicial name change. Patricia A. Felch, *The Common Law Right For An Adult To Assume A New Name Without Court Approval*, VIII Women's Law Reporter (Loyola U School of Law) 1 (Fall 1984) (article, however, mistakenly attributes a statement of Elizabeth Cady Stanton to Lucy Stone, which will be noted in a future addition of the Women's Law Reporter).

gan giving their children hyphenated names, maternal names, or entirely new surnames. They immediately encountered resistance from state agencies which refused to register marital children in any other surname than the paternal. At the same time, unmarried mothers met resistance in giving their children the surnames of their biological fathers whether the men agreed with their choice or not.¹⁰

As this article demonstrates, where women have the approval of their children's fathers, state resistance to women's choices of their children's surnames ultimately fails. The government simply cannot tell parents what to name their offspring.

In contrast, when a woman wants to name her children one way and the father does not agree, a woman finds herself facing an almost insurmountable legal obstacle. Except in some cases involving nonmarital children, the courts have traditionally and expressly upheld the right of the father to control the naming of children, irrespective of what surname best serves the *children*.

This legal brick wall blocks the parental influence of women on their own children and in their own homes. It tells children that their mother's authority remains secondary to that of their father even after their parents are divorced. Women must topple this brick wall, as it stands in the way of their responsibility and authority to rear their children.

Children's names are a women's issue regardless of the origin of the name chosen by a woman. This article neither espouses that a child should bear any particular surname¹¹ nor advocates that women should give their children the maternal name or any other nonpaternal name. It is, however, a fundamental feminist concern that society and its courts respect women for wanting to pass their surnames onto their children or to give them surnames which dif-

10 Most of these situations were resolved by attorney general opinions which caused agencies to recognize the legal rights of parents to name their children. Unfavorable attorney general rulings or failure of agencies to follow favorable opinions resulted in litigation. See, e.g., *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977). For a list of the state attorney general opinions respecting the right of women to use their own names, see MacDougall, *supra* note 9, at 4017-18.

11 When "name" is used in this article it usually refers to a last name. Men assert their authority over women in naming children primarily in the context of surnames. Men also claim the right to determine children's first and middle names and to require women to name sons for them with the designation "Jr." Courts have, therefore, in a few cases also adjudicated the relative rights of parents in selecting first and middle names which are also referred to as "given" names. Women have always prevailed in cases involving conflicts of authority over first or middle names. *In re Nguyen*, 684 P.2d 258 (Colo. App. 1983), *cert. denied*, 105 S.Ct. 785 (1985), *Webber v. Parker*, 167 So.2d 519 (La. Ct. App. 1964), *writ refused*, 246 La. 886, 168 So.2d 269 (1964), *In re M.L.P.*, 621 S.W.2d 430 (Tex. Civ. App. 1981).

fer from those of the children's fathers. It is a fundamental women's issue that women should and must have a legally recognized and enforceable right to name their children on an equal basis to men. Further, it is a fundamental women's concern that women who are custodial parents have the same legally recognized decision-making power respecting their children's names as they have over other aspects of their children's lives.

Recognition of the right of women to name their children also promotes the rights of children. Such recognition will result in children being allowed to bear names which are, in fact, good for their welfare,¹² rather than requiring them to use their fathers' names whenever their fathers want them to.

Despite these interests of children and women, courts are quick to respect men's desire to control their children's names. In March 1982, the United States Supreme Court declined to review the first case to reach it involving the right of women to name their children. In *Saxton v. Dennis*,¹³ the Court refused to review the Minnesota Supreme Court's denial to a custodial mother and her two children of the right to statutorily change the children's surnames to a hyphenated name of both parents' names. The father had objected and insisted that the children continue to use only his surname. A month later, the Nebraska Supreme Court became the first appellate court to construe a state statute which specified what surnames could be given newborn marital children on their birth certificates. The court accepted one of the non-custodial father's choices of a name—a hyphenated name with the father's name first—over the wishes of the custodial mother to have the children bear only her surname.¹⁴

Similarly, courts and legislatures are allowing unmarried fa-

12. The legal term used in family law is the child's "best interests." See *infra* notes 120-132, 139, 200-206, 216-217, 227-237 and accompanying text.

13. *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982), *Noted in Note, Family Law-Parental Rights in Changing Child's Surname-In re Saxton*, 9 Wm. Mitchell L. Rev. 484 (1983) and *Note, Like Father, Like Child: the Rights of Parents in their Children's Surnames*, 70 Va. L. Rev. 1303 (1984). The court denied certiorari in *Saxton* ten years and sixteen days from the day that it summarily affirmed *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972). See *supra* note 3 and accompanying text.

14. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982) (rehearing denied May 12, 1982). The father asked that the child bear only his name or the hyphenated name.

The Nebraska Supreme Court recited and deferred to the standards established by courts over the years to protect divorced noncustodial fathers' right to control the naming of their children: 1) misconduct by "one of the parents" (i.e. the father); 2) failure to support the child; 3) failure to maintain contact with the child; 4) the length of time a surname has been used, and 5) whether the surname is different from that of the custodial parent. The court neither made nor ordered any fac-

thers rights almost equal to married fathers in naming children if they contribute to the children's support and express minimal interest in them.¹⁵ This is in spite of these fathers' limited success in obtaining other rights over mothers to their children unless the fathers have demonstrated a considerable commitment to the child.¹⁶

Because the issue of a woman's right to name her children is only beginning to be recognized as a feminist issue, not many cases have been litigated from a women's rights perspective and taken to the appellate level. Therefore, with the exception of a few well-litigated cases and forward-looking judiciary¹⁷ the courts of this country are not yet sensitized to the importance of the issue of naming children as a women's and children's legal rights issue. Nor are they aware to any depth of the extent of legal developments in the area over the past decade.

Women generally have been hesitant to express and assert their desires and their rights to name their children over their

tual evaluation of the "best interests" of the child in question and denied rehearing to clarify the meaning of the opinion.

The bid for rehearing was almost not filed. The father, who had at first denied paternity, gave up the child for adoption as the mother remarried, possibly raising a mootness issue. One of the reasons *D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980), was not pursued beyond an unsuccessful petition for rehearing was because the unwed father relinquished any rights to the child, the mother married and her husband adopted the child. Although the individual situations in such cases may thus be rectified, the appellate opinions make bad law for later cases.

15. *Donald J. v. Evna M-W*, 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978); *D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980); *Winkenhofer v. Griffin*, 511 S.W.2d 216 (Ky. 1974); *Jacobs v. Jacobs*, 309 N.W.2d 303 (Minn. 1981); *Kirksey v. Abbott*, 591 S.W.2d 751 (Mo. Ct. App. 1979).

16. *Lehr v. Robertson*, 463 U.S. 248 (1983) ("the mere existence of a biological link does not merit equivalent protection."). *In re Baby Girl S.*, 628 S.W.2d 261 (Tex. Civ. App. 1982), *cert. granted sub nom.*, *Kirkpatrick v. Christian Homes of Abilene*, 459 U.S. 1145, *vacated and remanded*, 460 U.S. 1074 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979) (statute giving unwed mother but not unwed father right to block an adoption is a violation of equal protection; not denial of equal protection to deny unwed father who has participated in rearing of his child right to veto adoption of child); *Parham v. Hughes*, 441 U.S. 347 (1979) (upholding Georgia statute denying father who had not legitimated child right to sue for child's wrongful death); *Quillon v. Walcott*, 434 U.S. 246 (1978) (unmarried father may not legitimate child and block adoption of child where adoption is in the child's best interests); *Stanley v. Illinois*, 405 U.S. 645 (1972). See further Nancy S. Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 *Law & Inequality* 447 (1984).

17. *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979), *noted in* 18 *J. Fam. L.* 408 (1979-80); *In re Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980); *Doe v. Hancock County Board of Health*, 436 N.E.2d 791 (Ind. 1982) (Hunter, J., dissenting); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977); *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976).

husbands' and families' expectations.¹⁸ Such hesitation is based in part on individual women's resistance to appear as if they are only fighting domestic matters in public. No organization monitors development of this issue despite the fact that new cases are continuously arising and establishing new law that affects all women. The right of women to name their children has not yet received the attention of feminist and civil rights activists as an issue in need of a carefully planned strategy for necessary legal reform.

This article sets forth the law of naming children as it has been inherited from England and developed in this country. It discusses the rights of the three people always involved in the determination of a child's name: the mother, the father, and the child. Parts II and IV discuss the various naming rights women have achieved: the right of married women and men in agreement to name their children without state interference, and the invalidity of state statutes requiring that children bear specific names on their birth certificates. Part III explains the traditional right of women to name nonmarital children, and part V considers the law in disputes between fathers and mothers over naming infant marital and nonmarital children. Part VI analyzes disputes between parents about naming older marital children originally given the paternal name. Part VII sets forth the custodial parent presumption as a solution to determining which parent should be entrusted with the right of naming children. Part VIII examines the arguments of fathers and the contention that the maternal name implies illegitimacy. Finally, part IX discusses the role of legislation, constitutional challenges, and the Equal Rights Amendment in assuring a woman's right to name children on an equal basis to men.

The first section sets forth the the common law of names, which is based on English common law, and followed generally in the United States. This section further summarizes the context in which litigation over naming children arises and sets forth the importance of developments of the past decade in the movement toward recognizing the right of women to participate in the naming of their children.

A. English Common Law

American states, except Louisiana,¹⁹ expressly follow English

18. One married woman rented a post office box for the sole purpose of corresponding with the author about the possibility of giving her child her name instead of her husband's and still keeping her marriage intact. She anticipated unreasonableness and hostility to the idea from her husband.

19. Commentators and courts usually contend that Louisiana follows the civil law and a married woman never loses her "patronymic" name although "she has

common law. In contrast to the civil law of the continent,²⁰ the common law recognizes the right of all persons to use and be known for all legal and social purposes by the surname(s) they choose as long as they do not do so for a fraudulent purpose. Under the common law, fraudulent purpose meant intent to conceal one's person to avoid being recognized.²¹ A person can be

the right to use her husband's name in all acts of her civil life and even of her commercial life." 1 Marcel Planiol & Georges Ripert, *Traite Elementaire De Droit Civil*, Pt. 1, p. 258, §§ 390, 392 (1935). Thus the fact that a remarried woman signed her marriage license in her "maiden name" did not indicate she had not been previously married: "[I]n law, she still retained her maiden name, and bore Rupp's name, if married to him, as a matter of custom." *Succession of Kneipp*, 172 La. 411, 416, 134 So. 376, 378 (1931). Where defendants did not show that a woman was known by her "maiden name" a lien in the woman's husband's name was not held improper. *Pugh v. Theall*, 342 So. 2d 274 (La. Ct. App. 1977), *cert. denied*, 344 So. 2d 1055 (La. 1977). Louisiana law recognizes the custom of a wife using her husband's name. *Welcker v. Welcker*, 342 So. 2d 251 (La. Ct. App. 1977), *cert. denied sub nom.*, *Welcker v. Little*, 343 So. 2d 1077 (La. 1977) (denying injunctive relief of man against his ex-wife from continuing to use "his" name); *Coyle v. Coyle*, 268 So. 2d 520 (La. Ct. App. 1972) (denying injunction to man against his ex-wife from continuing to use his full name preceded by "Mrs."). Louisiana women nonetheless have had to litigate to vote using their birth names due to a re-registration statute referring to changes of name by "marriage or otherwise." *Boothe v. Papale*, No. 74-1939, Slip. Op. at 3 (E.D. La. Feb. 11, 1975) ("The Court . . . concludes that under the Law of Louisiana a wife never loses her patronymic name.") (citing Planiol, *supra*); *Nett v. Parish Registrar of Voting*, No. 568-265 (Civ. Dist. Ct. Parish of Orleans, April 2, 1976) (Judgment for Plaintiff on Motion for Summary Judgment).

A 1950 Tulane Law Review note analyzed Louisiana as a common law names state. Note, *Names—Change of Name*, 24 Tul. L. Rev. 496 (1950) and the case of *Wilty v. Jefferson Parish Dem. Exec. Comm.*, 245 La. 145, 157 So. 2d 718 (1963) leave room for doubt as to how Louisiana law really differs from the common law. La. Rev. Stat. Ann. § 40:34(1)(a)(iii) (July, 1983) repealed the law requiring newborn marital children to be given their fathers' names on their birth certificates. It specified that marital newborns be given the husband's name, or, if both parents agree, the "maiden" name of the mother or a combination of the two, rendering references to a woman never losing her "patronymic" name obsolete. A bill to delete the preference for the paternal name and the superior right of the father to veto any other name died in committee during the 1985 Legislative Session. S. Bill No. 227 (1985).

20. Noncommon law countries regulate personal names by statutory prescription. Charles F. Blackman, *The Civil Sacrament: Law and Practice of Soviet Weddings*, 28 Am. Jur. Comp. L. 555 (1980); *Symposium on the Status of Women in Various Countries*, 20 Am. Jur. Comp. L. 585, 588 (Ruth Bader Ginsburg ed. 1972); *Symposium on Law and the Status of Women*, 8 Colum. Hum. Rts. L. Rev. 1, 15 (1976).

21. The Marriage Act of 1823, 4 Geo. 4, c. 76, ss. 7 and 22 (repealed, Marriage Act of 1949, c. 76, s. 25) required persons to publish notice of their marriage in their "true" Christian and surnames. A marriage published "knowingly and wilfully . . . without due publication" was void. *Sullivan v. Sullivan* (1818) 2 Hag. Con. 238 ("I am of the opinion that the interposition of the name of Holmes is not calculated to conceal the identity of the woman"); *Wiltshire v. Prince* (1830) 3 Hag. Ecc. 332, 334, 27 Digest 48, 162 E.R. 1176 ("both the man and the woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties"); *Tooth v. Barrow* (1854), 1 Ecc. and Ad. 371, 164 E.R. 214; *Dancer v. Dancer* (1948) 2 All E.R. 731; *Chipchase v. Chipchase*, (1941) 2 All E.R. 560. A

known by more than one surname, although at old English common law, one could have only one first—Christian— name which could be changed only at baptism, confirmation or royal decree.²² A person's "full" name usually includes a first and last name; middle names are not required or strictly part of a person's name in the sense that they must be used.²³ Courts do not deem prefixes and titles such as Ms., Mr., Miss, Mrs., or Dr., suffixes such as Jr. or Sr., or education degree initials part of a person's name.²⁴

Pursuant to the common law, people can change their names at will, without judicial proceedings. State name change statutes

"maiden" name could conceal or be used to conceal identity when the woman was no longer known by it. *Fendall v. Goldsmid* (1877), 2 P.D. 263.; *Allen v. Wood* (1834), 1 Bing. N.C. 81, 4 Moo. and S. 510, 3 L.J.C.P. 219, 131 E.R. 1020; *Parks v. Tolman*, 113 Mo. App. 14, 87 S.W. 576 (1905), although a "maiden name" is not per se an alias. *State v. Braxton*, 294 N.C. 446, 242 S.E.2d 769 (1978). As a criminal standard for the fraudulent use of a name, concealing one's identity in itself is constitutionally vague. *Esco v. State*, 43 Ala. App. 61, 179 So. 2d 766 (1965). See *United States v. Wasman*, 484 F. Supp. 54 (S.D. Fla. 1979) (adopting name to conceal being Jewish to trade with Arab merchants constitutes fraudulent name usage); *People v. Briggins*, 50 N.Y.2d 302, 406 N.E.2d 766, 428 N.Y.S.2d 909 (1980) (using assumed name to hide finances from wife not a fraudulent usage as to creditor).

22. Co. Litt. 3a; *Re Parrott* (1946) 1 All E.R. 321; *Personal Names*, 26 The Solicitors Journal 689 (Sept. 9, 1882); Lawyer, *The Legal Status of a Name*, 40 Cen L.J. 316 (1895). The old English rule has been eroded and considered no longer in effect by legal commentary. *Names and Arms, Change of*, 22 Halsb. L. Eng. 1211 (3d ed.); W.E. Lisle Benthon, *What's In a Name?* Justice of the Peace and Local Gov't Rev. 616 (Sept. 29, 1951); Vincent Powell-Smith, *Change of Name Problems*, The New L.J. 1027 (July 7, 1966). American courts have not carved out an exception to the common law right of name change to first names. *In re Faith's Application*, 22 N.J. Misc. 412, 39 A.2d 638 (1944); *Roberts v. Mosier*, 35 Okla. 691, 132 P. 678 (1913) (citing examples of Presidents Cleveland and Grant and others who changed first names); *Stevenson v. Ellisor*, 270 S.C. 560, 243 S.E.2d 445 (1978); Op. Att'y Gen. Ken. (May 14, 1974); Op. Att'y Gen. Wis. (March 4, 1976) (President Carter's first name a change, not a nickname). State legislatures in the U.S. are deleting the term "Christian" name from their statutes. *E.g.*, 1979 Wis. Laws 337 amending Wis. Stat. §§ 443.01(8), 446.02(2), 447.05(7), 447.08(7).

23. 57 Am. Jur. 2d *Name* § 4 (1971); 65 C.J.S. *Names* § 4; G.S. Arnold, *Personal Names*, 15 Yale L.J. 227, 228 (1905-06); Perays Morris, *The Middle Initial*, Dicta 361 (Nov.-Dec. 1960); *Turner v. Gregory*, 151 Mo. 100, 52 S.W. 234 (1899); *Imperial-Yumo Production v. Hunter*, 609 P.2d 1329, 1330-31 (Utah 1980). Generally courts give middle names or initials little legal significance. This approach, which is rooted in the common law recognition of only one Christian name, is not without exception.

24. 57 Am. Jur. 2d *Name* § 1; 65 C.J.S. *Names* § 3 (1966). "Mrs." is not part of a name and raises no presumption in law that the person using it is married. *Davis v. Roos*, 326 So. 2d 226 (Fla. Dist. Ct. App. 1976); *Carlton v. Phelan*, 100 Fla. 1164, 131 So. 117 (1930); *Hubbard v. State*, 123 Ga. App. 597, 181 S.E.2d 890 (1971); *Bank of America Nat. Trust and Savings Ass'n v. Reserve Life Ins. Co.*, 90 Ga. App. 332, 83 S.E.2d 66 (1954); *City of Camilla v. May*, 70 Ga. App. 136, 27 S.E.2d 777 (1943); *Guyton v. Young*, 84 Ga. App. 155, 65 S.E.2d 858 (1951); *Wrightsville and T.R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S.E. 691 (1911); *Brown v. Reinke*, 159 Minn. 458, 199 N.W. 235 (1924); *State ex rel. Rainey, M.D. v. Crowe*, 382 S.W.2d 38 (Mo. Ct. App. 1964); *In re Dengler*, 246 N.W.2d 758 (N.D. 1976); *Hamilton v. State*, 555 S.W.2d 724 (Tenn. 1977); *Walker v. Jackson*, 391 F. Supp. 1395 (E.D. Ark. 1975).

are meant to be in aid of that right, as optional means of making a record of a name change. In England, changing one's name is statutorily defined as "exercising a deed poll."²⁵

At common law no one has a property right to a personal name such that she can keep another from using it.²⁶ Consistent with the right to change one's name is the right not to change it at marriage as most women traditionally have done.²⁷ A woman has the right to discard her pre-marriage name by failing to use it; failure to use a name can lead to its extinction as a reliable means of

25. Enrollment of Deeds (Change of Name), Regulations 1949, S.I. 1949 No. 316 as amended by S.I. 1951 No. 377 and S.I. 1969 No. 1432; Olive Stone, *The Status of Women in Great Britain*, 20 Am. J. Comp. L. 592 (1972); Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947 (1910); *In re Snook*, 2 Hilt. Rep. 566 (N.Y. 1859); *In re Useldinger*, 35 Cal. App. 2d 723, 96 P.2d 959 (1939); *In re Ross*, 8 Cal. 2d 608, 67 P.2d 94 (1937); *noted in Discharge in Bankruptcy as Affecting Individual's Right to Change Name*, 26 Cal. L. Rev. 268 (1938); *In re Hauptly*, 263 Ind. 150, 312 N.E.2d 857 (1974); *Loser v. Plainfield Savings Bank*, 149 Iowa 672, 128 N.W. 1101 (1901); *In re Buyarsky*, 322 Mass. 335, 77 N.E.2d 216 (1948); *In re Merolevitz*, 320 Mass. 448, 70 N.E.2d 249 (1946); *In re Falcucci*, 355 Pa. 588, 50 A.2d 200 (1947); *Laf- lin and Rand Co. v. Steytler*, 146 Pa. 434, 23 A. 215 (1892).

26. Arnold, *supra* note 23; *Weingand v. Lorre*, 231 Cal. App. 2d 289, 41 Cal. Rptr. 778 (1964); George Cohen, *The Law Concerning Change of Personal Names*, 2 Conn. B.J. 110 (1928); *In re Falcucci*, 355 Pa. 588, 50 A.2d 200 (1947), *noted in Clark, Name Case of Falcucci To Frame*, 3 J. Mo. B. 80 (May, 1947); *DuBoulay v. DuBoulay* (1869) L.R. 2 P.C. 430; *Cowley v. Cowley* (1901) A.C. 450.

Accordingly, women have adopted names of men with whom they live. *Clark v. Clark*, 19 Kan. 522 (1878). A wife is entitled to adopt her husband's name but has no right to enjoin others from using the same despite personal displeasure or embarrassment. *O'Brien v. Eustice*, 198 Ill. App. 510, 19 N.E.2d 137 (1939); *Lowe v. Lowe*, 265 N.Y. 197, 192 N.E. 291 (1934); *Bauman v. Bauman*, 250 N.Y. 382, 165 N.E. 819 (1929); *Somberg v. Somberg*, 263 N.Y. 1, 188 N.E. 137 (1933). One court denied a minor son the right to enjoin another woman from using "Mrs." and his father's full name. *Bartholomew v. Workman*, 197 Okla. 267, 169 P.2d 1012 (1946). Another court denied a married woman the right to preclude the other woman from naming her nonmarital child with the woman's husband's surname. *In re M*, 91 N.J. Super. 296, 219 A.2d 906 (1966). While assumption of the man's name is evidence of an intent to hold herself out as his wife, courts do not require such assumption in a common law marriage. *State v. Durnam*, 49 Ohio App. 2d 231, 360 N.E.2d 743 (1976); *In re Glasco*, 619 S.W.2d 567 (Tex. Civ. App. 1981). *But see In re Linda Ann*, 126 Misc. 2d 43, 480 N.Y.S.2d 996 (Sup. Ct. 1984) in which a New York City trial court refused to grant an unmarried woman's petition for a court order changing her surname to that of her lover whom the court presumed was married to another woman although recognizing that pursuant to the common law no judicial proceeding is necessary to change a name.

27. Vera Brittain, *Surnames of Married Women*, 12 Equal Rts. 317 (Nov. 14, 1925); Stone, *supra* note 25, at 606; Note, *Bill 28—An Act to Amend the Change of Name Act*, 41 Sask. L. Rev. 177 (1976-77); *Cowley v. Cowley*, (1901) A.C. 450; *In re Fry Reynolds v. Denne* (1945), 1 Ch. 348; *The King v. Inhabitants of St. Faith's*, III Dow. and Ry. 348 (K.B. 1823), *discussed in* Helena Normanton, *The Institution of the Surname*, 12 Equal Rts. 30, 31 (March 7, 1925); Cecil Henry Ewen, *History of Surnames of the British Isles* 391-92 (1931); Rainey, *The Origins of English Surnames* 82-85 (1962); Leslie Gilbert Pine, *The Story of Surnames* 23 (1966); M. Turner-Samuels, *The Law of Married Women* (1957).

identification.²⁸

A person's right to use and change names under the common law does not depend upon one's right or marital status or sex. Men can change their names to those of their wives or to any other name. This custom is not uncommon at old English common law and has received some recent legal and social attention in the United States.²⁹ Clearly set forth in *Halsbury's Laws of England*,³⁰ this common law of personal names should by now be part of common legal knowledge.³¹

28. A woman can lose the right to use her birth name as her "true" name by nonusage. *Fendall v. Goldsmid*, (1877) 2 P.D. 263; *Allen v. Wood*, (1834) 1 Bing. N.C. 81, 4 Moo. and S. 510, 3 L.J.C.P. 219, 131 E.R. 1020; *Chipchase v. Chipchase*, (1941) 2 All E.R. 560.

29. Pine, *supra* note 27. Some state statutes provide for men to adopt their wives' names and hyphenate their names when they marry or divorce. *Supra* note 9. The Tennessee Supreme Court stated that a statute requiring a person to re-register within 90 days "after he changes his name by marriage or otherwise" is "equally susceptible of the construction that when either party to the civil contract of marriage elects to use the name of the other, the registration will be changed." *Dunn v. Palermo*, 522 S.W.2d 679, 680 (Tenn. 1975). Three attorneys general have issued opinions recognizing men's common law right to change their names because of marriage. Op. Att'y Gen. Wis. (Aug. 25, 1984); Op. Att'y Gen. Mich. (April 14, 1980); Op. Att'y Gen. Me. (April 4, 1978).

The modern man who changes his name to that of his wife currently receives media attention similar to, but somewhat less sympathetic than, that which women received a decade ago when they did not change theirs. Detroit Free Press columnist Nickie McWhirter commented: "So far . . . we haven't taken the next step. That would be for a man to trade his surname for his wife's. . . . I guess they won't do that, not until she is president of Seagram's anyway." Nickie McWhirter, *Next Play in the Name Game is for Him to Adopt Hers*, Detroit Free Press, June 11, 1982.

Without court orders men have experienced difficulty using their wife's names. Men's difficulties, however, are not comparable to the obstacles women experienced exercising their right to not change their names. See, e.g., Dave Gourevitch, *Double Standard Irks Spouse of Electrician*, Palm Beach Post, June 25, 1982 (man denied driver's license in new marital name). In contrast to the support his predecessors gave the issue of women's names, the Florida attorney general declined to intervene in this situation. He advised a state legislator that the correct agency must inquire in order to render an opinion on the issue. Letter to William G. Myers, Representative, from Jim Smith, Florida Attorney General (July 13, 1982) and to author (August 6, 1982).

30. *Husband and Wife Assumption by Wife of Husband's Name*, 22 Halsb. L. of Eng., § 1018 at 633 (4th ed. 1979).

31. "A woman is not legally obligated to assume her husband's name when she marries him," reads a trivia book. E.C. McKenzie, *Salted Peanuts*, A Fun-Filled Collection of 1800 Tantalizing Facts (1972). Most advice columnists have acknowledged the right. See, e.g., Abigail Van Buren advises addressing two surnamed couples "Mr. Peter Smith and Ms. Joan Jones." Dear Abby, *Faulty Invitations May Miss This Ms.*, Fairmont Sentinel, Dec. 5, 1982. The beleaguered Environmental Protection Agency head Anne Burford was criticized for changing her name when she married, thereby deflecting the adverse publicity against her. Susan Trausch, *New Name Stirs Brouhaha*, Boston Globe, March 3, 1983.

The law recognizes names as words³² which identify a person, the "designation or appellation used to distinguish one person from another."³³ Courts deem irrelevant the intrinsic or personal meaning people give to their names. The name "is not the person, but only a means of designating the person intended."³⁴ A name assists the state's interest in proper identification. As stated by the Pennsylvania attorney general, in interpreting state law requiring persons to vote in their "surname," a citizen must give her or his name

for the same reason that he or she must provide information as to height, color of hair and eyes, and date of birth: this is the means by which an identity is established, so that the applicant may be assured of the right to exercise the franchise, while the state may guard against any fraudulent exercise of that right.³⁵

A person's name in law is merely evidence of one's person, a symbol of one's identity. The term "legal" name, carelessly used in the United States as a registered inflexible name equivalent to a social security number and dependent upon one's marital, sex or birth status, is unknown to the common law. "[T]here is no such thing as a 'legal name' of an individual in the sense that he may not lawfully adopt or acquire another and lawfully do business under the substituted appellation" wrote the Iowa Supreme Court in 1901 in a frequently cited case.³⁶

32. A number is not a name. *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979), *appeal dismissed*, 446 U.S. 949 (1980); *In re Dengler*, 246 N.W.2d 758 (N.D. 1976) (number 1069 is not a "name"). *In re Ritchie III*, 159 Cal. App. 3d 1070, 206 Cal. Rptr. 239, (1984) (Numeral III is not a name, following the Dengler cases). See Thomas Lockney & Karl Ames, *Is 1069 a Name?*, 29 Names 1 (1981).

33. *Romans v. State*, 178 Md. 588, 596, 16 A.2d 642, 646 (1940).

34. *Emery v. Kipp*, 154 Cal. 83, 87, 97 P. 17, 19 (1908). "The meaning of the word constituting the name of a person is of no importance, for, considered as a name, it derives its whole significance from the fact that it is the mark or indicia by which he is known." *In re Snook*, 2 Hilt. Rep. 566, 566-67 (1859). The periodical, *Names*, published by the American Names Society, regularly contributes to the literature on the meaning and derivation of names which is beyond the scope of this discussion. See also Elsdon Smith, *The Story of Our Names* (1970) and *Smith v. United States Casualty Co.*, 197 N.Y. 420, 90 N.E. 947 (1910). The *Snook* and *Smith* cases relate most of the history of surnames discussed in legal commentary and judicial opinions.

35. Op. Att'y Gen. Pa. No. 72 (Oct. 25, 1973).

36. *Loser v. Plainfield Savings Bank*, 149 Iowa 672, 677, 128 N.W. 1101, 1103 (1910):

In the absence of any restrictive statute, it is the common-law right of a person to change his name, or he may by general usage or habit acquire a name notwithstanding it differs from the one given him in infancy. A man's name for all practical and legal purposes is the name by which he is known and called in the community where he lives and is best known.

An English law professor summarized the common law of names in 1972: "In Eng-

Just as English common law never required a married woman to adopt her husband's name, never has it required parents to name marital children with their fathers' names.³⁷ Nor does the common law require nonmarital children to bear their mothers' surnames. At common law a "bastard" had no name based on parentage, but was a "filius nullius"—a child of no one—and could gain a name only by becoming known by it.³⁸ By custom, however, because mothers were the identified parents and took the care, custody, and control of the children, the mothers named them, usually but not always with their own surnames.³⁹

Minors' names at English common law were established by usage and could be changed at will, just as adults' names could be changed.⁴⁰ Because parents had control of children, they generally

lish law, contrary to the law of most countries, there are no rules about legal names. The surname of any person, male or female, is the name by which he or she is generally known, provided that the name was not assumed for any fraudulent purpose." Stone, *supra* note 25, at 606.

37. Cf. *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977).

The California Supreme Court in *In re Schiffman* made the misleading statement that Henry VIII "required recordation of legitimate births in the name of the father. Thence the naming of children after the fathers became the custom in England." 28 Cal. 3d at 643, 620 P.2d at 580, 169 Cal. Rptr. at 920, citing Note, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 Utah L. Rev. 303, 305. The article asserts that Henry VIII caused a "record to be kept in every parish of the births, marriages, and deaths of the parish inhabitants, with legitimate births generally being recorded in the name of the father," *id.* at 305-06. The article cited *In re Snook*, 2 Hilt. 566, 571 (C.P.N.Y. City and County 1859), which advised that "a record was required to be kept in every parish of births, marriages and deaths. . . . [T]his recording of such events in every family, led to the use of one name to designate members of one family." However, until the Births and Deaths Registration Act of 1874 (37 and 38 Vict. c. 88) registration was voluntary according to the introductory notes to Halsbury's Laws of England. The 1874 Act referred to registering "the names, if any, by which it was registered is altered, or if it was registered without a name; when a name is given to it." Sec. 25, Name reads "In column 2 (Name, if any)." Current regulations read "(3) With respect to space 2 (Name and surname) the surname to be entered shall be the surname by which at the date of the registration of the birth it is intended that the child shall be known and, if a name is not given, the registrar shall enter the surname by a horizontal line." S.I. 1968, 2049 18(3). It is not an error of fact or substance per se to record a child in a name other than the father's. *D. v. B.* (1979) 1 All E.R. 92. See generally *In re Shipley*, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. Nassau, 1960); *In re Snook*, 2 Hilt. 566 (C.P.N.Y. Cty. 1859); *Smith v. United States Casualty Co.*, 197 N.Y. 420, 90 N.E. 947 (1910); *In re Falcucci*, 355 P. 588, 50 A.2d 200 (1947).

38. *W. Hooper, The Law of Illegitimacy* (1911); *Estate of Lund*, 26 Cal. 2d 472, 159 P.2d 643 (1945); *DuBoulay v. DuBoulay*, (1869) 2 L.R.-P.C. 430; *Shannon v. The People*, 5 Mich. 71 (1858).

39. *Sullivan v. Sullivan* (1818) 2 Hag. Con. 238, 161 Eng. Rep. 728, *aff'd*, (1819) 3 Phill. Ecc. 45, 161 Eng. Rep. 1253; *Wakefield v. MacKay* (1807) 1 Hag. Con. 394, 161 Eng. Rep. 593; *Wilson v. Brockley* (1810) 1 Phill. Ecc. 132, 161 Eng. Rep. 937.

40. The cases under the old English statute requiring publication of an impending marriage (marriage banns statute) reflect examples of young persons who have

caused them to be known by a certain name.⁴¹ By custom, marital children were initially named with their fathers' surnames and thereafter known by them.⁴² Children of married parents, however, sometimes took their mothers' surnames at birth or thereafter.⁴³ As the Supreme Judicial Court of Massachusetts stated in 1977 in the United States' most comprehensive opinion on the common law naming rights of adults and children, *Secretary of the Commonwealth v. City Clerk of Lowell*:⁴⁴ "[T]he common law principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child."⁴⁵

However, where parents have originally given a child the father's surname, the English courts have traditionally accorded men superior naming rights in disputes between the parents over *changing* the children's patronymic after divorce or separation.⁴⁶ They have based this right on the man's prerogative to decide his

been known by different surnames throughout their minority. *See supra* note 21. The right of minors to change their names (subject to their parents' authority) without statutory proceedings is recognized in American caselaw. *Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952); *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. Ct. App. 1979); *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *In re Natale*, 527 S.W.2d 402 (Mo. Ct. App. 1975); *Bruguier v. Bruguier*, 12 N.J. Super. 350, 79 A.2d 497 (1951). It must be noted that minors have never had a common law right to name themselves independent of their parents. The State only recognized that minors' names could be changed without judicial proceedings. A recent valuable law review note on *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982) did not emphasize this important distinction. Note, *Like Father, Like Child: the Rights of Parents in their Children's Surnames*, 70 Va. L. Rev. 1303, 1309 (1984)

41. *Supra* note 27 and accompanying text.

42. *Supra* note 30.

43. A prime example of this accepted variance in custom is Thomas Littleton, son of Elizabeth Littleton and her husband Thomas Wescott. Co. Litt. 3a. The Ontario Law Reform Commission, used this example in its comprehensive study of naming customs and laws in Ontario. Report on Changes of Name (1976); Mark Anthony Lower, *English Surnames: An Essay on Family Nomenclature, Historical, Etymological, and Humorous* 52 (1875); Rainey, *supra* note 27; Ewen, *supra* note 27.

44. 373 Mass. 178, 190, 366 N.E.2d 717, 725 (1977).

Courts and state attorney generals have accepted naming one's children as an incident of childrearing: "The naming of a child is a right and privilege belonging to the child's parents." *D'Ambrosio v. Rizzo*, 12 Mass. App. Ct. 926, 425 N.E.2d 369 (1981); *See also* *L.A.M. v. State*, 547 P.2d 827, 832 (Alaska 1976); *Parks v. Francis's Administrator*, 50 Vt. 626 (1878); *Hosmer v. Hosmer*, 611 S.W.2d 32 (Mo. Ct. App. 1980). The Attorney General of Connecticut wrote in 1975:

The natural parents, or parent, as the case may be, have legal responsibility for the children which may be terminated only after certain procedures and findings are followed and made. . . . Until such time, the parents have the prerogatives as well as the responsibilities and duties which devolved upon them. One of the prerogatives is naming the child.

Op. Att'y Gen. Conn. 5 (Jan. 23, 1975).

45. 373 Mass. 178, 190, 366 N.E.2d 717, 725 (1977).

46. *E.g.*, *W. v. A.* (1981) 2 W.L.R. 124, noted in Note, *Change of Child's Name*,

children's names, and the supposed best interests of the children, and not on a factual or legal presumption that minors should not change their names at all during their childhood.

B. *Erosion of the Common Law*

Several states, in various contexts, have eroded the common law right to name children.⁴⁷ A few states have limited parents' rights in naming marital children on their birth certificates. At the beginning of the 1970s only Hawaii and North Carolina had statutes requiring the father's name to be given to newborn marital children. During the 1970s Florida, Louisiana and New Hampshire passed similar laws. All of these statutes have been invalidated as unconstitutional⁴⁸ or repealed and replaced.⁴⁹

Twelve states have passed statutes requiring that the mother's name be given newborn nonmarital children on their birth certificates absent an acknowledgement or determination of paternity or legitimation.⁵⁰ Three states statutorily mandate that

97 Law Q. Rev. 197 (1981); Re T (1963) 1 Ch. 238; Evelyn Ellis, *The Choice of Children's Surnames*, 9 Anglo-Am. L. Rev. 92 (1980).

47. See *infra* notes 102-113 and accompanying text.

48. *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979), declared Hawaii's statute an unconstitutional infringement on parental liberty. A federal district court likewise invalidated North Carolina's statute as an unconstitutional infringement on parents' right to privacy. *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981). This court also noted that the statute created a classification on the basis of gender and birth status, and granted summary judgment to the plaintiffs. *Id.* Florida's statute was invalidated as an unconstitutional intrusion on the parents' "constitutionally protected right to choose the name of their child." *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1982).

49. Louisiana replaced its statute in July, 1983 with a provision which limits parental choices to the father's name, the mother's "maiden" name or a combination thereof and gives the husband veto power over the latter two options by requiring both parents' consent. La. Rev. Stat. Ann. § 40:34(1)(a)(iii) (West Supp. 1985). A recent attempt was made to revise this statute. See *supra*, note 19; *infra*, note 52. North Carolina replaced its statute in 1983 with a provision that "[t]he surname of the child shall be the same as that of the husband, except that upon agreement of the mother and father . . . any surname may be chosen." N.C. Gen. Stat. § 130A-101(e) (Supp. 1983). The New Hampshire legislature replaced its statute in 1979 with a law limiting parental naming options to "either the father or the mother or any combination thereof." N.H. Rev. Stat. Ann. § 126:6, V(a) (repealed 1983). In June, 1983 New Hampshire removed these limitations and amended the statute to read that "[t]he surname of the child shall be any name chosen by the parents." N.H. Rev. Stat. Ann. § 126:6-a, I(a) (Supp. 1983). In case of separation or divorce at the time of birth, "the choice of surname rests with the parent who has actual custody following birth." *Id.*

50. D.C. Code Ann. § 6-205(e)(5) (Supp. 1984); Fla. Stat. Ann. § 382.16(5)(e) (West Supp. 1983); Ga. Code Ann. § 31-10-9(e)(5) (Supp. 1984); Hawaii Rev. Stat. § 574-3 (Supp. 1984); Ind. Code Ann. § 16-1-16-15 (Burns 1983); Ky. Rev. Stat. Ann. § 213.050(1) (1982); La. Rev. Stat. Ann. § 40-34(1)(a)(iii) (West 1985); N.D. Cent. Code § 23-02.1-13(6) (1983); Ohio Rev. Code Ann. § 3705.14 (Page 1980); Tenn. Code Ann. § 68-3-305(b) (1983); Wyo. Stat. Ann. § 35-1-411 (1977). A new law in North

upon a determination or acknowledgement of paternity or legitimation the surname on a child's birth certificate automatically becomes the same as the father's, or that the father has the right to choose the name.⁵¹

Louisiana,⁵² Nebraska,⁵³ and Tennessee⁵⁴ currently restrict marital newborn children's surnames on their certificates to those of the mother, father or a combination thereof. Several states have regulations to the same effect.⁵⁵ Similarly, nine states statutorily limit the surnames given to nonmarital children on their

Carolina recognizes the father's right to participate in the naming, but requires the mother's name be given a nonmarital child in cases of disagreement N C Gen Stat § 130A-101(f) (Supp 1983) For a statutory compilation, see Note, *The Controversy Over Children's Surnames Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 Utah L Rev 303, 335-45 The author's categorization of changes in birth certificate records as a "change of name" is not accurate Whether or not a change in the name on a birth certificate amounts to a "change of name" depends on the age of the child when the birth certificate is changed and the name by which the child has been known In considering the names of infants or very young children who do not yet know their names, the courts give inconsistent attention to the issue of whether a determination of the child's name is really a *change* at such an age See *infra* notes 114-148 and accompanying text

51 Indiana, Kentucky and South Carolina still have such laws Statutes in Alabama, North Carolina and South Dakota have been invalidated as unconstitutional *Roe v Conn*, 417 F Supp 769 (M D Ala 1976), *Jones v McDowell*, 53 N C App 434, 281 S E 2d 192 (1981), *Boelter v Blair*, No Civ 81-4217 (S D S D April 21, 1982) (Judgment) The Kentucky statutes are currently being reviewed for revision Conversation with John H Walker, Counsel to the Kentucky Department For Human Resources (June 7, 1985)

52 La Rev Stat Ann § 40 34(A)(a)(1)(iii) (West 1984)

The surnames of the child shall be the surname of the husband of the mother if he was married to the mother at the time of conception and birth of the child or had not been legally divorced from the mother of the child for more than three hundred days prior to the birth of the child, or, if both the husband and mother agree, the surname of the child may be the maiden name of the mother or a combination of the surnames of the husband and the maiden name of the mother

The defeated bill to correct this statute provided "The surname of the child shall be the surname agreed upon by the mother and the husband of the mother" S Bill No 227 (1985)

53 Neb Rev Stat § 71-640 01(1) (1981)

[T]he surname of the child shall be entered on the certificate as being (a) the same as that of the husband, unless paternity has been determined otherwise by a court of competent jurisdiction, (b) the surname of the mother, (c) the maiden surname of the mother, or (d) the hyphenated surname of both parents

54 Tenn Code Ann § 68-3-305(a) (1983)

The surname of the child shall be entered on the certificate as that of the natural father, except that where the mother though married has retained her married surname, then on sworn application of both parents, the child's surname to be entered on the birth certificate may be the maiden surname of the child's mother, or both surnames as the parents mutually agree

55 See, e.g., Sec 4(e)(1) Ark Rules and Regulations Pertaining to Vital Records (1981), N J Admin Code tit 8 § 2-1 1(a)(1)(u) (1975) (New Jersey Department of Health Rules Recording and/or Correcting Original Birth Certificate of a

birth certificates to the mother's, the father's, or a combination of both upon their joint request following acknowledgement or determination of paternity or legitimation.⁵⁶

The consequence of this erosion of the common law has been to generate a new type of litigation, that by parents against the state instead of against each other.

C. Contexts of Litigation

Litigation over children's names generally arises between separated or divorced parents over the change of the child's name from the father's name. The language in United States cases concerning children bearing the paternal name and regarding the father's "natural," "primary," "time-honored," "legal" or "protectible" right⁵⁷ to name marital children derives from disputes of this kind, not from any state requirements that children bear certain names. No reported case involves a parental dispute over naming children in an ongoing marriage, either at birth or thereafter.⁵⁸

Child Born In or Out of Wedlock); Sec. 1-311(I)(B) (1982) Oklahoma Rules and Regulations Governing Vital Statistics Registration of Birth Certificates.

56. *E.g.*, D.C. Code Ann. § 6-205(e)(3) (Supp. 1984); Fla. Stat. Ann. § 382.16(5)(c) (West Supp. 1983); Hawaii Rev. Stat. § 574-2 (Supp. 1984); Neb. Rev. Stat. § 71-640.01(2) (1981); N.H. Rev. Stat. Ann. § 126:6-a(II)(a) and (IV) (1983); Ohio Rev. Code Ann. § 3705.14 (Page 1980); S.D. Codified Laws Ann. § 34-25-15 (Supp. 1984); Tenn. Code Ann. § 68-3-305(b) (1983); Va. Code § 32.1-269(D) (Supp. 1984); Wyo. Stat. Ann. § 35-1-411(d) (1977).

57. *See generally In re Tubbs*, 620 P.2d 384 (Okla. 1980); *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974); *Application of Lone*, 134 N.J. Super. 213, 338 A.2d 883 (1975). A trial court in New Jersey recently refused to follow the *Lone* reasoning in *In re Rossell*, 196 N.J. Super. 109, 481 A.2d 602, 605 (1984).

The principle which it [*Lone*] espouses denies equality. The right of the father to have his child bear his name is no greater than the right of the mother to have her child bear her name. The deference which *Lone* accords the father is a deference rooted in an antiquity.

58. A singular case involved a child who had always born her mother's birth given surname. In a divorce action the trial court, on its own motion, referred to the child by the husband's surname. The father, however, was not attempting to change the child's name and the appellate court said that the lower court's reference did not operate to change the child's surname. *In re Ramirez*, 31 Or. App. 959, 571 P.2d 1280 (1977).

As head of the household under the common law, the father in an ongoing marriage probably would have been judged to have the primary right of naming—first, middle and last names—over the mother. *See Kathleen A. Ryan Carlsson, Surnames of Women and Legitimate Children*, 17 N.Y.L.F. 852 (1971).

At common law the father had absolute control and custody of his marital children after divorce. *Herma Hill Kay, Sex-Based Discrimination: Text, Cases and Materials* 299 (1981). *Commonwealth* recognized the father's absolute control by citing cases in which fathers contracted with third persons for money in exchange for naming their children for them. 373 Mass. 178, 366 N.E.2d 717 (1977). *Gardner v. Denison*, 217 Mass. 492, 105 N.E. 359 (1914); *Eaton v. Libbey*, 165 Mass. 218, 42

Courts would have certain jurisdiction to entertain disputes over children's names in ongoing marriages in two contexts: 1) statutory name change proceedings, probably in a state not requiring both parents to petition for consent to the change, or 2) actions against the state for recognizing one parent's choice of name over the other's for driving, school registration, or the like. Most likely courts will discuss the relative rights of parents in ongoing marriages to name infants and older children in cases between divorced parents who have legal and actual joint custody following divorce.⁵⁹

Recent litigation has, additionally, arisen in the context of parents challenging statutory or other state requirements that they name their children in a particular way at birth or thereafter.⁶⁰ Statutes recognizing a superior naming right in the father generate litigation by women against the state.⁶¹

D. Developments of the 1970s and Early 1980s

To plan legal action and strategy for the next decade it is necessary to articulate the precise extent of women's legal right to name their children. Summarizing the advances made to date acknowledges our history and sets the stage for an evaluation of our future. The last several years have seen the following recognition

N.E. 1127 (1896). There is, however, no case on the issue of a parental dispute in an ongoing marriage.

Several of the earliest state attorney general opinions state that a father's change of name does not automatically change his children's names absent their usage of the same. Op. Att'y Gen. Cal. (Sept. 25, 1969); Op. Att'y Gen. Cal. (Nov. 26, 1943); Op. Att'y Gen. Mo. (May 15, 1951); Op. Att'y Gen. Mo. (March 22, 1951). Some state name change statutes have provided that a change of name of a man changes his wife's and children's names also. Vermont repealed the country's last such statute in 1979. Vt. Stat. Ann. tit. 15, § 814 (1974), *repealed by* 1979 Vt. Acts, No. 142 (Adj. Sess.), Sec. 26.

As a general rule, absent criminal action or child abuse or neglect, the state does not interfere with ongoing marriages and the rearing of children. See *generally* Santosky v. Kramer, 455 U.S. 745 (1982); Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); Dike v. School Board of Orange County, 650 F.2d 783, 786 (5th Cir. 1981).

59. In a recent decision the Minnesota Court of Appeals treated a situation involving joint legal custody in which physical custody was with the mother no differently than if the mother had sole legal custody. Young v. Young, 356 N.W.2d 825 (Minn. Ct. App. 1984).

60. See *infra* notes 81-96 and accompanying text.

61. See, e.g., Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981). The Louisiana, North Carolina and Tennessee birth certificate statutes which require the father's name be given a newborn marital child on its birth certificate unless the father agrees otherwise are certain to create litigation which could be destined for Supreme Court review within the next decade if they are not repealed or revised. See *supra* notes 52-54.

of the rights of parents to name their marital and nonmarital children:

1. Courts and state legislatures, attorneys general and registrars of vital statistics have generally recognized that married parents have the common law right to name their newborn children any surname they choose.⁶²

2. Courts and state attorneys general and registrars of vital statistics have generally recognized that, absent a statute to the contrary, unmarried women have the right to name their newborn children either as a right superior to the father's or in the absence

62. The highest courts of two states have recognized the common law right of parents to name their children with any surname they wish. *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977); *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976). On remand, the Florida Department of Health and Rehabilitative Services determined that a statute requiring the father's surname on its birth certificate encompassed a hyphenated name including the mother's surname. *Rice v. Department of Health and Rehabil. Services*, 386 So. 2d 844 (Fla. Dist. Ct. App. 1980) (Case No. 80-1674) (*on remand*, Recommended Order and Findings of Fact of Div. of Administrative Hearings, Dec. 31, 1980. Final order, Jan. 13, 1981). Prior to the passage of the statute the Florida Attorney General had ruled that parents had the right to give their children any surname. *Op. Att'y Gen. Fla. No. 076-235* (Dec. 21, 1976). The present statute was invalidated in 1982. *Sydney v. Pingree*, 564 F. Supp. 412 (S.D. Fla. 1982). Numerous state attorney generals have recognized this common law right. *Op. Att'y Gen. Alaska* (May 5, 1976); *Op. Att'y Gen. Conn.* (Jan. 23, 1975); *Op. Att'y Gen. Me.* (Aug. 18, 1976; March 22, 1977); *Op. Att'y Gen. Md.* (Nov. 9, 1978); *Op. Att'y Gen. Mass.* (Jan. 24, 1974); *Op. Att'y Gen. Mich.* (April 14, 1980); *Op. Att'y Gen. Mo.* (May 1, 1953), reaffirmed by *Mo. Att'y Gen.* June 6, 1974; *Op. Att'y Gen. Vt.* No. 81-75 (March 10, 1975); 63 *Op. Att'y Gen. Wis.* 501 (Oct. 7, 1974).

Several state health agencies expressly recognize this parental right and do not require parents to choose a specific surname, e.g., "Illinois law does not specify what name a child shall be given when a birth record is prepared. Children of married or unmarried parents may be given any surname the parent or parents request." Letter from Aaron Bengelison, Deputy State Registrar, to author (Feb. 3, 1982). "Iowa law does not specify as to, between two parents, who has the right to determine surname for the child shall control. If parents disagree, it would seem that the name provided on the child's birth certificate would control unless and until that name is changed pursuant to a court order." Letter from Ass't Attorney General Jeanine Freeman to author (April 19, 1982). Mich. Comp. Laws Ann. § 333.2824(1) (West 1980) provides that "the surname of the child [born to married parents] shall be registered as designated by the child's parents." N.H. Rev. Stat. Ann. § 126:6-(a)(I)(a) (1983) reads: "The surname of the child shall be any name chosen by the parents. . . ." S.C. Code Ann. vol. 24A, R. 61-19 8(g)(1) (Law. Co-op. 1982) reads: "The child's surname shall be entered on the certificate as designated by the parents." Pennsylvania's published regulation, 28 Pa. Code § 1.7(a) (1985) reads: "The designation of a child's name, including surname, is the right of the child's parents. Thus, a child's surname . . . may be the surname of either or both of the child's parents, a surname formed by combining the surname of the parents in hyphenated or other form, or a name which bears no relationship to the surname of either parent."

of an objection by an acknowledged father.⁶³

3. State registrars and health officials for the most part abide by the general rule of law that in the absence of a specific statute to the contrary parents have the mutual right to name their newborn marital children with any surname.⁶⁴ These officials also recognize an unmarried women's right to name newborn nonmarital children with any surname on their birth certificates.⁶⁵

63. *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976); *Secretary of Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977).

Several state attorney generals have recognized the common law naming rights of unmarried women. *Op. Att'y Gen. Conn.* (Jan. 23, 1975); *Op. Att'y Gen. Me.* (April 8, 1977); *Op. Atty. Gen. Me.* (Feb. 23, 1978); 63 *Att'y Gen. Md.* 70 (1978); *Op. Att'y Gen. Pa.* No. 75-8 (Feb. 19, 1975); *Op. Att'y Gen. Tex.* No. H-1078 (Oct. 26, 1977); *Op. Att'y Gen. Vt.* No. 81-75 (March 10, 1975); 63 *Op. Att'y Gen. Wis.* 501 (1974). *Op. Att'y Gen. Mo.* (May 1, 1953) was reaffirmed by the Missouri Attorney General by opinion June 6, 1974. Statutes giving a father the right to name a child upon legitimation or determination of paternity have been successfully challenged in Alabama, North Carolina and South Dakota. *See supra* note 51.

64. Some registrars, however, convey to citizens their views of how parents should name children.

There are no restrictions on the bestowing of surnames of children born in Missouri. However, our experience has been that when a surname other than that of the father's is bestowed upon the issue of a legitimate marriage problems with the record result for the parents and child. . . . The mother of a child born out of lawful wedlock may bestow upon the child any surname that she chooses. Again, this frequently causes problems for if she applies for public assistance, she usually furnishes the agency with a different surname which makes it extremely difficult to identify the child's record so that the child may qualify for any benefits that might be available.

Letter from Charles L. Bell, Director, Bureau of Vital Statistics, Mo. Dept. of Social Services, Division of Health to author (Jan. 22, 1982).

65. Several state health agencies expressly recognize this parental right of the mother and do not require her to choose a specific name. *E.g.*, 24A S.C. Code Ann. Reg. 61-19(8)(g)(2) (Law. Co-op. 1983) ("In any case in which the mother was not married either at the time of birth or conception and there is no paternity acknowledgment . . . the surname of the child shall be entered as designated by the mother.").

"In the case of a child born out-of-wedlock, the mother may choose *any* name she wishes and that name is entered on the child's birth certificate." Letter from Muriel E. Cedenio, Iowa State Department of Health, to author (Feb. 18, 1982).

Mich. Comp. Laws Ann. § 333.2824 (West 1980) provides that, if the father is named, at the consent of the mother and father, the name is chosen by both parents. If the father is named as a result of a paternity suit as when a father is not named at all, "[t]he surname of the child shall be entered on the certificate of birth pursuant to the designation of the child's mother."

"Mothers in Nevada, are allowed to name their child whatever they wish." Letter from Mary Howard, Management Ass't, Nevada State Division of Health to author (Feb. 23, 1982).

See supra note 63 for the two state court decisions recognizing women's common law rights in naming nonmarital children.

Several states operate pursuant to administrative regulations specifying what names shall be given newborns. The validity of these regulations depends on the states. Statutes prescribe names; record keepers do not. Sidney Norton, *Legal Aspects of Illegitimacy for the Registrar*, 12 Md. L. Rev. 181 (1951).

4. Wherever challenged, statutory requirements that either a marital or nonmarital child bear its father's surname or its father's choice of surname on its birth certificate at birth⁶⁶ after acknowledgement or determination of paternity,⁶⁷ or legitimation⁶⁸ have been invalidated as unconstitutional.

5. In several of the appellate cases involving the naming of marital children at birth or in their first few years where the parents disagree and the mother, who usually uses her birth given surname, has custody, the courts have rejected the traditional superior naming right of the father and have awarded the naming right to the custodial mother in one of three ways: 1) by declining jurisdiction, 2) by a direct ruling, or 3) by remanding for a determination of the child's best interests.⁶⁹

6. Courts have moved in the direction of recognizing new rights of men to name nonmarital children.⁷⁰ As custodial parents of nonmarital children, women, however, usually maintain their right to determine their children's names at least when the children have been given a non-paternal name on their birth certificates or in early infancy.⁷¹

66 *Sydney v Pingree*, 564 F Supp 412 (S D Fla 1982), *O'Brien v Tilson*, 523 F Supp 494 (E D N C 1981), *Jech v Burch*, 466 F Supp 714 (D Hawaii 1979)

67 A statute requiring that a child bear the patronymic after acknowledgment or determination of paternity was invalidated in *Boelter v Blair*, No Civ 81-4217 (S D S D April 21, 1982) (Judgment)

68 *Roe v Conn*, 417 F Supp 769 (M D Ala 1976), *Jones v McDowell*, 53 N C App 434, 281 S E 2d 192 (1981)

69 *In re Schiffman*, 28 Cal 3d 640, 620 P 2d 579, 169 Cal Rptr 918 (1980), *In re Nguyen*, 684 P 2d 258 (Colo App 1983), *cert denied*, 105 S Ct 785 (1985), *Blasi v Blasi*, 648 S W 2d 80 (Ky 1983) (divorce court refused to exercise jurisdiction to order mother to change infant's name back to father's by a statutory name change), *Webber v Parker*, 167 So 2d 519 (La Ct App 1964), *writ refused*, 264 La 886, 168 So 2d 269 (1964) (dispute over given names), *Jacobs v Jacobs*, 309 N W 2d 303 (Minn 1981), *Cohee v Cohee*, 210 Neb 855, 317 N W 2d 381 (1982) (father's choice honored—hyphenated name with his name first), *In re Schidlmeier*, No J 27018-85, slip op (Pa Super Aug 9, 1985), *In re M L P*, 621 S W 2d 430 (Tex Civ App 1981), *Hurta v Hurta*, 25 Wash App 95, 605 P 2d 1278 (1979) *In Laks v Laks*, 25 Ariz App 58, 540 P 2d 1277 (1975) the court stated in dicta that parents have equal rights to name marital children at birth. The court did not indicate whether these rights exist within or without an ongoing marriage

70 *In re Schiffman*, 28 Cal 3d 640, 620 P 2d 579, 169 Cal Rptr 918 (1980) (citing *Donald J v Evna M*, 81 Cal App 3d 929, 147 Cal Rptr 15 (1978)), *Jacobs v Jacobs*, 309 N W 2d 303 (Minn 1981) (equal naming right at birth), *Kirksey v Abbott*, 591 S W 2d 751 (Mo Ct App 1979), *Hardy v Hardy*, 269 Md App 412, 306 A 2d 244 (1973) (framing the father's right as an interested party with information pertaining to the child's interests) *In Kirksey*, 591 S W 2d at 752, the court stated "Neither parent has an absolute right for the child to bear his or her name." The Massachusetts Supreme Court did not explain whether or not the distinction between wed and unwed fathers was significant in a factually unclear setting *Fuss v Fuss*, 371 Mass 64, 368 N E 2d 271 (1977)

71 *Sullivan v McGaw*, 134 Ill App 3d 455, 480 N E 2d 1283 (1985), *In re*

Thus, wherever married parents are in agreement or there is a statute requiring that a marital child be given its father's surname or choice of surname on its birth certificate, parents suing jointly have prevailed in *all* challenges to mandatory state requirements. Courts hold that the requirements interfere with parental liberty and privacy to rear children and discriminate on the basis of sex or birth status.⁷² Only one reported case has challenged a statute requiring the mother's name to be given a newborn ^{non}marital child on its birth certificate. The Indiana Supreme Court rejected the challenge in a one-paragraph opinion, but a long dissent reasoned that the statute was unconstitutional.⁷³ Where children are newborn or very young (under three), until 1982 courts were upholding custodial mothers' judgments as to their children's names. The courts in all such cases nevertheless consistently articulated that women and men have equal rights in naming marital children at birth. Since 1982,⁷⁴ however, courts have retreated from award-

G.L.A., 430 N.E.2d 433 (Ind. Ct. App. 1982). *G.L.A.* overruled a decision of the same court rendered a year previously. *D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980). *D.R.S.* awarded the primary naming right to the father as if he had been a married father. *G.L.A.* was litigated expressly to undo the bad law articulated in *D.R.S.* Although *D.R.S.* was on appeal when *G.L.A.* was pending, the attorneys litigating *G.L.A.* did not know about the case until the decision appeared in the local newspapers. The same appellate division decided the two cases. It went as far as any court could be expected to in rectifying its own mistake of only a few months before. It is too early in litigation to evaluate if mothers of nonmarital children are maintaining their naming right because they are the custodial parents. Courts have always held that third persons have no legal interest in statutory name changes of nonmarital children. *In re Dunston*, 18 N.C. App. 647, 197 S.E.2d 560 (1973); *Winkenhof v. Griffin*, 511 S.W.2d 216 (Ky. Ct. App. 1974); *In re Toelkes*, 97 Idaho 406, 545 P.2d 1012 (1976).

72. See *infra* notes 81-96 and accompanying text.

73. In *Doe v. Hancock County Board of Health*, 436 N.E.2d 791 (Ind. 1982), the Indiana Supreme Court dismissed a challenge to the statute requiring the mother's name to be given to a nonmarital child on its birth certificate. The state moved to dismiss because the Indiana Court of Appeals refused to accept its late-filed brief. The Supreme Court granted the State's motion. Review beyond rehearing was not sought because of the procedural posture of the case and because the parties *intermarried*. An Indiana law, the constitutionality of which is yet to be tested, mandatorily gave the parents the relief they sought as an automatic result of their marriage—the father's name for the child. A long dissent reviewed the case on the merits and concluded that the state cannot constitutionally interfere with unwed parents' right to name their children.

Lawsuits against mother's name requirements are difficult to locate for three reasons: 1) the parents intermarry and states will then change the children's birth certificate names, 2) the mother or both parents want the mother's name and/or 3) the mother or parents do not know where to get legal assistance. That new birth certificates thus issued do not appear as an original marital child's birth certificate has been ruled to not constitute discrimination on the basis of birth status. *Dorian v. Johnson*, 297 N.W.2d 175 (S.D. 1980). Compare *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976).

74. In *re Saxton*, 309 N.W.2d 298 (Minn. 1981), cert. denied, 455 U.S. 1034 (1982). *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982).

ing women the right to name infant children over fathers' objections. They have almost unanimously upheld the demands of divorced fathers to have children bear the patronymic.⁷⁵

The naming of children is necessarily an orchestration of the relative rights of parents against the state and each other.⁷⁶ No state has ever required a child to bear a certain surname simply because of its birth status or parentage. Until very recently, *all* states have expressly or indirectly accepted the primary right of fathers over mothers to determine marital children's names when a dispute between the parents arises. They have accepted a presumption that children are best off keeping their father's surnames if fathers want them to use them.⁷⁷ The recent at-birth

75. *In re Presson*, 102 Ill. 2d 303, 80 Ill. Dec. 294, 465 N.E.2d 85 (1984); *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984); *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984); *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 492 A.2d 303 (1985); *Overton v. Overton*, 674 P.2d 1089 (Mont. 1983); *Cohan v. Cunningham*, 104 A.D.2d 716, 480 N.Y.S.2d 656 (1984); *In re Newcomb*, 15 Ohio App. 3d 107, 472 N.E.2d 1142 (1984); *Brown v. Carroll*, 683 S.W.2d 61 (Tex. Civ. App. 1984). *But see In re Goldstein*, 104 A.D.2d 616, 479 N.Y.S.2d 385 (N.Y. App. 1984); compare *In re Fletcher*, 144 Vt. 419, 468 A.2d 627 (1984). *Ex parte Stone*, 328 S.E.2d 346 (S.C. 1985). Trial courts have also moved in the direction of sustaining the male naming power. *In re Petras*, 123 Misc. 2d 665 (Civ. Ct. N.Y. 1984).

76. The yardstick used to measure these rights is supposedly the children's best interests. See Annot., *Rights and Remedies of Parents Inter Se With Respect to the Names of Their Children*, 92 A.L.R.3d 1091 (1979). Note, *Domestic Relations: Change of Minor's Surname: Parental Rights in Minor's Surname: Sobel v. Sobel*, 46 N.J. Super. 284, 134 A.2d 598 (Ch. 1957); *Marshall v. Marshall*, 93 So. 2d 822 (Miss. 1957), 44 Cornell L.Q. 144 (1958).

77. Arkansas: *Norton v. Norton*, 268 Ark. 791, 595 S.W.2d 709 (Ark. Ct. App. 1980); *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978); *Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952); Arizona: *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975); California: see cases cited in *In re Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980); Delaware: *Degerberg v. McCormick*, 41 Del. Ch. 46, 187 A.2d 436 (1963); *Degerberg v. McCormick*, 40 Del. Ch. 471, 184 A.2d 468 (1962); District of Columbia: *Nellis v. Pressman*, 282 A.2d 539 (D.C. 1971), *cert. denied*, 405 U.S. 975 (1972); Florida: *Arnett v. Matthews*, 259 So. 2d 535 (Fla. Dist. Ct. App. 1972); *Lazow v. Lazow*, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962); Georgia: *Doe v. Roe*, 235 Ga. 318, 219 S.E.2d 700 (1975); Illinois: *In re Presson*, 116 Ill. App. 3d 458, 71 Ill. Dec. 816, 451 N.E.2d 970 (1984); *In re Omelson*, 112 Ill. App. 3d 725, 445 N.E.2d 951 (1983); *Weinert v. Weinert*, 105 Ill. App. 3d 56, 433 N.E.2d 1158 (1982); Indiana: *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984); Iowa: *Green v. Sherman*, 173 N.W.2d 843 (Iowa 1970); Kentucky: *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. Ct. App. 1974); Maryland: *West v. Wright*, 263 Md. 297, 283 A.2d 401 (1971); *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 492 A.2d 303 (1985); Massachusetts: *Margolis v. Margolis*, 338 Mass. 416, 155 N.E.2d 177 (1959); *Mark v. Kahn*, 333 Mass. 517, 131 N.E.2d 758 (1956); Minnesota: *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974); *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984); Mississippi: *Marshall v. Marshall*, 230 Miss. 719, 93 So. 2d 822 (1957); Montana: *Firman v. Firman*, 187 Mont. 465, 610 P.2d 178 (1980); Nebraska: *In re Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977); New Jersey: *In re Lone*, 134 N.J. Super. 213, 338 A.2d 883 (1975); *W. v. H.*, 103 N.J. Super. 24, 246 A.2d 501 (Ch. Div. 1968); *Sobel v. Sobel*, 46 N.J. Super. 284, 134 A.2d 598 (Ch. Div. 1957); New

naming cases were beginning to erode this right and presumption, but to date only the California Supreme Court, in the landmark case *In re Schiffman*,⁷⁸ has expressly rejected this male power and overturned all the state's precedent⁷⁹ based on it. In the cases involving older children, women prevail rarely and then only when they succeed in rebutting the superior right of the father to control the naming of children, usually where the children have already been known by the name selected by the mother and/or children.⁸⁰ Women have made some gains in naming children, but

York *Cohan v Cunningham*, 104 A D 2d 716, 480 N Y S 2d 656 (App Div 1984), *In re Goldstein*, 104 A D 616, 479 N Y S 2d 385 (1984), (trial level cases) *In re Determan*, N J L F 13 (Sup Ct Nassau Co Feb 23, 1982), *In re Good*, 8 F L R 2377 (Sup Ct Queen's Co April 15, 1982) and cases cited therein, *In re Cohn*, 181 Misc 1021, 50 N Y S 2d 278 (Sup Ct N Y Co 1943), *In re Hinrichs*, 41 Misc 2d 422 (Sup Ct Westchester 1964), *In re Yessmer*, 61 Misc 2d 174, 304 N Y S 2d 901 (N Y City Kings County 1969), *In re Fein*, 51 Misc 2d 1012, 274 N Y S 2d 547 (Civ Ct N Y 1966), *In re Epstein*, 121 Misc 151, 200 N Y S 897 (City Ct N Y 1923), Ohio *In re Newcomb*, 15 Ohio App 107, 472 N E 2d 1142 (1984), *In re Russek*, 38 Ohio App 2d 45, 312 N E 2d 536 (1974), *Dolgin v Dolgin*, 1 Ohio App 2d 430, 205 N E 2d 106 (1965), *Logan v Logan*, 111 Ohio App 534, 170 N E 2d 922 (1960), *Kay v Bell*, 95 Ohio App 520, 121 N E 2d 206 (1953), *Kay v Kay*, 65 Ohio Abst. 472, 112 N E 2d 562 (1953), Oklahoma *In re Tubbs*, 620 P 2d 384 (Okla 1980), *Reed v Reed*, 338 P 2d 350 (Okla 1959), Oregon *Walberg v Walberg*, 22 Or App 118, 538 P 2d 96 (1975), *Ouellette v Ouellette*, 245 Or 138, 420 P 2d 631 (1966), Pennsylvania *In re Christjohn*, 286 Pa Super 112, 429 A 2d 597 (1981), *In re Fink*, 75 Pa D and C 2d 234 (C P Lycoming 1976), *Rothstein's Petition*, 28 Pa D and C 2d 665 (Com Pleas Mont 1962), *Rounick's Petition*, 47 Pa D and C 71 (Com Pleas Mont 1962), Tennessee *Pendray v Pendray*, 35 Tenn App 284, 245 S W 2d 204 (1951), Texas *Brown v Carroll*, 683 S W 2d 61 (Tex Civ App 1984), *In re Baird*, 610 S W 2d 252 (Tex Civ App 1980), *Jochec v Jochec*, No 12965 (Tex Civ App 1979) (unpublished), *Bennett v Northcutt*, 544 S W 2d 703 (Tex Civ App 1976), *Eschrich v Williamson*, 475 S W 2d 380 (Tex Civ App 1972), *Newman v King*, 433 S W 2d 420 (Tex 1968), *Plass v Leithold*, 381 S W 2d 580 (Tex Civ App 1964), *Ex parte Taylor*, 322 S W 2d 309 (Tex Civ App 1959), Virginia *Flowers v Cain*, 218 Va 324, 237 S E 2d 111 (1977), West Virginia *In re Harris*, 236 S E 2d 426 (W Va 1977) Other cases, while not reciting the standard of the father's right, have implied that in a dispute situation the court would pronounce a primary paternal right *Green v Sherman*, 173 N W 2d 843 (Iowa 1970), *In re Dillen*, 423 A 2d 426 (Pa Super, 1980), *Niesen v Niesen*, 38 Wis 2d 599, 157 N W 2d 660 (1968), or that if the court had jurisdiction of the dispute it would recognize the right *Monteux v Monteux*, 5 Ohio App 2d 34, 213 N E 2d 495 (1966)

78 28 Cal 3d 640, 620 P 2d 579, 169 Cal Rptr 918 (1980) William Carlsen, *Fathers Lose Ruling on Last Names*, S F Chronicle, Dec 23, 1980, at 1, *What to Call What's-His-Name*, Virginia Pilot, Jan 5, 1981, at A-10, col 1 (editorial)

79 *In re Trower*, 260 Cal App 2d 75, 66 Cal Rptr 873 (1968), *In re Worms*, 252 Cal App 2d 130, 60 Cal Rptr 88 (1967), *Montandon v Montandon*, 242 Cal App 2d 886, 52 Cal Rptr 43 (1966), *In re Larson*, 81 Cal App 2d 258, 183 P 2d 688 (1947)

80 *Clinton v Morrow*, 220 Ark 377, 247 S W 2d 1015 (1952), *Nellis v Pressman*, 282 A 2d 539 (D C 1971), *cert denied*, 405 U S 975 (1972), *Weinert v Weinert*, 105 Ill App 3d 56, 433 N E 2d 1158 (1982), *W v H*, 103 N J Super 24, 246 A 2d 501 (1968), *In re Williams*, 381 N Y S 2d 994 (City Ct N Y Queens County 1976), *In re Loerch*, N Y L T 16 (June 8, 1981), *In re Robinson*, 74 Misc 2d 63, 344 N Y S 2d 147 (City Ct N Y 1972), *In re Determan*, N J L T 13 (Nassau Co Feb 23, 1982), *In re Russek*, 39 Ohio App 2d 45, 312 N E 2d 536 (1974), *Bilenkun v Bilenkun*, 78 Ohio

major, perhaps insurmountable, barriers still stand. It is important to note that the cases of old involved women seeking to give their children a new marital name. Where women have made recent gains, they have sought to name their children with their own names.

II. The Right of Married Parents in Agreement to Name Their Children Without State Interference

As set forth in the previous section, courts and state attorneys general have firmly established the right of married parents in agreement to name their children without state interference. The major case on this issue arose in Massachusetts in the mid-1970s.⁸¹ When city and town clerks in Massachusetts refused to follow the Massachusetts Attorney General's directive that parents had the common law right to select or change the names of themselves and their children, the State Registrar of Vital Records and Statistics, represented by the Attorney General's office, brought an action directly in the Supreme Judicial Court of Massachusetts. The City Clerk's Association had unanimously adopted the position that "legitimate births would only be recorded in the surname of the father and illegitimate births in the surname of the mother"⁸² in accordance with "custom and usage" for over 200 years. The clerks had asserted "a power to determine people's surnames according to customary rules regardless of the people concerned."⁸³ In *Secretary of the Commonwealth v. City Clerk of Lowell, et al.* the court ruled in favor of the Attorney General, stating that "it is no part of the duty of the clerk to substitute his legal judgment for that of the Attorney General. . . . No tradition of city and town clerks can override the law or the rights of the people."⁸⁴

The court, specifically disregarding cases involving parental disputes, articulated that the common law principle of freedom of choice in the matter of names "extends to the name chosen by a married couple for their child."⁸⁵ Similarly, absent objection from the father, the mother of a nonmarital child has "the same right to

App. 481, 34 Ohio Op. 198, 64 N.E.2d 84 (1945); *Newman v. King*, 433 S.W.2d 421 (Tex. 1968); *In re Yessmer*, 61 Misc. 2d 174, 304 N.Y.S.2d 901 (1964); *In re Fein*, 51 Misc. 2d 1012, 274 N.Y.S.2d 547 (1966); *In re Christjohn*, 286 Pa. Super. 112, 428 A.2d 597 (1981).

81. *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977).

82. *Id.* at 181, 366 N.E.2d at 720.

83. *Id.* at 179, 366 N.E.2d at 720.

84. *Id.* at 183, 185, 366 N.E.2d at 720, 722.

85. *Id.* at 190, 366 N.E.2d at 725.

control the initial surname of the child as the parents of a legitimate child."⁸⁶

Attorneys general in Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Michigan, Vermont and Wisconsin have similarly directed their birth registration record keepers that, absent a statute to the contrary, couples have the right to give their children the mother's name, a hyphenated name, or a brand new name.⁸⁷ "Parents are free to choose whatever surname they please for their child,"⁸⁸ wrote the Vermont Attorney General in 1975. "[I]t may be the mother's or the father's surname, or a combination of the two, or it may be a surname wholly different from the parents' surnames."⁸⁹

It is not unusual, however, for state registrars to resist change and to attempt to follow the traditional Model State Vital Statistics Act⁹⁰ or to make their own legal interpretations, rules or regulations.⁹¹ Most registrars, however, follow the law that in the

86. *Id.* at 191, 366 N.E.2d at 726.

87. *Supra* note 62.

88. Op. Att'y Gen. Vt. 3 (March 10, 1975).

89. *Id.*

90. U.S. Dept. of Health, Education and Welfare, Public Health Service, National Center for Health Statistics (1977 Revision) § 7(e)(1)-(5). (marital children should be given the paternal name and non-marital children the maternal name unless the father and mother request the paternal).

91. The Kentucky State Registrar until 1982 refused to recognize married parent's right to give their children hyphenated names, citing *C.J.S.* for the law of married women's names instead of Kentucky Attorney General opinions or *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. Ct. App. 1979). He pointed to the statutory requirement that a nonmarital child bear its mother's surname as indication of legislative intent to require that a marital child be given only its father's surname. Letter from Omar L. Greeman, Registrar of Vital Statistics to a citizen (March 13, 1979). Following an opinion of May 14, 1982 from John H. Walker, counsel to the Department for Human Resources, the Department changed its policy to recognize the right of parents to name their marital children with the surname of their choice. Letter from Omar L. Greeman to author (Jan. 31, 1983). The Maine Attorney General in 1976 ruled that married parents have the right to give their child a hyphenated surname. At the time the state still had a statute, since repealed, requiring the mother's name be given a nonmarital newborn child. Op. Att'y Gen. Me. (Aug. 18, 1976). *Cf.* Op. Att'y Gen. Ga. (Nov. 22, 1976) (marital child can be given hyphenated name if parents use hyphenated name; requirement that nonmarital child bear mother's surname on certificate of no bearing). Following this opinion a married couple successfully litigated their right to give their child a hyphenated name. *Kibler v. Skelton*, No. 31278 (Fulton County, Georgia, 1978) (Order Granting Writ of Mandamus).

For an example of rules made by a state registrar, see *Rules Governing the Registration and Certification of Vital Events in Mississippi*, Rule 24 ("Name of the Child" requires a marital child to bear her or his father's surname and a nonmarital child her or his mother's "legal surname" or the father's if he acknowledges paternity, or the court's decision if there is a court determination of paternity).

Rules and Regulations Governing Vital Statistics Registration (1977) Part

absence of a statute to the contrary any name may be given newborn children.⁹² Where no such statute exists, litigants have needlessly conceded to the record keeper's version of the law.⁹³ Such agency impositions on parents' right to name their children have no better chance of withstanding constitutional scrutiny than the state statutes which have been successfully challenged.⁹⁴

Parents faced with agency impositions can sue on constitutional grounds. A state mandamus action will, however, prove more speedy for a client even if it may not guarantee attorneys' fees. If state counsel do not simply rubber stamp their client agen-

II(1)(B)(C) of Oklahoma required a marital child to be given its father's surname and a nonmarital child its mother's name. In *Miller v. Leavitt*, No. CIV 82-369-E (W.D. Okla., Dec. 24, 1982) (Journal Entry of Judgment) the registrar interpreted its regulation to prohibit a couple from giving a marital child a hyphenated surname unless the father's name came last. A couple who wanted the father's name first in the hyphenated name challenged the registrar. After losing a motion to dismiss, the state entered into a settlement changing the regulation so that it now reads: "The child's surname shall be shown the same as either the father's or mother's surname or a combination of both."

92. *E.g.*, Utah Vital Statistics Regulations (Jan. 25, 1982) *Surname of the Child* reads:

The surname given the child should be determined by both parents. It clearly is not mandatory that the child have the father's surname. . . . When the mother is not married she . . . may give the child a surname different than her own surname. Additionally, the mother may name the father on the birth certificate . . . and give the child a surname different than [sic] the father's.

State registrars have often vigorously opposed free naming choice. In North Carolina health officials lobbied against legislation sought by the plaintiffs in *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.D. 1981), to amend the father's name requirement. The State Registrar of Vital Statistics was quoted as saying that "[u]nder common law it is the child's birth right to have his father's name." Janet Fox, *Couples Want Choice in Naming Babies*, Winston-Salem Twin City Sentinel, Aug. 8, 1979, at 1. After losing in *Rice v. Department of Health and Rehabil. Services*, 386 So. 2d 844 (Fla. Dist. Ct. App. 1980), Case No. 80-1674 (Recommended Order and Findings of Fact of Div. of Administrative Hearings, Dec. 31, 1980. Final Order, Jan. 13, 1981), Florida officials changed their assertion of state interest from record keeping problems and perpetuation of custom to preserving the family and preventing inappropriate names from being given children by their parents. At oral argument Judge Gonzales asked if one's sense of liberty was not affected by the state imposition. Conversation with James K. Green, attorney for the couple (November, 1982.) In Iowa, registrars lobbied for S.B. 301 in 1973 which would have given the state registrar the authority to "refuse to register a certificate of birth with an unacceptable name given in the same manner as a delayed certificate of birth is refused registration" (referring to "obscene, lewd, lascivious, indecent, or otherwise potentially harmful to the future of the child" names).

93. *E.g.*, *Miller v. Leavitt*, No. CIV 82-369-E (W.D. Okla., Dec. 24, 1982) (Journal Entry of Judgment). See *supra* note 91. Instead of contesting the agency's prohibition of a hyphenated name as a violation of Oklahoma law, the parties went directly into federal court with a constitutional challenge to the requirement. This is dangerous litigation strategy which risks a court's pronouncing as law a requirement that a child bear a certain name when, in fact, the legislature has not so mandated. *E.g.*, *Forbush v. Wallace*.

94. *Id.* See *infra* notes 102-113 and accompanying text.

cies' desires, most lawsuits can be avoided or cut short⁹⁵ with a little name law assistance to the agency. Because state attorney general offices rarely designate an attorney responsible for directing agencies in the area of name law, the agency may simply be ignorant in the matter of the law of personal names.

Federal agencies are not unaware of the issue. The passport office, for example, has recognized the right of parents to procure a new passport for a child in a new name without a court order since at least 1938.⁹⁶ Married parents in agreement as to their children's names will prevail against any state mandate that they name their children a particular way.

III. The Traditional Right of Women to Name Nonmarital Children Without Interference from the State or the Biological Fathers

American courts have long recognized that a nonmarital child may be known by a name other than its mother's.⁹⁷ Attorneys general in Connecticut, Maine, Maryland, Missouri, Pennsylvania, Vermont and Wisconsin have specifically ruled that nonmarital children need not bear the mother's name on their birth certificates and that the right of naming lies primarily with the mother.⁹⁸ In the absence of an objection from the father, courts have always recognized the right of a mother of a nonmarital child to statutorily change her child's name.⁹⁹ This right stems from the unwed mother's status as sole parent and custodian of her

95. As but one example, in Maine a lawsuit by a couple for a hyphenated surname for their marital child was resolved by the attorney general's issuing Op. Att'y Gen. Me. (Aug. 18, 1976). *Sheppard v. Labrack*, No. 76-206 (Superior Court, Penobscot Co. Oct. 12, 1976) (Judgment).

96. Passport Agents Manual (1978) E.O. 7856 (March 30, 1938); 22 C.F.R. § 51.3, 4, 5, 19 (1938). The Wisconsin Department of Public Instruction specifically recognizes out-of-court name changes for students and accepts the custodial parent's authority in registering children. Max Ashwill, *Student May Change Name Without Court Proceedings*, *Legal Corner*, Wis. D.P.I. Newsletter, Nov. 19, 1978, at 6. Letter from D.P.I. Legal Counsel Mary Brooks Fraser to author (Oct. 6, 1981).

97. *E.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979); *Buckley v. State*, 19 Ala. App. 508, 98 So. 362 (1923); *Don v. Don*, 142 Conn. 309, 114 A.2d 203 (1965); *In re Toelkes*, 97 Idaho 406, 545 P.2d 1012 (1976); *People v. Gray*, 251 Ill. 431, 96 N.E. 268 (1911); *Hardy v. Hardy*, 269 Md. 412, 306 A.2d 244 (1973); *In re Calobrisi*, 7 F.L.R. 2721 (Westchester City Sup. Ct. July 21, 1981); *In re M.*, 91 N.J. Super. 296, 219 A.2d 906 (1966); *In re Biegaj*, 25 N.Y.S.2d 85 (1941); *Pintor v. Martinez*, 202 S.W.2d 333 (Tex. 1947); *Pettus v. Dawson*, 82 Tex. 18, 17, S.W. 714 (1891); *But see Boston v. Sears*, 11 Ohio App. 2d 220, 229 N.E.2d 847 (1967).

98. *E.g.*, Op. Att'y Gen. Vt. (March 10, 1975) at 3 ("The mother of an illegitimate child is its legal guardian. . . . As such, she is solely responsible for the naming of the child. In accordance with the common law, she may insert any surname she pleases on the child's birth certificate.").

99. *E.g.*, *Winkenhof v. Griffin*, 511 S.W.2d 216 (Ky. Ct. App. 1974); *In re Dun-*

nonmarital children. In 1974 the Wisconsin Attorney General concluded that biological fathers' rights had not expanded to the point that they could participate in the at-birth naming of nonmarital children.¹⁰⁰ Biological fathers, however, are now challenging this right of women, with some success.¹⁰¹

IV. Constitutional Challenges to Statutory Requirements That Children Be Given Specified Surnames on Their Birth Certificates

Parents have successfully maintained constitutional challenges to statutory requirements that children bear specified names on their birth certificates. The United States Supreme Court has established the helpful precedent that in matters of rearing one's children, absent abuse or neglect, the state has no legitimate interest in interfering with parental decisions.¹⁰² Nonetheless, in *Commonwealth*, the Massachusetts Supreme Court declined to articulate a federal constitutional right to name children. It was a federal district court, in 1979, in the case of *Jech v. Burch*,¹⁰³ which elevated the "common law right [of parents] to give their child any name they wish"¹⁰⁴ to federal constitutional status. Parents wanting to give their marital child a surname differing from both their names (a fusion of their names) on their son's birth certificate challenged Hawaii's statute requiring the father's name. The court articulated that "[t]he naming of one's own child comes within this catalogue of blessings of liberty"¹⁰⁵ under the Constitution.

At the end of 1982 a Florida court invalidated an identical requirement in a challenge by a couple who also gave their son a

ston, 18 N.C. App. 647, 197 S.E.2d 560 (1973); *In re Toekles*, 97 Idaho 406, 545 P.2d 1012 (1976).

100. Op. Att'y. Gen. Vt. 3 (March 10, 1975); 63 Op. Att'y Gen. Wis. 501 (Oct. 7, 1974). In the early 1970s issuing an opinion which simply affirmed that in the absence of a statute to the contrary, a parent could give a nonmarital newborn any name, was highly controversial and many attorney generals were reluctant to deal with the issue. The Wisconsin opinion, for example, was prepared in 1972 but the Wisconsin Attorney General did not issue it until 1974 because of its potential controversial effect.

101. See generally discussion, *infra* notes 134-148. See *Collins v. Collins*, 126 Misc. 2d 522, 483 N.Y.S.2d 151 (Sup. Ct. 1984).

102. See *supra* note 58.

103. *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979). The Hawaii attorney general had interpreted the requirement as encompassing a hyphenated name including the mother's. *Id.*

104. *Id.* at 719. See also *Doe v. Hancock County Board of Health*, 436 N.E.2d 791, 792 (Ind. 1982) (Hunter, J. dissenting) referring to "the constitutionally protected common law right of parents to name their children."

105. *Jech*, 466 F. Supp. at 714.

fused surname of their last names.¹⁰⁶ The father's name requirement had been interpreted as not precluding a hyphenated name,¹⁰⁷ but the couple wanted a fused name. In 1981 a federal district court set aside the North Carolina's father's name birth certificate statute as an unconstitutional infringement on family liberty as well as discrimination on the basis of sex and birth status.¹⁰⁸ New Hampshire repealed its statute which restricted names parents could choose to the mother's, father's, or a combination name in 1983. The legislature's guarantee that parents can choose any name for their child directly resulted from a constitutional challenge by a couple seeking to name their child with a hyphenated name bearing no relation to either parent's name.¹⁰⁹

Courts have similarly questioned statutes specifying which names may be recorded on nonmarital children's birth certificates. Statutes mandating the change of a child's name on its birth certificate to its father's choice of name upon legitimation¹¹⁰ or paternity¹¹¹ have similarly been invalidated in recent years. In an Indiana case,¹¹² a long dissent on the merits analyzed a statute requiring nonmarital children to be given their mothers' names. The dissent noted that the statute distinguishes between "legitimate children, who may be given any name, and illegitimate children, who must bear the mother's name."¹¹³

106 *Sydney v Pingree*, 564 F Supp 412 (S D Fla 1982) Sydney Anthony Skybetter was named for columnist Sydney Harris, Susan B Anthony and his parents Chris Ledbetter and Dean Skylar and would have been given the same moniker whether he had been a boy or a girl Conversation with Sydney's parents, May 20, 1982

107 *Rice v Department of Health and Rehabil Services*, 386 So 2d 844 (Fla Dist Ct App 1980), *on remand* No 80-1674, Recommended Order and Findings of Fact (Div of Administrative Hearings, Dec 31, 1980 Final Order, Jan 13, 1981)

108 *O'Brien v Tilson*, 523 F Supp 494 (E D N C 1981) The case involved three sets of married parents One couple wanted to name their child pursuant to Swedish custom by combining the father's first name with the suffix "son" Another wanted to give their child a hyphenated surname pursuant to Spanish custom The third wanted to give their child a hyphenated name as a symbol of equality

109 1983 N H H B 729 amending § 126 6-a(1)(a) The parents, Pierce Barker and Carol Frost, wanted to give their child the hyphenated surname of Smith-Cook, a combination of the names of maternal and paternal ancestors having no relation to either parent's names Their first child, born in California, was given the hyphenated name Roth-Tubman, bearing no relation to his parents' or ancestors' names A third child born September 30, 1984 was given the nonhyphenated surname Woods, the name of the mother of the child's maternal grandmother, with no difficulty Conversations with Pierce Barker (Jan 25, 1983, June 20, 1985)

110 *Roe v Conn*, 417 F Supp 769 (M D Ala 1976)

111 *Boelter v Blair*, No CIV 81-4217 (D C S D) (Judgment April 21, 1981) (case moot after passage of amendment to S D Codified Laws 34-25-15 (1984) deleting requirement that child be given father's name upon acknowledgment of paternity)

112 *Doe v Hancock County Board of Health*, 436 N E 2d 79 (Ind 1982) See *supra* note 73 and accompanying text

113 *Id* at 794 (Hunter, J, dissenting)

Wherever parents challenge statutes mandating a child be given the father's surname, courts have found the statute unconstitutional. In carefully litigated cases when parents are in agreement, no statute prescribing what names parents can give their children will withstand constitutional scrutiny.

V. Disputes Between Mothers and the Biological Fathers Over Naming Newborn or Infant Marital and Nonmarital Children

The law establishing some right of women to name their marital children, where fathers disagree with their choice, is developing in situations involving the naming of children at birth or while they are very young. The women usually use their birth given surnames and seek to give the same to their children.

A 1964 case provided favorable precedent for women.¹¹⁴ In a separation action the Louisiana Court of Appeals recognized the court's jurisdiction to decide the child's name issue. The court denied the father the right to require the mother to rename their child born during the proceeding, rejecting his claim to an absolute legal right to name the child. The case involved a dispute over the given names and a lineal designation for the child.

Ten years later, in *Laks v. Laks*,¹¹⁵ an Arizona Court of Appeals denied a custodial mother's claim that she had a co-equal constitutional right with the children's father to include her birth surname in the names of the children, ages ten, thirteen, and fourteen. The court, in a statement relied on by future courts, said: "[T]here is merit in this contention. However, it must be remembered that what we are concerned with . . . is not the initial naming of the child but a change of name. The persons who have the paramount interest are the children and their best interests are controlling."¹¹⁶

In the companion cases of *Application of Saxton*¹¹⁷ and *Jacobs v. Jacobs*,¹¹⁸ the Minnesota Supreme Court, in 1981, adopted the *Laks* reasoning as to the initial naming of children. In remanding a dispute over the naming of a marital child in a divorce action, the court in *Jacobs* stated that "neither parent has a supe-

114. *Webber v. Parker*, 167 So. 2d 519 (La. Ct. App. 1964), *writ refused*, 264 La. 886, 168 So. 2d 269 (1964).

115. 25 Ariz. App. 58, 540 P.2d 1277 (1975).

116. 25 Ariz. App. at 61, 540 P.2d at 1280. The Court did not clarify whether this mutual right would be applicable in dissolution or separation situations, or in ongoing marriages, or both.

117. 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982).

118. 309 N.W.2d 303 (Minn. 1981).

rior right to determine the initial surname of their child."¹¹⁹ In *Saxton* the court denied any independent right to the custodial mother of older children, ages seven and nine, to give the children a hyphenated name of both parents' names over the objection of the father. Stating that either name would serve the children's best interests, the majority deferred to "the fact that the child has borne a given surname for an extended period of time."¹²⁰

In 1979 and 1983 state courts in Washington and Kentucky declined jurisdiction to decide a child's name or to order a woman to statutorily change her child's name back to the ex-husband's surname pursuant to the courts' divorce jurisdiction.¹²¹ The Washington Court of Appeals stated, however, that if it had jurisdiction, it would have denied the father's motion to have the child, born during the action, renamed to bear his name instead of the mother's. The father's motion would have been denied "because there is nothing in the record to show that the proposal was considered from the standpoint of the child, and it is the child's best interests which control."¹²² The refusals to take jurisdiction effectively confirmed the custodial mother's choice of her birth name for the children.

In 1981, on facts almost identical to those of *Webber*, a Texas Court of Civil Appeals refused to change the given names of a child to those of the father's choice.¹²³ The court cited *Webber* and reasoned that "the record . . . falls far short of even suggesting that the name chosen by the mother would prove detrimental to the child, now or in the future, or that the name preferred by appellant would further the present or future welfare of the child."¹²⁴

In 1980 the California Supreme Court rendered a landmark decision. *In re Schiffman*¹²⁵ held that "the rule giving the father, as against the mother, a primary right to have his child bear his surname should be abolished."¹²⁶ The court emphasized that the

119. *Id.* at 305.

120. 309 N.W.2d 298, at 302. In seeking United States Supreme Court review, the plaintiff argued that where both names serve the child's best interest, the Minnesota Supreme Court's rule favoring the paternal name compared to Oregon's former statute selecting fathers over equally qualified mothers in administering children's estates. The Court invalidated Oregon's statutory solution in *Reed v. Reed*, 411 U.S. 91 (1971).

121. *Hurta v. Hurta*, 25 Wash. App. 95, 605 P.2d 1278 (1979); *Blasi v. Blasi*, 648 S.W.2d 80 (Ky. 1983).

122. *Hurta*, 25 Wash. App. at 96, 605 P.2d at 1279.

123. *In re Interest of M.L.P.*, 621 S.W.2d 430 (Tex. Civ. App. 1981).

124. *Id.* at 431.

125. 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).

126. *Id.* at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922.

custodial mother gave the child, born during the dissolution proceedings, her birth name. The court remanded the case to the trial court for a "finding whether the name change requested by the father is in the best interest of the child."¹²⁷

Despite this precedent involving the naming of newborns, in 1982 the Nebraska Supreme Court decided that the father's choice of name—a hyphenated surname with his name first—would best serve the child's welfare.¹²⁸ This ruling was without regard to the virtually nonexistent trial record on the child's best interests. The trial court in *Cohee v. Cohee* had ordered the custodial mother to change the child's birth certificate name from hers to one of two names, the husband's name or a hyphenated surname with the mother's name first. The supreme court said "No automatic preference as to the surname of a legitimate child now exists in Nebraska law. We believe each parent has an equal right and interest in determining the surname of a child."¹²⁹ The court, however, did not follow this rule. Instead, it recited the tests traditionally used by the courts to protect the primary right of the father to block name changes of older children originally given his name and gave the father his choice.¹³⁰

Similarly, in 1983, the Montana Supreme Court¹³¹ stated that parents have an equal right to name their children but then de-

127. *Id.* at 648, 620 P.2d at 584, 169 Cal. Rptr. at 923.

128. 210 Neb. 855, 317 N.W.2d 381 (1982).

129. *Id.* at 860, 317 N.W.2d at 384.

130. The court denied rehearing to clarify itself. Motion and Brief in Support of Motion for Rehearing, No. 43923. The Supreme Court's decision does not report that the trial court ordered a hyphenated name with the mother's name first, and that the father demanded his name or a hyphenated name with his name first. The decision only states that the father sought a hyphenated name and that the mother sought only her name. A requirement that the father's name come first in a hyphenated name would be unconstitutional according to the Maine Attorney General. Op. Att'y Gen. Me. (March 22, 1977). Although the hyphenated names sought by the women in *Laks* and *Saxton* included the mothers' name listed first, in neither of those cases was the order of the names separated by a hyphen made an issue. The fathers in both cases opposed the children using any names other than the paternal alone.

131. *Overton v. Overton*, 674 P.2d 1089 (Mont. 1983). Petitions for Rehearing and to Suspend the Rules to Rehear and Reconsider the Appeal and Decision were denied. Where an appeal involves the review of a trial court order granting the father the right to name a child, higher courts seldom overrule the lower court. Where a woman wins the right to determine her child's name at the trial court level, however, appellate courts are likely to overturn the lower courts. The Montana Supreme Court was a classic example of this dynamic. In *Firman v. Firman*, 187 Mont. 465, 610 P.2d 178 (1980) the court overruled, as an abuse of discretion, a trial court's judgment that children should bear their mother's new marital name. The Montana Supreme Court has thus effectively cut off any enforceable legal right of married women in that state to name their children over their ex-husband's objection.

ferred to the trial court's order in favor of the noncustodial father. The court declined to overturn the trial court's determination that the two-year-old girl's name should be changed from her mother's to her father's surname at the request of the father. The same month, the Colorado Court of Appeals¹³² deferred to a trial court's judgment in favor of a custodial mother. Because the mother had custody the court reasoned that the mother could change the infant girl's first name despite the objection of the mother's ex-husband.

In addition, this year Pennsylvania's intermediate court ruled in favor of a custodial mother who had given her newborn daughter her birth given surname pursuant to Pennsylvania's published regulation which expressly gives the right of naming to "the parent who has custody of the newborn child."¹³³ The noncustodial father waited over a year after the child's birth and then petitioned to change the child's surname.

These at-birth/infancy naming cases all respect a naming right of women which is new to the law of naming marital children perhaps because, in the ones involving surnames, the women all used their birth given surnames. However, since *Schiffman* women have not prevailed at the appellate level with few exceptions.¹³⁴

1984 was a particularly bleak year. Women lost bids to give the children in their custody their new marital names in appellate courts in Illinois,¹³⁵ Indiana,¹³⁶ Minnesota,¹³⁷ New York,¹³⁸ Ohio,¹³⁹ and Texas.¹⁴⁰ In South Carolina the supreme court re-

132. *In re Nguyen*, 684 P.2d 258 (Colo. App. 1983), cert. denied, 105 S. Ct. 785 (1985).

133. *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985). A Petition for Allowance of Appeal has been filed in this first case involving interpretation of 28 Pa. Admin. Code § 1.7 (Shepard's 1975). See *infra* notes 231-234 and accompanying text.

134. These exceptions involved the mother's and child's use of the mother's birth name. *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985). In *In re Goldstein*, 104 A.D.2d 616, 479 N.Y.S.2d 385 (1984) the court denied a divorced father's appeal of a name change of his daughter from the name Goldstein, which he no longer used, to the mother's birth name which the mother used as a middle name with her new marital name. The court, however, recited the traditional standard in favor of the paternal name. In *In re Fletcher*, 146 Vt. 209, 486 A.2d 627 (1984), the supreme court remanded a case on appeal by the mother (name used by mother and requested for child appears to be mother's birth name, but opinion is unclear).

135. *In re Presson*, 116 Ill. App. 3d 458, 71 Ill. Dec. 816, 451 N.E.2d 970 (1984).

136. *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984).

137. *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984).

138. *Cohan v. Cunningham*, 480 N.Y.S.2d 656 (App. Div. 1984). See also *Gershowitz v. Gershowitz*, 491 N.Y.S.2d 356 (App. Div. 1985).

139. *In re Newcomb*, 15 Ohio App. 3d 107, 472 N.E.2d 1142 (1984).

manded a decision unfavorable to a father¹⁴¹ in 1985. In May, 1985 Maryland's Court of Special Appeals denied a divorced woman whose child was born when she was separated, the right to give the newborn her birth-given surname.¹⁴²

In cases involving disputes between parents over the initial or infancy naming of nonmarital children women prevail more frequently than the biological fathers, but the fathers are being recognized by the courts as having new naming rights over their children if they contribute to, or are ordered to contribute, support to them. In *Jacobs*,¹⁴³ a main issue was the birth status of the child in question. The mother claimed that the child was nonmarital and that she consequently had primary control over rearing the child in all aspects. After determining that the child was marital, the Minnesota Supreme Court noted that "a finding of illegitimacy in the instant case would not have affected the resolution of the dispute as to the child's surname since Jacobs has asserted his parental rights and recognized his parental obligations."¹⁴⁴

In *In re G.L.A.*,¹⁴⁵ the Indiana Court of Appeals reversed a trial judge whose general practice was

to change the surname of children in paternity proceedings to that of the father in the absence of good reasons shown to the contrary. . . . I always point out that the man who is going to support the children should have the children in his name unless there is some valid strong reason, like he is a murderer or a criminal of some kind that would keep him from—the chil-

140. *Brown v. Carroll*, 683 S.W.2d 61 (Tex. Civ. App. 1984).

141. *Ex parte Stone*, 328 S.E.2d 346 (S.C. 1985).

142. *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 492 A.2d 303 (1985).

143. 309 N.W.2d at 303.

144. *Id.* at 305. Michigan and New Hampshire have statutorily recognized mutual rights to name nonmarital children at birth. Mich. Comp. Laws Ann. § 333.2824(2) (West 1980) provides that where the father acknowledges paternity, "upon the written request of both parents, the surname of the child shall be designated by the child's parents." If the father is judged the father by a lawsuit, however, the mother has control over naming. Mich. Comp. Laws Ann. § 333.2824(4) (West 1980). New Hampshire's new law provides that when the mother consents to have a man named as the child's father on its birth certificate, "the surname of the child shall be any name chosen by the mother and father." N.H. Rev. Stat. Ann. § 126:6-a(II)(a) (1983). Otherwise the name will be "any name chosen by the mother," N.H. Rev. Stat. Ann. § 126:6-a(IV) (1983), or as determined by a court in paternity proceedings, § 126:6-a(III) (1983). This law is expected to be revised in the next legislative session to give the mother or custodial parent the right of naming.

Several states have recognized the right of the unmarried father to participate in naming a child on its birth certificate to the extent that the mother is limited in selecting the child's name to her name, or with her and the father's consent, to the father's or a combination of the two. See *supra* note 56. Such restrictions have been objected to, but not yet litigated.

145. 430 N.E.2d 433 (Ind. Ct. App. 1982).

dren from revering his name.¹⁴⁶

The appellate court rejected the trial court's acceptance of the "erroneous presumption" that "a child should share the surname of its biological father as long as the father is contributing to its support."¹⁴⁷ Unfavorable precedent¹⁴⁸ decided only a year before by the same court was also rejected.

In sum, women, who use their own surnames and have been married to their children's fathers, have often prevailed in cases concerning the at-birth naming of children of whom they have custody. Older children's names, however, remain almost completely subject to paternal control.

VI. Disputes Between Parents Over Naming Older Marital Children Originally Given Fathers' Names

This section analyzes the class of cases which determine whether women have any real voice in naming children: those involving older marital children (over three years of age) originally given their fathers' surnames.

Appellate courts in most states have articulated a standard for the resolution of disputes between parents of marital children originally given their fathers' surnames. All of the courts purport to consider the best interests of the children. Careful review of the cases, however, demonstrates that this "standard" is not, in fact, employed by the courts in naming disputes. All states, except California,¹⁴⁹ have actually accepted and followed the time-honored primary right of the father over the mother to control the naming of children.

The courts accept three presumptions, sometimes expressly, but most often indirectly: 1) that honoring the father's right serves children's "best interests"; 2) that using the father's name preserves or promotes the paternal/child bond; and/or 3) that unless the children have actually already changed their names by using another name for a long period of time, children's names should not be changed if the father objects. Most significantly, however, the courts do not employ a presumption that it is generally not in the best interest of children to not change their names.

146. *Id.* at 434.

147. *Id.* See *supra* note 71. *G.L.A.* was expressly followed in *Sullivan v. McGaw*, 134 Ill. App. 3d 455, 480 N.E.2d 1283 (1985).

148. *D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980). The mother did not appeal this decision, in part because the father had given up the child he won the right to name, and in part because the mother married and her new husband adopted the child. See *supra* note 71.

149. See *In re Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).

In the cases where a custodial mother prevails over the father's wishes, the father forfeits or waives his right by his own actions and the mother rebuts it by meeting a high burden of proof. The father forfeits his superior right only where he has utterly abandoned the child, has failed to pay child support, and/or is guilty of misconduct amounting to child abuse or incarceration. A man can also forfeit his superior right by waiving it by failing to exercise his paternal right of naming in a timely fashion.¹⁵⁰

Until recently, the overwhelming majority of cases have involved the choice between a natural father's name and a stepfather's name that the mother has adopted. The cases of the 1970s and 1980s, however, have involved the mother's birth name,¹⁵¹ hyphenated names of the mother's and father's birth names,¹⁵² as well as remarried names.¹⁵³ In *Schiffman*, and also in the *Saxton* dissent, distinctions were made expressly on the basis of the particular names chosen by the mother or children. Usually courts have ruled against women and children by upholding rights of fathers, by stating a preference for the paternal name, and by resisting any change of minors' names from the patronymic without discussion of the alternative name.¹⁵⁴ Most appellate cases involve children reintegrating into a family with a stepfather whose name the mother has adopted. Consequently, making a distinction as to

150. *E.g.*, *Nellis v. Pressman*, 282 A.2d 539 (D.C. 1971), *cert. denied*, 405 U.S. 975 (1972) (teenagers known by their stepfather's surname for a long while with the knowledge of their father).

151. *In re Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980); *Blasi v. Blasi*, 648 S.W.2d 80 (Ky. 1983); *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 492 A.2d 303 (1985); *In re Goldstein*, 104 A.D. 616, 479 N.Y.S.2d 385 (1984); *In re Fletcher*, 145 Vt. 209, 486 A.2d 627 (1984) (unclear); *Ex parte Stone*, 328 S.E.2d 346 (S.C. 1985) (unclear); *Jacobs v. Jacobs*, 309 N.W.2d 303 (Minn. 1981); *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985); *Hurta v. Hurta*, 25 Wash. App. 95, 605 P.2d 1278 (1979); *In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977); *Ogle v. Circuit Court*, 89 S.D. 18, 227 N.W.2d 621 (1975) (petitioner withdrew her request for her child's name change).

152. *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975); *In re Staros*, 280 N.W.2d 409 (Iowa 1979); *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982); *In re Warschberger*, 8 F.L.R. 2514 (N.Y. Sup. Ct. Naussau County, June 21, 1982); *Gershowitz v. Gershowitz*, 491 N.Y.S.2d 356 (App. Div. 1985).

153. All other appellate cases cited in *supra* notes 77-80.

154. Most of the at-birth/infancy naming cases of marital children have involved the mother giving a child her name as opposed to a stepfather's. In *Kirksey v. Abbott*, 591 S.W.2d 751 (Mo. Ct. App. 1979) the mother of a nonmarital child indicated that she wanted her daughter to have the same name as her 12-year-old marital son who bore her last name. She indicated that she would be marrying and changing her name. The opinion, however, does not make clear whether or not she intended to have the children also adopt her new name or the origin of her current surname. Compare cases of older children, *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982) giving deference to names used a long while. This deference virtually precludes women who originally consent to their children bearing the father's name from having any say in controlling their names thereafter.

the names involved only makes it more difficult for most women to secure naming rights. The issue is a woman's legal right to control, as custodian, the naming of her children, not the particular name she may choose.

Whether or not women have any real rights in naming children will be determined in parental disputes over naming children originally given their fathers' surnames by the mothers and fathers. The trial judiciary used to deny divorcing and divorced women the right to change their names, supposedly out of concern for children bearing different names than their custodial mothers.¹⁵⁵ Now it greets women's assertion of the right to name their children with the same names (or any nonpaternal names) with sheer personal bias, obstinacy and male protectivism. A Maryland chancellor put it forthrightly in one case:

Let me say this for the record. I felt very strongly about this case when it came up; in fact, I will say for the record that I just think that it is just horrendous that a parent who has been divorced from her husband would even attempt to change the child's name and, in a sense, cut off the parental rights of the father. I was very upset about it.¹⁵⁶

This section discusses the procedural and substantive issues involved in securing women's right to name noninfant marital children originally given the paternal name. Jurisdictional bases for courts to decide these disputes are discussed first. The second part discusses further the assumptions, acknowledged and unacknowledged, behind courts' protection of fathers' primary naming right. It also examines the methods by which courts grant men the right to control children's names. The third part of this section discusses the burden of proof set up for mothers in naming disputes.

A. *Jurisdiction of Courts Over Children's Names*

In litigation, jurisdictional and procedural disputes in children's names cases can become very technical. If a court does not

155. All such cases were reversed on appeal. *E.g.*, *In re Banks*, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (1974); *In re Hooper*, 436 So. 2d 401 (Fla. Dist. Ct. App. 1983); *In re Hauptly*, 262 Ind. 150, 312 N.E.2d 857 (1974); *Thomas v. Thomas*, 100 Ill. App. 3d 1080, 427 N.E.2d 1009 (1981); *Piotrowski v. Piotrowski*, 71 Mich. App. 213, 247 N.W.2d 354 (1976); *Egner v. Egner*, 133 N.J. Super. 403, 337 A.2d 46 (1975). See also cases cited *supra* note 9.

156. *Hall v. Hall*, 30 Md. App. 214, 216, 351 A.2d 917, 920 (1976). Such pronouncements bring to mind the conclusion of early commentators: "With some notable exceptions, [judges] have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . ." John Johnston & Charles Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 676 (1971).

want to consider the controversial issue, one party may easily persuade the court that it has no jurisdiction to do so. Awareness of the technical issues involved may prevent men and/or guardians ad litem from keeping names cases out of court.¹⁵⁷

Courts exercise jurisdiction to determine children's names in three situations: 1) pursuant to state general name change statutes;¹⁵⁸ 2) in personal equity injunctive actions to protect a father's personal interests in controlling the naming of his child;¹⁵⁹ and 3) in actions involving the care, custody and control of children, in-

157. For example, one Milwaukee, Wisconsin lower court judge recently declined to take jurisdiction over a child's name pursuant to a divorce action. The court declined jurisdiction on the grounds that the statutory name change procedure requires both parents to bring a petition for their child's name change. The appointed guardian ad litem had taken this position. The court carefully worded its order in sex neutral terms but the case involved the usual fact situation, a father objecting to his child's name being changed from the paternal. The effect of a court's refusal to take jurisdiction is to prevent women from having the right to adjudicate women's and children's naming rights if the father insists on imposing his name on his children. *In re Husmann and Birmingham*, No. 600-721 (Milwaukee Circuit Court, Findings and Order, March 15, 1984). In an unpublished opinion of the Court of Appeals in 1981, the court ruled that it saw "no jurisdictional problem with family court judge entertaining a petition or entering an order for a change of name of a minor child of the parents to an action for divorce" but stated that it should exercise it "only where there is no adequate remedy at law." *In re Mendal*, 104 Wis. 2d 744, 314 N.W.2d 363 (1981) (an unpublished opinion is not precedential and cannot be cited in most forums in Wisconsin). See also *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984). Maintaining the status quo through this technique has also worked to the benefit of women. *E.g.*, *Hurta v. Hurta*, 25 Wash. App. 95, 605 P.2d 1278 (1979); *Blasi v. Blasi*, 648 S.W.2d 80 (Ky. 1983).

158. *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978); *In re Malloy*, 185 Cal. App. 2d 135, 8 Cal. Rptr. 143 (1960); *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1968); *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (1967); *In re McGehee*, 147 Cal. App. 2d 25, 304 P.2d 167 (1956); *In re Larson*, 81 Cal. App. 2d 258, 183 P.2d 688 (1947); *Lazow v. Lazow*, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962); *Wearn v. Wray*, 139 Ga. App. 363, 228 S.E.2d 385 (1976); *Tolbert v. Tolbert*, 131 Ga. App. 388, 206 S.E.2d 63 (1974); *Fulgham v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972); *Johnson v. Coggins*, 124 Ga. App. 603, 184 S.E.2d 696 (1971); *Binford v. Reid*, 83 Ga. App. 280, 63 S.E.2d 345 (1951); *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984) *West v. Wright*, 263 Md. 297, 283 A.2d 401 (1971); *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974); *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Marshall v. Marshall*, 230 Miss. 719, 93 So. 2d 822 (1957); *In re Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977); *In re Lone*, 134 N.J. Super. 213, 338 A.2d 883 (1975); *W. v. H.*, 103 N.J. Super. 24, 246 A.2d 501 (Ch. Div. 1968); *Cohan v. Cunningham*, 104 A.D.2d 721, 480 N.Y.S.2d 657 (1984); *In re Newcomb*, 15 Ohio App. 3d 107, 472 N.E.2d 1142 (1984); *In re Tubbs*, 620 P.2d 384 (Okla. 1980); *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985); *In re Christjohn*, 286 Pa. Super. 112, 428 A.2d 597 (1981); *Ex Parte Stull*, 276 S.C. 512, 280 S.E.2d 209 (1981); *Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App. 1976); *Eschrich v. Williamson*, 475 S.W.2d 380 (Tex. Civ. App. 1972); *Newman v. King*, 433 S.W.2d 420 (Tex. 1968); *Plass v. Leithold*, 381 S.W.2d 580 (Tex. Civ. App. 1964); *Flowers v. Cain*, 218 Va. 324, 237 S.E.2d 111 (1977); *In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977).

159. *Mark v. Kahn*, 333 Mass. 517, 131 N.E.2d 758 (1956); *Sobel v. Sobel*, 46 N.J. Super. 284, 134 A.2d 598 (Ch. Div. 1957); *Degerberg v. McCormick*, 40 Del. Ch. 471, 184 A.2d 468 (1962). See *supra* note 76.

cluding separation,¹⁶⁰ divorce or dissolution,¹⁶¹ adoption,¹⁶² and paternity proceedings.¹⁶³ Although appellate courts in Kentucky, Ohio, and Washington have declined jurisdiction over children's names in divorce matters,¹⁶⁴ other courts have upheld jurisdiction.

An Illinois Court of Appeals summarized the basis of a divorce court's jurisdiction over naming children in 1951. "If the matter of a change of name of a minor child of divorced parents is a matter incidental to the custody of the child, and we hold that it is, then the court had the jurisdiction to entertain the motion and to

160 *Eg*, *Webber v Parker*, 167 So 2d 519 (La Ct App 1964) *writ refused*, 264 La 886, 168 So 2d 269 (1964). The jurisdictional basis of *Webber* has been superseded by La Rev Stat Ann § 40 34(1)(a) (West Supp 1983). "Any change in the surname of a child from that required herein shall be by court order as provided for in RS 13 4751 through RS 13 4755."

161 *Norton v Norton*, 268 Ark 791, 595 S W 2d 709 (1980), *Clinton v Morrow*, 220 Ark 377, 247 S W 2d 1015 (1952), *Montandon v Montandon*, 242 Cal App 2d 886, 52 Cal Rptr 43 (1966), *In re Nguyen*, 684 P 2d 258 (Colo App 1983) *cert de nied*, 105 S Ct 785 (1985), *Nellis v Pressman*, 282 A 2d 539 (DC 1971), *cert de nied*, 405 US 975 (1972), *Solomon v Solomon*, 5 Ill App 2d 297, 125 NE 2d 675 (1955), *Weinert v Weinert*, 105 Ill App 3d 56, 433 NE 2d 1158 (1982), *In re Presson*, 102 Ill 2d 303, 80 Ill Dec 294, 465 NE 2d 85 (1984), *Burke v Hammonds*, 586 S W 2d 307 (Ky Ct App 1979), *overruled sub silentio by Blasi v Blasi*, 648 S W 2d 80 (Ky 1983), *Dalton v Dalton*, 367 S W 2d 840 (Ky Ct App 1963), *Hall v Hall*, 30 Md App 214, 351 A 2d 917 (1976), *Fuss v Fuss*, 372 Mass 64, 368 NE 2d 271 (1977), *Jacobs v Jacobs*, 309 N W 2d 303 (Minn 1981), *Young v Young*, 356 N W 2d 823 (Minn Ct App 1984), *Bruguier v Bruguier*, 12 N J Super 350, 79 A 2d 497 (1951), *Gershowitz v Gershowitz*, 491 N Y S 2d 356 (App Div 1985), *Meadows v Meadows*, 312 N W 2d 464 (ND 1981), *Reed v Reed*, 338 P 2d 350 (Okla 1959), *Walberg v Walberg*, 22 Or App 118, 538 P 2d 96 (1975), *Pendray v Pendray*, 35 Tenn App 284, 245 S W 2d 204 (1951), *Jochec v Jochec*, No 12,965 (Tex Civ App 1979) (unpublished), *In re Baird*, 610 S W 2d 252 (Tex Civ App 1980), *Brown v Carroll*, 683 S W 2d 61 (Tex Civ App 1984), *Hurta v Hurta*, 25 Wash App 95, 605 P 2d 1278 (1979), *Niesen v Niesen*, 38 Wis 2d 599, 157 N W 2d 660 (1968).

162 *In re Thomas*, 404 S W 2d 199 (Mo 1966), *Arnett v Matthews*, 259 So 2d 535 (Fla Dist Ct App 1972) (name changes granted but not adoptions). *Cf* *Korbin v Ginsberg*, 232 So 2d 417 (Fla Dist Ct App 1970). Name changes pursuant to adoptions are routine and do not make caselaw. All states accept the authority of adoptive parents to determine their children's names and no known case concerns an adoptive couple disagreeing on a child's name. In practice many women have felt pressure to accept the father's surname for an adopted child or risk not getting the child. An adoption agency's requirement that a couple use the same surname and/or give the paternal name to an adopted child would be unconstitutional and subject to challenge if the agency is state funded.

163 *Sullivan v McGaw*, 134 Ill App 3d 455, 480 NE 2d 1283 (1985). *In re G L A*, 430 NE 2d 433 (Ind Ct App 1982). *DRS v RSH*, 412 NE 2d 1257 (Ind Ct App 1980). *Kirksey v Abbott*, 591 S W 2d 751 (Mo Ct App 1979). *Compare Agee v Altice*, 427 So 2d 667 (La Ct App 1983).

164 *Monteux v Monteux*, 5 Ohio App 2d 34, 213 NE 2d 495 (1966), *Dolgin v Dolgin*, 1 Ohio App 2d 430, 205 NE 2d 106 (1965), *Hurta v Hurta*, 25 Wash App 95, 605 P 2d 1278 (1979). *See also* *Young v Young*, 356 N W 2d 823 (Minn Ct App 1984) and *Blasi v Blasi*, 648 S W 2d 80 (Ky 1983). However, the Supreme Court did not expressly overrule *Burke v Hammonds*, 586 S W 2d 307 (Ky Ct App 1979). *Burke* held that the divorce court, pursuant to its jurisdiction over custody matters, could enjoin a custodial mother from changing her children's names.

enter the order involved in this appeal."¹⁶⁵

Cases pursuant to a divorce court's jurisdiction usually arise with respect to the enforcement of modification of custody or support awards and not at the time of divorce or dissolution.¹⁶⁶ Most women seek to change their children's names sometime after the actual divorce and the establishment of a new household. Specific statutory authority for changing children's names during divorce proceedings could actually serve to restrict a divorce court's jurisdiction to determine children's names at a later date pursuant to its continuing jurisdiction over children. The jurisdictional issue has nevertheless concerned several courts,¹⁶⁷ and women should prepare to litigate it.

B. Father's Primary Right to Require Marital Children to Continue Using His Name

Consistent with the basic tenet of the common law that no one has such a property right in his or her personal name such that he or she can prevent another from using it,¹⁶⁸ courts have expressly rejected the father's right in naming his marital children as a constitutional property right.¹⁶⁹ They have, however, accepted the father's prerogative as a liberty right, similar to the rights ac-

165. *Solomon v. Solomon*, 5 Ill. App. 2d 297, 125 N.E.2d 675 (1955). The Illinois Supreme Court recently stated: "We agree with *Solomon* that changing a child's name is a matter incident to custody of the child, and that the court which had jurisdiction over the divorce can entertain a petition enjoining the name change." *In re Presson*, 102 Ill. 2d 303, 465 N.E.2d 85, 87 (1984), reversing 116 Ill. App. 3d 458, 451 N.E.2d 970 (1983).

166. *But see In re Nguyen*, 684 P.2d 258 (Colo. App. 1983), cert. denied, 105 S. Ct. 785 (1985).

167. *E.g.*, J. Byrd concurring in *In re Schiffman*. The Minnesota Supreme Court in *Jacobs v. Jacobs* wrote:

We do not decide at what point a trial court loses jurisdiction to change a child's surname through modification of a divorce decree. Since the child was not provided for in the original decree, the trial court had the authority to change the child's surname in the context of a petition to amend the divorce decree.

Jacobs at 304 n.1. If *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984) had been appealed, the court would have had the opportunity to decide this issue for Minnesota. In *Blasi v. Blasi*, 648 S.W.2d 80, 81 (Ky. 1983), the Supreme Court of Kentucky recently said that "[h]ad the General Assembly intended for the circuit court to have jurisdiction to effect a name change it would have specifically granted such jurisdiction." The Indiana court of appeals ruled against the mother's claim that the court did not have jurisdiction over names in a paternity proceeding. *D.R.S. v. R.S.H.*, 412 N.E.2d 1247 (Ind. Ct. App. 1980). See *infra*, note 148.

168. See *supra* note 26.

169. *Fulgham v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972); *In re Thomas*, 404 S.W.2d 199 (Mo. 1966); *Newman v. King*, 433 S.W.2d 421 (Tex. 1968).

corded parents in agreement in naming their offspring.¹⁷⁰ The Oklahoma Supreme Court recently articulated the nature of the father's primary right in American case law: "It is generally recognized that a father has a protectible claim in the continued use by the child of the paternal surname in accordance with the usual custom, even though the mother may be the custodial parent."¹⁷¹

The highest courts of Arkansas, District of Columbia, Georgia, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Virginia, and West Virginia have accepted the standard that the father has a "primary," "protectable," "natural," or "time-honored" right superior to that of the mother to name his children. He can forfeit that right by his misconduct, or by lack of objection. Even if the father fails to object, the mother must show that the children's best interests are not served by their use of this name, and that "the substantial welfare of the child necessitates such change."¹⁷²

Appellate courts of Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, New Jersey, Ohio, Oregon, Tennessee, and Texas have likewise accepted this superior right.¹⁷³

In naming minors there is an almost irrebuttable presumption that their surnames should never be changed from the patronymic if their fathers object. A Georgia appellate court articulated this presumption as: "Courts generally frown upon name changes of unemancipated minors where the objecting natural father supports them, and there is no substantial reason therefore other than personal preference."¹⁷⁴

Unlike the California Supreme Court in *Schiffman*, the Nebraska and Minnesota Supreme Courts in *Cohee*, *Jacobs*, and *Saxton* did not overrule existing precedent in their states which were based on the father's superior right. In the frequently cited case of *Robinson v. Hansel*,¹⁷⁵ the Minnesota Supreme Court in 1974 had written: "A change in surname, so that a child no longer bears his father's name, not only obviously is of inherent concern

170. *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978); *In re Tubbs*, 620 P.2d 384 (Okla. 1980).

171. *In re Tubbs*, 620 P.2d 384 (Okla. 1980).

172. *In re Saxton*, 309 N.W.2d 298, 301 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982) (quoting *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974)). *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984), followed this standard. See *supra* note 77.

173. See *supra* note 77.

174. *Tolbert v. Tolbert*, 131 Ga. App. 388, 206 S.E.2d 63 (1974).

175. 302 Minn. 34, 223 N.W.2d 138 (1974).

to the natural father, so that he should have standing to object, but is in a real sense a change in status."¹⁷⁶

As justification for protection of the paternal right, the courts have adopted the additional presumption that a child's bond to his or her noncustodial father is served by or necessitated by preservation of the paternal name. The courts presume that what the father wants is good for his children. Courts do not consider convenience or embarrassment to the children in having a surname different from the household in which they live sufficient to overcome this presumption.¹⁷⁷ Whether framed as 1) the father's interest in naming his child; 2) preserving the bond between the father and children; or 3) the children's interests in being close to their father, the end result is the same: even if it embarrasses the children, a virtually irrebuttable presumption in favor of the father's right to control the name.

1. Duty of Support as the Basis of the Father's Primary Right to Control the Naming of Marital Children in Their Mother's Custody

In 1922, Ruth Hale, advocate of women's right to determine their own names and co-founder of the Lucy Stone League, in discussing the basis for men's demand that women take their husbands' surnames, articulated the underlying basis of men's expectation that they have the absolute right to name their children:

Custom said, too, that man owned what he paid for, and could put his name on everything for which he provided money. He wrote his name more often than a little boy with chalk signs his to a fence. He put it on his land, his house, his wife and children, his slaves when he had them, and on everything that was his.¹⁷⁸

The legal basis of this right of ownership is the legal duty of support, which in turn derives from the man's traditional status as head of the household.¹⁷⁹ The West Virginia Supreme Court summarized the rule in 1977: "The weight of authority appears to be that absent extreme circumstances a father who exercises his parental rights has a protectable interest in his children bearing his surname and this interest is one *quid pro quo* of his reciprocal ob-

176. *Id.* at 35, 223 N.W.2d at 140.

177. *E.g.*, *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (1967).

178. Ruth Hale, *But What About the Postman?*, 54 *The Bookman* 560, 561 (Feb. 1922).

179. Kathleen A. Ryan Carlsson, *Surnames of Women and Legitimate Children*, 17 N.Y.L.F. 852 (1971).

ligation of support and maintenance."¹⁸⁰

Unmarried fathers rely on this same duty to procure naming rights. In practice, the primary right of fathers serves as a powerful negotiating tool to keep support payments for both marital and nonmarital children low.¹⁸¹

Ex-husbands often attempt to avoid their duty of support when mothers change the children's names. Courts, however, do not accept a change of a child's name as grounds to avoid support obligations. Nor do courts accept failure to make support payments as grounds for automatically terminating a father's naming rights.¹⁸² Men's primary naming right provides little incentive to pay child support regularly whereas it does serve to deny women any real voice in naming their children. Further abandonment or misconduct on the part of fathers is necessary.¹⁸³ Misconduct usually means felonious activity leading to incarceration or child abuse, not merely bad parenting.¹⁸⁴

Thus, a father's threat to beat his child if he used his mother's and stepfather's surname was not "the type of misconduct which the law recognizes as foreclosing a father from complaining of a change in his child's surname," according to a Delaware court.¹⁸⁵ The father, the court explained, "was justified in insisting that his son use the paternal surname, and in threatening to punish him if he adopted another."¹⁸⁶

The misconduct an ex-husband must engage in to forfeit his naming rights must be heinous. In a recent case, the Pennsylvania Superior Court considered that murdering the man whose name the child was changing to constituted sufficient misconduct to for-

180. *In re Harris*, 160 W. Va. 422, 427, 236 S.E.2d 426, 429 (1977).

181. *In D.R.S. v. R.S.H.*, 412 N.E.2d 1257, 1279 (Ind. Ct. App. 1980), the lower court judge indicated that he might reduce child support payments if the child's name were not changed to that of the father. Courts do not usually state this fact of reality in opinions.

182. *E.g.*, *Robinson v. Hansel*, 302 Minn. at 34, 223 N.W.2d at 138; *In re Krcelic*, 90 Misc. 2d 666, 395 N.Y.S.2d 382 (1977); *Bilenkin v. Bilenkin*, 78 Ohio App. 481, 64 N.E.2d 84 (1945). *But see In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977).

183. *E.g.*, *West v. Wright*, 263 Md. 297, 283 A.2d 401 (1971). *In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977).

184. An Indiana trial court recently epitomized this thinking:

I always point out that the man who is going to support the children should have the children in his name unless there is some valid strong reason, like he is a murderer or a criminal of some kind that would keep him from—the children from using his name and carry it, you see.

In re G.L.A., 430 N.E.2d 433, 434 (Ind. Ct. App. 1982).

185. *Degerberg v. McCormick*, 41 Del. Ch. 46, 52, 187 A.2d 436, 440 (1963).

186. *Id.*

feet a father's naming right.¹⁸⁷

In the rare instances where mothers have prevailed in older children's name disputes, the children have virtually always been using the mother's choice of name for a long while. Typically, the ex-husbands have long known about the children's use of the other name without objecting to its use.¹⁸⁸

Although today most judges would deny that fathers can purchase possessory rights in their children, courts continue to connect fathers' naming prerogatives with the duty to support children, whether or not the fathers actually fulfill this duty. Women must prove extreme misconduct before ex-husbands forfeit the right to control the naming of their children.

2. Requirement of Notice to the Father of Statutory Name Change Proceedings

Courts further protect the father's right to control the naming of marital children by reading into name change statutes a requirement of notice to the father. Such legal protection imposes requirements even where the statute does not require both parents to sign the petition, or to give notice to each other.¹⁸⁹ Courts also avoid dealing with the issue by dismissing petitions brought by children themselves.¹⁹⁰ Because a father is entitled to notice, he can usually cause a statutory name change to be voided for lack of

187 In *In re Christjohn*, 286 Pa Super 112, 428 A 2d 597 (1981), the trial court took extensive psychiatric testimony as to the damage the murder did to the child. And in *W v H*, 103 N.J. Super 24, 246 A 2d 501 (1968), incest and incarceration were sufficient to rebut the father's right. Murder or incarceration, as reflected in New York lower court cases, are the usual misconduct standards. *In re Fein*, 51 Misc. 2d 1012, 274 N.Y.S. 2d 547 (1966), *In re Yessmer*, 61 Misc. 2d 174, 304 N.Y.S. 2d 901 (1964). *In re Calobrisi*, 7 F.L.R. 272 (Westchester City Sup. Ct. July 21, 1981). But see *In re Krcelic*, 90 Misc. 2d 666, 395 N.Y.S. 2d 382 (Civ. Ct. Queens Co. 1977), *In re Petras*, 123 Misc. 2d 665, 475 N.Y.S. 2d 199 (Civ. Ct. Queens Co. 1984).

Murdering one's father-in-law in reaction to his assertion that his child's name would be changed did not constitute "a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such a passion in a reasonable person" so as to reduce the charge to manslaughter according to the Georgia Supreme Court. *Perez v. State*, 249 Ga. 767, 294 S.E. 2d 498 (1982).

188 *Nellis v. Pressman*, 282 A.2d 539 (D.C. 1971), cert. denied, 405 U.S. 975 (1972). See *Bilenkun v. Bilenkun*, 78 Ohio App. 481, 64 N.E. 2d 84 (1945).

189 Several states require both parents to sign a name change petition, or that notice be given the nonpetitioning parent. See, e.g., *Carroll v. Johnson*, 263 Ark. 280, 565 S.W. 2d 10 (1978). See Op. Atty. Gen. Hawaii (Oct. 18, 1979) for a discussion of the national requirement of notice to noncustodial fathers even in the absence of a statutory notice requirement. The notice requirement is not without exception. *In re Fletcher*, 146 Vt. 209, 486 A.2d 627 (1984). See statutory table in Comment, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 Utah L. Rev. 303.

190 *Ex parte Stull*, 276 S.C. 512, 280 S.E. 2d 209 (1981), c.f. *In re Staros*, 280 N.W. 2d 409 (Iowa 1979). Compare *In re Fletcher*, 486 A.2d 627 (Vt. 1974).

it.¹⁹¹ Men can even enforce their rights by enjoining women from using name change statutes which contain notice requirements.¹⁹² In many states ex-husbands can enjoin their ex-wives from encouraging their children in any way to use a name other than the father's.¹⁹³

C. Burden of Proof Required to Rebut Father's Right and the Presumption That Marital Children Should Continue to Bear the Paternal Name

Courts have saddled women with an extremely heavy burden in proving that marital children should not bear the paternal name. In asserting his right to have his children continue to bear his name, a father need only object. He does not even need to appear in court.¹⁹⁴ However the dispute arises—in the context of a statutory name change to which he objects, or by injunction against the mother—the woman has the burden of proof. She must rebut the right of the father and the presumptions against children bearing a name to which the father objects. Under present law she must rebut the right and presumptions not by asserting an equal right to naming her children,¹⁹⁵ but by virtually negating, with clear and compelling facts, that the children's interests are "substantially" served by usage of the natural father's name.¹⁹⁶ She must usually show that her choice of name not only is in the children's best interests, but that their use of the father's

191. *In re Larson*, 81 Cal. App. 2d 258, 183 P.2d 688 (1947); *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978); *Lawrence v. Lawrence*, 86 Ill. App. 3d 810, 408 N.E.2d 330 (1980); *Lazow v. Lazow*, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962); *Eschrich v. Williamson*, 475 S.W.2d 380 (Tex. Civ. App. 1972); *In re Tubbs*, 620 P.2d 384 (Okla. 1980); *In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977).

192. *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. 1974) (enjoining a woman from changing her child's name by court proceedings or otherwise); *Blasi v. Blasi*, 648 S.W.2d 80 (Ky. 1983) (refusing jurisdiction to require a woman to change her child's name by court proceeding; weakening, if not overruling, *Burke*, *sub silentio*).

193. *Walberg v. Walberg*, 22 Or. App. 118, 538 P.2d 96 (1975); *Ouellette v. Ouellette*, 245 Or. 138, 420 P.2d 631 (1966); *Degerberg v. McCormick*, 41 Del. Ch. 46, 187 A.2d 436 (1963); *Mark v. Kahn*, 333 Mass. 517, 131 N.E.2d 758 (1956); *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984). But see a New York trial court's language in *Collins v. Collins*, 483 N.Y.S.2d 151 (Sup. Ct. Schenectady Co. 1984) (father's motion for change of name on birth certificate from mother's birth name to his granted, but court refused to order mother to call the child by such name. "How she refers to her daughter is the prerogative of the defendant.") *Id.* at 152. See also *In re Presson*, 102 Ill. 2d 303, 465 N.E.2d 85, 90 (1984) ("we cannot prevent Pamela from calling her son Kelly or by any other name or nickname within her own living room.").

194. *E.g.*, *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982).

195. *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975) rejected this argument as to older children first given their father's name.

196. *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982).

name is *not* in their interests.¹⁹⁷

While a father must allege that his objection is based on the child's interests, his burden of proof is virtually non-existent. All a father needs to offer is his own belief that the child's use of a different name will weaken the parental bond between them.¹⁹⁸ In contrast, the mother has to prove "not by a mere preponderance of the evidence, but by *evidence satisfactory to the trial court*,"¹⁹⁹ that her name choice is in the child's best interests.

A national consensus as to what constitutes "satisfactory" evidence has yet to develop. In the most frequently cited case on the burden of proof, *Robinson v. Hansel*,²⁰⁰ the court declared: "[J]udicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change."²⁰¹ This standard was reaffirmed by the majority in *Saxton*, but disputed in a potentially important dissent by Justice Wahl who said that she would require only that a woman show that the name change "promotes" her child's interests when the name sought includes her own birthname and does not eliminate the other parent's name.²⁰² In *Saxton* the mother sought a name consisting of a hyphenation of the mother's and father's birth names, rather than a new marital name.²⁰³

Courts recognize children's preferences as material to the issue but of no great importance or weight unless the children are in their teens.²⁰⁴ Courts have suggested the appointment of a guard-

197. *E.g.*, *W. v. H.*, 103 N.J. Super. 24, 246 A.2d 501 (1968) (effect of incest is shown to demonstrate that use of father's name would be detrimental to two daughters); *In re Christjohn*, 286 Pa. Super. 112, 429 A.2d 597 (1981) (evidence of effect on child of her stepfather's murder by her father necessary to show that use of the father's name was detrimental to the child).

198. *E.g.*, *Margolis v. Margolis*, 338 Mass. 416, 155 N.E.2d 177 (1959).

199. *Plass v. Leithold*, 381 S.W.2d 580, 581 (Tex. Civ. App. 1964). Italics in the original.

200. 302 Minn. 34, 223 N.W.2d 138 (1964).

201. *Id.* at 36, 223 N.W.2d at 140.

202. 309 N.W.2d at 298, 302-303 (Wahl and Amdahl, JJ., dissenting). The Minnesota Court of Appeals reaffirmed the woman's heavy burden of proof in *Young v. Young*, 356 N.W.2d 823 (Minn. Ct. App. 1984), which involved a child's use of his mother's new marital name.

203. 309 N.W.2d at 302-03. In *Robinson v. Hansel* the mother sought to add her new husband's surname to the paternal name but not to include it as part of a hyphenated name.

204. *See e.g.*, *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982). Recently, in *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984) the Indiana Court of Appeals overturned the trial court's award of a name change to the mother on the grounds that the child wanted the name, stating that there was "no showing" of the four and one half year old girl's "maturity" to have a preference as

ian ad litem to represent children's interests,²⁰⁵ yet a series of Texas cases rejected such a requirement.²⁰⁶ The advisability of using a guardian ad litem depends largely on the particular jurisdiction and attitudes of the bench and bar. The wrong guardian ad litem can harm women's and children's interests by failing to confront the relative rights involved in a dispute over children's names.²⁰⁷ The right guardian, however, can effectively challenge the traditional male power system. A statutory or judicially imposed requirement of the appointment of a guardian ad litem would thus probably be counter-productive, but in the right case a guardian can be very effective.

As courts awaken to the fact that women and children are asserting constitutional rights in this area, they frame men's right to oppose women's right to name children in neutral terms. The Oklahoma Supreme Court, for example, in *In re Tubbs*,²⁰⁸ rephrased the father's right: "Every divorced parent—custodial or not—whose paternal or maternal bond remained unsevered, has a cognizable claim to having his/her child continue to bear the very same legal name as that by which it was known at the time the marriage was dissolved."²⁰⁹

In direct reaction to the fear that fathers might lose control over naming marital children, the Indiana legislature passed a statute in 1979 to give a rebuttable presumption in statutory name changes proceedings to an objecting noncustodial parent if the parent pays support.²¹⁰ In a recent decision interpreting the statute,

to her name. See also *In re Presson*, 102 Ill. 2d 303, 80 Ill. Dec. 294, 465 N.E.2d 85 (1984).

205. *Id.* In *M.M. v. R.R.M.*, 358 N.W.2d 86 (Minn. Ct. App. 1984) the court cited *Saxton* as supporting the appointment of a guardian in a custody dispute stating that "custody is a more significant issue" than the one addressed in *Saxton* and thus warranted the appointment.

206. *Brown v. Carroll*, 683 S.W.2d 61 (Tex. Civ. App. 1984); *Scucchi v. Woodruff*, 503 S.W.2d 356 (Tex. Civ. App. 1973); *Bennett v. Northcutt*, 544 S.W.2d 703 (Tex. Civ. App. 1976); *Newman v. King*, 433 S.W.2d 421 (Tex. 1968), noted in *Family Law—Failure to Appoint Guardian Ad Litem for Minor Not Fundamental Error*, 22 Sw. L.J. 649 (1968).

207. See, e.g., *supra* note 157.

208. 620 P.2d 384 (Okla. 1980).

209. *Id.* at 385. The 1979 American Law Reports annotation likewise neutralizes the gender of the "objecting parent." Annot. "Rights and Remedies of Parents Inter Se With Respect to the Names of Their Children," 92 A.L.R.3d 1091 (1979).

210. Ind. Code Ann. § 34-4-6-4(d) (Burns Supp. 1985):

In deciding on a petition to change the name of a minor child, the court shall be guided by the best interest of the child. . . . However, there is a presumption in favor of a parent of a minor child who: (1) Has been making support payments and fulfilling other duties in accordance with a decree . . . and (2) Objects to the proposed name change of the child.

In my comments to the bill I expressed that the bill:

the Indiana Court of Appeals wrote:

[T]he presumption created by the legislature is it is in the best interest of the child to retain the name of the parent who makes support payments and fulfills other duties imposed by a dissolution decree, if such parent objects to the proposed name change. To prevail in such an action, then, the petitioning party must overcome that presumption. This is not to say, as Blank posits, such presumption must be overcome before the best interest of the child is relevant. Rather, the best interest of the child is always the primary concern with merely a presumption the supporting parent's position is in the best interests of the child.²¹¹

In no known case has a custodial mother sought to change her marital child's surname from her birth name to the father's name or to another name. Nor is there any reported case of a non-custodial father attempting to change his marital child's surname from the parental to the maternal or another surname. The courts' attempts to appear neutral amount to sheer judicial hypocrisy. An English commentator tactfully wrote: "It is submitted that this is a somewhat unreal situation, since only rarely is the father likely to wish for a name change, but rather to insist on the children retaining their original surname, his own."²¹² Neutral language cannot conceal the appallingly disparate burden of proof imposed upon women in these names cases.

The lower and higher courts of Minnesota in *Saxton*, citing approvingly to its earlier case of *Robinson*, thinly disguised their continued acceptance of the father's right and the mother's heavy burden of proof. The noncustodial father in *Saxton* insisted that his children use only his surname, alleging that the children's best interests would be served by his name and because his son was his "only male heir." The trial referee recommended the father's

appears to be patently designed to prevent women with children in their custody from statutorily changing their children's names if the father objects and contributes any support for the child and is in obedience with a decree issued pursuant to IC 31-1-11.5

While this discrimination is phrased as a presumption, it appears, though "neutrally" worded, to clearly be written to give men the predominant naming rights of children

Letter to Lesley DuVall, Chair, Indiana Senate Judiciary Committee (March 5, 1979)

211 *In re Meyer*, 471 N.E.2d 718 (Ind. Ct. App. 1984). Neither the constitutionality of the pretextually sex neutral language of the statute, nor any other constitutional issue, was raised by either party before the trial or appellate courts. To rebut the presumption in favor of the noncustodial parent's preference, the evidence must be "clear and convincing," the court stated. It rejected the finding of the trial court that the new name would be good for the child as being enough to rebut the presumption.

212 Evelyn Ellis, *The Choice of Children's Surnames*, 9 *Anglo-Am L. Rev.* 92 (1980).

choice of surname. He cited the father's right, the standard cases to protect it, and the contention that the mother had not met her burden of proof. The referee failed, however, to admit that he was deferring to the father's choice: "In other words, the Court is not so much imposing patriarchical custom and tradition upon the children, but rather, securing and maintaining the parent's understanding and agreement when they first named their children at birth."²¹³ The Minnesota Supreme Court stated that either parent's choice of name would serve the children's interests. It then broke the tie between the two names to that name (paternal) used over a long period of time.²¹⁴ In the companion case, *Jacobs v. Jacobs*, the court enunciated a co-equal right of parents to name children at birth. The court, nonetheless, rejected Audrey Davis Saxton's claim that this distinction causes courts to support the patrilineal naming system.

The petitioner in *Saxton* married in 1969, a time when few women knew their rights or deviated from custom by not changing their names at marriage. She divorced in West Virginia when its statutes still prohibited a divorced woman with children from changing her name pursuant to the divorce decree. The change in name had been the idea of her son, Robert, and discussed by them and her daughter, Jessica, over a long period of time. The father had at first agreed, then withdrawn his consent. As Ms. Saxton's attorney I unsuccessfully wrote the United States Supreme Court:

The Petitioner before this Court is typical of the victims of prejudice and discrimination against women determining their own names. "Caught between a rock and a hard place," first having to fight and litigate simply to not change their names, or to change them if they had children or might have children, they are now being slapped in the face again by being told that it is only right that they be denied participation in the naming of the children in their custody over the fathers' objection because they consented to naming the children with the father's name in the first place!²¹⁵

The United States Supreme Court will have to be convinced that the issue of naming children raises substantial federal questions and is important and widespread enough for it to render guidance to the state courts.²¹⁶ Until then, women must continually

213. *In re Saxton*, No. 755270 (Dist. Ct. Hennepin Co., Minn., July 16, 1979), Memorandum of Referee Thomas F. Haeg (citing to *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975)).

214. See *supra* note 120.

215. Reply of Petitioner to Response of Respondent to Petition for A Writ of Certiorari to the Supreme Court of Minnesota, *Saxton v. Dennis*, No. 81-959 (U.S. S. Ct., 1981).

216. It is unlikely that the Supreme Court will hear any children's names case

attack and overcome this high burden of proof before they will have any voice in naming their noninfant children.

VII. Resolving Disputes Over Naming Children at Birth or Thereafter—The Developing Custodial Parent Presumption

With the law stacked against women obtaining any right of participation in the naming of their marital children when the ex-husband objects, attorneys in the mid-1970s began arguing that the law should recognize a presumption in favor of the custodial parent's judgment. Attorneys have made this argument in most of the recent successful at-birth naming disputes.²¹⁷ New Hampshire recently adopted the presumption statutorily as a means to resolve disputes over naming newborn marital children on their birth certificates.²¹⁸ Pennsylvania promulgated and published regulations to such effect in 1975.²¹⁹

which involves any factual dispute over individual children's "best interests" See *supra* note 120

217 "Absent a showing of abuse or neglect, the custodial parent should be presumed to show good judgment in his or her decision regarding the child and the court should not dictate his or her action" Brief for Appellant by Evergreen Legal Services, *Hurta v Hurta*, 25 Wash App 95, 605 P 2d 1278 (1979) "The choice of a surname should rest with the parent, male or female, who will take custody of the newborn child and make day-to-day decisions affecting the child's life and best interests" Brief for Appellant, *In re Schidlmeier*, No J 27018-85, slip op (Pa Super Aug 9, 1985) Attorneys argued the concept in *In re Schiffman*, 28 Cal 3d 640, 620 P 2d 579, 169 Cal Rptr 918 (1980), *Jacobs v Jacobs*, 309 N W 2d 303 (Minn 1981), *In re Saxton*, 309 N W 2d 298 (Minn 1981), *cert denied*, 455 U S 1034 (1982), and *Cohee v Cohee*, 210 Neb 855, 317 N W 2d 381 (1982), as well as in several unreported lower cases In *Jacobs* the Minnesota Supreme Court was obviously disturbed by the fact situation of a mother seemingly attempting to "bastardize" her child by getting impregnated by her ex-husband after divorce proceedings were filed or finalized Given such a fact situation the court was unlikely to remand with a presumption in favor of the custodial parent See *supra* notes 114-148 and accompanying text for discussion of at-birth naming law In *In re Schidlmeier*, No J 27018-85, slip op (Pa Super Aug 9, 1985), the mother appellant unsuccessfully argued that a noncustodial father should not have standing to petition to change the name of a child in its mother's custody except as part of a petition to change custody

The NOW LDEF wrote as amici curiae in the unsuccessful *Cohee* case "When parents are unable to agree on the child's surname, the law should presume that it is in the child's best interests to bear the surname chosen by the custodial parent the custodial parent is the head of the household and, as custodian, has the ultimate responsibility for decisions regarding the child While it may be desirable to encourage the participation of the non-custodial parent in the various phases of the child's upbringing, the custodial parents should be the final arbiter" Brief of Amici Curiae, NOW Legal Defense and Education Fund joined by the National Center on Women and Family Law and the (since defunct) Center For A Woman's Own Name

218 NH Rev Stat Ann § 126 6-A(I)(a) (1984) ("the choice of surname rests with the parent who has actual custody following birth")

219 28 Pa Admin Code § 17(b) (Shepard's 1975) ("If the parents are divorced

The custodial parent presumption was not new. It had appeared in disputes over marital children's names particularly in California.²²⁰ A mother's right to name nonmarital children is based on her right as guardian and custodian.²²¹ Parental rights claimed by joint custodians in ongoing marriages to name their children against the state are also based on the presumption.²²² Adoption of the presumption follows logically from the divorce courts' exercise of jurisdiction over the naming of children as incidental to children's care, custody, and control.²²³ Excellent law review commentary has also discussed the presumption favorably.²²⁴

Cases involving parental disputes over children's names have, however, traditionally carved out, as a singular exception to custodial mothers' rights to rear children, the right to name the children. The District of Columbia Court of Appeals once stated that "evaluating the evidence bearing upon the real issue, the views of the mother are also entitled to consideration."²²⁵ Until recently, this represents the most recognition any court has made of a wo-

or separated at the time of the child's birth, the choice of surname rests with the parent who has custody of the newborn child") This regulation was cited by Justice Mosk in his concurring opinion advocating the custodial parent presumption in *In re Schiffman*, 28 Cal 3d 640, 620 P 2d 579, 169 Cal Rptr 918 (1980). It was interpreted for the first time in *In re Schidlmeier*, No J 27018-85, slip op (Pa Super Aug 9, 1985). See *supra* note 133 and *infra* notes 231-234 and accompanying text.

²²⁰ *Reed v Reed*, 338 P 2d 350 (Okla 1959), *In re Trower*, 260 Cal App 2d 75, 66 Cal Rptr 873 (1968), *In re Cohn*, 181 Misc 1021, 50 N Y S 2d 279 (Sup Ct N Y County, 1943), *Webber v Parker*, 167 So 2d 519 (La Ct App 1964), *writ refused* 264 La 86, 168 So 2d 269 (1964), stopped short of recognizing a custodial parent's right.

²²¹ *Supra* notes 98-100 and accompanying text, Op Att'y Gen Wis (Oct 7, 1974).

²²² *Supra* notes 81-96, 102-113 and accompanying text. In cases of joint custody, if the child actually lives with both parents, the naming right should remain mutual with neither parent having a greater burden of proof to establish that her or his choice of name should be used by the children.

²²³ See *supra* notes 160-167 and accompanying text.

²²⁴ Note, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 Utah L Rev 303, M Hannah Leavitt, *Surname Alternatives in Pennsylvania*, 82 Dick L Rev 101, 115-16 (1977). See Kathryn Urbonya, *No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes the Paternal Right to Name a Child*, 58 ND L Rev 793 (1982) (author worked on *In re Dengler*, 287 N W 2d 637 (Minn 1979), *appeal dismissed*, 446 U S 949 (1980), with Prof Thomas Lockney of the University of North Dakota School of Law), Laura A Foggan, *Parents' Childrearing Authority and the Selection of Children's Surnames*, 51 Geo Wash L Rev 583 (1983) (as a law student author worked on an amicus curiae brief for the Washington, D C Women's Legal Defense Fund in *Miller v Leavitt*, No Civ 82-369-E (WD Okl Dec 24, 1982) (Journal Entry of Judgment)) and filed an amicus curiae brief on behalf of the Fund in support of the Application To Suspend the Rules To Rehear and Reconsider the Appeal and Decision in *Overton v Overton*, 674 P 2d 1089 (Mont 1983).

²²⁵ *Nellis v Pressman*, 282 A 2d 539 (D C 1971), *cert denied*, 405 U S 975 (1972).

men's right to make decisions about naming children in her custody when she is not alleging paternal misconduct. In no other area of childrearing do courts intervene to the extent of even enjoining or ordering a parent to do what even the court acknowledges may embarrass the child.²²⁶

California Supreme Court Justice Mosk, in his pathsetting and thorough concurring opinion in *Schiffman*, urged the adoption of the presumption in favor of the custodial parent in naming matters. Because the custodial parent has been awarded custody of a child on the basis of the child's best interest, it should be presumed, he wrote, that the

parent with custody . . . has acted in the child's best interest in selecting the name. . . . Just as the noncustodial parent can seek a corrective order if the child's health, education or control are deleteriously affected by the abuse of custodial care, so the selection of name can be contested on the ground that it is not in the child's best interest. The burden, however, would be on the noncustodial parent to establish the intrusion on the child's best interest.²²⁷

To the extent that a custodial mother usually desires the children in her custody to bear in whole or part the same surname she does, the presumption itself can be said to be based on a presumption that children's best interests are served by using the same name as their custodial parent.²²⁸ However, attorneys and commentators appropriately found the presumption primarily on the legal right to determine what name is in a child's best interests, *not* on the specific name selected by the custodian. They base the

226. "Whatever the nature of the 'harassment' of the children by their peers, it would seem that it was in this case surely no more severe than [that] faced by thousands of other similarly situated children in a day when broken homes have become commonplace." *Robinson v. Hansel*, 302 Minn. 34, 37, 223 N.W.2d 138, 141 (1974). See also *Niesen v. Niesen*, 38 Wis. 2d 599, 157 N.W.2d 660 (1968); *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (1967); *Degerberg v. McCormick*, 41 Del. Ch. 46, 187 A.2d 436 (1963).

227. *In re Schiffman*, 28 Cal. 3d 640, 648, 620 P.2d 579, 584, 169 Cal. Rptr. 918, 923 (1980) (Mosk, J. concurring), noted in Cox, *When a Child's Surname is Different From the Custodial Parent's*, 10 Colo. Lawyer 1651 (July, 1981), and discussed in Urbonya, *supra* note 224.

228. *E.g.*, in *Niesen v. Niesen*, 38 Wis. 2d 599, 157 N.W.2d 660, 663-64 (1968), the Wisconsin Supreme Court wrote:

There are cases . . . when the use of the stepfather's surname by the child avoids not only difficulties but embarrassment to the child who is unable to explain to his playmates that he is a tragic victim of divorce. Even though the social evil of divorce is widespread, children and many adults still do not accept as convenient or natural a different surname for a child and his mother.

See also *Pintor v. Martinez*, 202 S.W.2d 333 (Tex. Civ. App. 1947); *Don v. Don*, 142 Conn. 309, 114 A.2d 203 (1955); *Kirksey v. Abbott*, 591 S.W.2d 751, 752 (Mo. Ct. App. 1979).

presumption on the authority of the custodial parent to rear her children without interference of the noncustodial parent.²²⁹ As one commentator characterized it:

The relationship between the custodial parent and child . . . is built upon the custodial parent's right to direct the child's development—psychological, educational, and religious. Because a name can have psychological, educational and religious significance, a custodial parent should also determine a child's name. The selection of a name would thus be one aspect of the custodial parent's duty to direct the development of a child's identity.²³⁰

In a recent decision, *In re Schidlmeier*,²³¹ the Pennsylvania Superior Court interpreted the state's regulation giving the choice of surname for a newborn to the custodial parent for the first time in the context of a noncustodial father petitioning to change the surname of an infant child from her mother's name to his. The trial court had dismissed the regulation as irrelevant and found for the father. The appellate court reversed, cited Justice Mosk's opinion, and stated:

The policy embodied in Section 1.7(a) fairly and practically allocates the responsibility for choosing a newborn child's surname. The custodial parent generally has the right to make major decisions affecting the best interests of a minor child.²³²

The court equated the term "custody" with "legal custody." After thus ruling that the initial naming had been done pursuant to valid public policy by the parent with the legal right to custody, it treated the father's request to change the birth certificate name of the child eighteen months after her birth as a name change, put the burden of going forward with the evidence that the proposed change was in the best interests of the child and stated:

In the case of a contested petition to change a child's name, the court must carefully evaluate all the relevant factual circumstances to determine if the petitioning parent has established

229. See, e.g., Joseph Goldstein, Annal Freud & Albert J. Solnit, *Beyond the Best Interests of the Child* (1973). It is particularly consistent with the theory that children's best interests are served by being in the custody of the caretaking parent. See Women's Legal Defense Fund, *Representing Primary Caretaker Parents in Custody Disputes* (1984) for a discussion of the law developing towards custody being awarded to the caretaking parent.

As attorney for Ms. Saxton I wrote to the U.S. Supreme Court: "As custodial parents of their children women now expect to be created not as babysitters of male property, branded with the male name, but as fully responsible and mature heads of household with no exception carved out for the naming of their children." Reply of Petitioner to Response of Respondent to Petition for a Writ of Certiorari to the Supreme Court of Minnesota at 11.

230. Urbonya, *supra* note 224, at 815.

231. No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985).

232. *Id.*

that the change is in the child's best interests. This the court must do without according a presumption in favor of either parent.²³³

Although it did not expressly adopt the custodial parent presumption in the case of infants, by shifting the burden to the non-custodial parent, the court effectively prevented noncustodial fathers from undermining the policy of the regulation to give the custodial parent the right to name newborns. The court, unfortunately, failed to discuss the policy in broader terms.

The court also failed to articulate the burden of the parent to prove that a proposed name change is in a child's best interests. Because the trial court had ruled in the father's favor on the basis of "tradition and custom," and because the father only alleged that it would be in the child's best interests to bear the parental name, the court held for the mother stating that the father's "allegation does not meet his burden of proof" and that the trial court's rational was not "legally sufficient to sustain a conclusion that the name change appellee seeks is in the child's best interests."²³⁴

Appellate courts have not expressly adopted the custodial parent presumption, and one court to which it has been argued has expressly rejected it.²³⁵ Georgia and Louisiana have provisions similar to the Indiana statute giving an express presumption in favor of a marital child's continued use of the noncustodial parent's name.²³⁶ In direct contrast, the Virginia legislature amended its law to provide that a change of name of a minor shall be denied only if the "change of name is not in the best interest of the minor."²³⁷ A similar new Minnesota statute was construed in *Saxton* as not changing the burdens of proof established by the 1974 decision in *Robinson v. Hansel*.²³⁸ Several trial judges have accepted the custodial parent preference as a viable means of resolving disputes between parents, especially when the children are very young or even unborn.²³⁹ Recently, the Colorado Court of Ap-

233. *Id.*

234. *Id.*

235. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982). The Nebraska Supreme Court, however, did say that custody should be considered, but it gave no explanation as to how.

236. Ga. Code Ann. § 19-12-1 (1982); La. Rev. Stat. Ann. § 13:4751(B) (West Supp. 1985). See Ind. Code Ann. § 34-4-6-4(d) (Burns Supp. 1985) and *supra* notes 200-201 and accompanying text.

237. Va. Code § 8.01-217 (1984):

[T]he court, shall, unless the evidence shows that the change of name is sought for a fraudulent purpose or would otherwise infringe upon the rights of others or, in case of a minor, that the change of name is not in the best interest of the minor, order a change of name. . . .

238. 302 Minn. 34, 223 N.W.2d 138 (1974).

239. *E.g.*, *In re Miles*, No. 80DR2859 (Dist. Ct. El Paso Co. Col. Nov. 14, 1980);

peals, although not expressly adopting the presumption, upheld a trial court order based partially on it.²⁴⁰

With the demise of the tender years doctrine, which presumed that mothers of young children should have custody, arose the nationwide standard of awarding custody according to a child's best interests. The custodial parent presumption offers a sex-neutral standard by which disputes can be resolved.

I believe that trial courts will experiment with, and soon tire of, hyphenated names as resolutions for naming disputes over newborns.²⁴¹ This will occur as trial and appellate courts, along with state legislatures, move towards recognizing naming as an incident of childrearing entrusted to the custodial parent over newborn or very young children.²⁴² I also think it is clear that the presumption will develop from cases where the mother uses her birth given surname or a surname not assumed because of a marriage, and does not seek to give her child the surname of another man. Whether the presumption will gain acceptance as a standard in disputes over naming older children, however, depends upon active and strategic advocacy during the next decade.

Reed v. Reed, No. 1590 (Super. Ct. Tolland Co. Conn. Nov. 23, 1973). In *State v. Tedeno*, 101 Misc. 2d 485, 421 N.Y.S.2d 297, 300 (Sup. Ct. 1979) a New York trial court wrote:

[T]he significant consideration is that the mother has custody and it is she who will be the primary caretaking figure and who will make the major decisions for Alexandria. Moreover, the Court recognizes that children, as they grow older, generally prefer to use the name of the parent with whom they live.

240. *In re Nguyen*, 684 P.2d 258 (Colo. App. 1983), cert. denied, 105 S. Ct. 785 (1985).

241. *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982). See *supra* notes 14-15 and 128-230 and accompanying text. A hyphenated surname is not necessarily good for a child, especially if it is imposed when the child is older, and is not often the choice of either parent in a naming dispute. One commentator advocates a rebuttable presumption in favor of a hyphenated surname but without discussion of how the mother, father (and child) would rebut the presumption and by what standard the court would then choose between the choices of the parents as being in the best interests of the child. Note, *Like Father Like Child: The Rights of Parents In their Children's Surnames*, 70 Va. L. Rev. 1303, 1347-48 (1984).

242. New Hampshire and Pennsylvania recognize the presumption by statute and administrative regulation. N.H. Rev. Stat. Ann. § 126:6(II)(a) reads "if the parents are separated or divorced at the time of the child's birth, the choice of surname rests with the parent who has actual custody following birth." 28 Pa. Admin. Code § 1.7(b) (1975): "If the parents are divorced or separated at the time of the child's birth, the choice of surname rests with the parent who has custody of the newborn child." The Pennsylvania Superior Court, however, in interpreting this regulation, in *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985), shied away from expressly articulating the presumption. See *supra* notes 231-234 and accompanying text. A requirement that one parent, on the basis of her or his sex, sign a state form for a minor is a violation of equal protection. *Johnson v. Hodges*, 372 F. Supp. 1015 (E.D. Ky. 1974) (driver's license). Most states provide that either or both parents sign a birth certificate.

VIII. Legal Recognition That a Name Does Not Imply Illegitimacy or Paternity

One of the spoken and unspoken objections to recognizing a child's right to bear its mother's surname has been that, because customarily nonmarital children are known by their mothers' surnames, society will stigmatize marital children as "illegitimate" if they also carry their mothers' surnames. Charlotte Perkins Gilman wrote in 1913: "As to illegitimate children, the term will disappear from the language. . . . When women have names of their own, names not obliterated by marriage . . . there will be no way of labeling a child at once, as legitimate or otherwise."²⁴³ Now that women increasingly have names of their own, society cannot, and should not, label children as "illegitimate" or "legitimate." The notion that use of a woman's birth name will impose a "badge of ignobility" on a child has been accepted by several lower court jurists. Only one appellate court, however, had given the notion any credence until May, 1985.²⁴⁴ Until May 14, 1985 no appellate no court had accepted the notion as reason to deny a child its mother's name.²⁴⁵

In *Doe v Dunning*,²⁴⁶ the Washington State Registrar declined to issue conventional birth certificates to nonmarital children, assuming that listing the father's name on a conventional certificate along with the mother's different surname was "indicative of a probability of illegitimacy."²⁴⁷ The Registrar based the policy on the "custom" of marital children taking their father's names. The Washington Supreme Court held that "disclosure of the fact that a child bears the mother's surname is not necessarily a fact from which illegitimacy can be ascertained."²⁴⁸ While some might suspect illegitimacy in looking at the child's birth certificate, the court wrote, "[o]thers might view it as an adoption of an emerging social trend."²⁴⁹

In another case,²⁵⁰ the trial court denied a woman's petition

243. Charlotte Perkins Gilman, *Illegitimate Children*, 4 *The Forerunner*, 295, 297 (1913).

244. *In re Harris*, 160 W. Va. 422, 236 S.E.2d 426 (1977).

245. *E.g.*, *In re Toekles*, 97 Idaho 406, 545 P.2d 1012 (1976); *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976). In *Lassiter-Geers v. Reichenbach*, 303 Md. 88, 492 A.2d 303, 307 (1985) the court upheld a chancellor's application of the "best interest test to the facts of this case." the chancellor had concluded from the bench that "some people and a lot of people may well infer this child was born out of wedlock."

246. 87 Wash. 2d 50, 549 P.2d 1 (1976). See *supra*, note 2 and accompanying text.

247. *Id.* at 52, 549 P.2d at 2.

248. *Id.* at 52, 549 P.2d at 3.

249. *Id.* at 52, 549 P.2d at 4.

250. *In re Toekles*, 97 Idaho 406, 545 P.2d 1012 (1976).

to change the name of her nonmarital child from the father's name to hers on the grounds it "would make her a bastard on the fact of the record."²⁵¹ The appeals court reversed, saying that the order would "only have determined the name by which the child would be known thereafter. It would not have any effect upon the child's legitimacy."²⁵²

Still, in the West Virginia case of *In re Harris*,²⁵³ the majority said "as the circuit judge in one of the cases before us so ably pointed out, a child's bearing a woman's maiden name does give fair indication that the child is illegitimate."²⁵⁴ Were a father to forfeit his legal right to name the child by disgracing his name or abandoning the child, the court noted, then a child's name might be changed to the mother's. The court did not clarify whether the child would be labeled any less "legitimate" under such circumstances.

In *Cohee v. Cohee*, the trial court stated that a common surname of a custodial mother and child is "usually accomplished by the mother keeping her prior name."²⁵⁵ The lower court stated that it may be "easier on the child to have the same name as the head of the house of the parent, but also easier on the child to have the name of the father to prevent any implication in later years that the child was an illegitimate child."²⁵⁶ The trial judge expressed no concern about birth status implied from different surnames of a custodial mother and child. The issue, however, was dealt with by the Nebraska Supreme Court in one sentence: "We consider and reject the trial court's reasons that the status of legitimacy would necessarily be raised by different surnames of mother and son."²⁵⁷ None of the courts which have denied women the right to name their marital children have suggested that a child's bearing the paternal name while its mother bears her own name implies that the child was illegitimate.²⁵⁸

251. *Id.* at 407, 545 P.2d at 1013.

252. *Id.*

253. 160 W. Va. 422, 236 S.E.2d 426 (1977).

254. *Id.* at 427, 236 S.E.2d at 429.

255. *Cohee v. Cohee*, Tr. 4:5-6.

256. Tr. 4:12-17.

257. *Cohee v. Cohee*, 210 Neb. 855, 860-61, 317 N.W.2d 381, 384 (1982).

258. In *Nellis v. Pressman*, 282 A.2d 539, 541 (D.C. 1971), *cert. denied*, 405 U.S. 975 (1972), the father, who objected to his children continuing to bear their mother's remarried name, said that "it is not natural for children to carry their mother's name." He did not, however, suggest that their birth status would be questioned. New Jersey Rules 8:2-1.1(a)4 provides that "since a choice of the options for recording the surname of a child can result in such surname being different from that of its father, the agreement or difference of the two surnames is not an indication of legitimacy or illegitimacy." The presence and introduction of ma-

More often it is argued that a woman's naming her child with the putative father's name is evidence of paternity. In *Doe v. Hancock County Board of Health*, Justice Hunter of the Indiana Supreme Court in dissent stated: "[I]t is clear that the use of a name does not legally imply that a biological relationship exists between persons with that same name. The only legal purpose served by a name is to identify the particular individual who uses it for that purpose."²⁵⁹ The Massachusetts Supreme Court in *Commonwealth* indicated that if there has been no acknowledgment or adjudication of paternity, there is the "possibility of a dishonest purpose to harass the alleged father" in naming a child for an alleged father.²⁶⁰

Although courts may refer to a name representing membership in a family unit,²⁶¹ the courts do not hold that a person's name itself evidences, in law, one's parentage or birth status. The law recognizes women's increasing use of their own names, and is gradually declining to stigmatize children as "legitimate" or "illegitimate." Legal recognition of women's right to name their children will result in more respectful treatment of children.

IX. The Need for Legislation, Constitutional Challenges and the Equal Rights Amendment to Guarantee Women Rights in Naming Children Where the Fathers Disagree

A. Legislation

Legislation on naming children, proposed or passed over the past dozen years, has not followed a coherent plan. This absence of strategy arises from the lack of knowledge in the women's movement about the law of naming and its failure to recognize naming children as a pressing women's issue. The legislation which has been enacted attempts to resolve two basic issues: 1) specification of the names parents may give newborn marital and nonmarital children on their birth certificates (or conscious lack of such specifications), and 2) allocation of the control over naming

ternal grandparents at oral argument helps courts to view the maternal name with respect.

259. *Doe v. Hancock County Board of Health*, 436 N.E.2d 791, 794 (Ind. 1982). See also *In re Dillon*, 283 Pa. Super. 26, 423 A.2d 426 (1980).

260. *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 192, 366 N.E.2d 717, 726 (1977). This is narcissistic, but it is also a common fear and negative supposition about women among men and probably the basis of the laws which require the biological father's consent or a determination of paternity for a child to bear its father's name on its birth certificate. The same presumed intent to harass could be manifested, moreover, by giving a child a man's name as a first and/or middle name.

261. *E.g., In re Schiffman*, 28 Cal. 3d at 647, 620 P.2d at 583, 169 Cal. Rptr. at 923.

children between parents, married or unmarried. Beyond unsuccessful attempts to maintain the custom of marital children bearing their fathers' names or to limit parental options,²⁶² legislation attempting to impose state control over naming children has been minimal. Except for the repeal of the Louisiana, Nebraska, North Carolina, and Tennessee limitations on names to be given marital children at birth, no legislation should be necessary to guarantee that married parents have the right to name their children with any name if general common law principles are followed. Statutes which simply codify the common law and state that parents have the right to name their children as they wish, such as those in Michigan and New Hampshire, are technically not necessary. Statutes mandating that a nonmarital child bear a certain surname on its birth certificate depending on its birth status or the relationship between the parents need to be repealed or invalidated by litigation.

New Hampshire provides an example of positive legislation which would be useful to guarantee women rights in naming children. The statute specifies that if parents are divorced or separated at the time of birth, the choice of name rests with the parent having actual custody.²⁶³

A proposal in Wisconsin goes further.²⁶⁴ First, it codifies Wisconsin's recognition of the common law right of parents who are married to each other and not separated, to register the given name(s) and surname of a child.²⁶⁵ Then it provides that if the parents are separated or divorced at the time of birth, the given name(s) and surname shall be registered by the parent with actual

262 In Iowa the state registrar supported a bill which provided: "The custodian shall not give the child a name which is obscene, lewd, lascivious, indecent, or otherwise potentially harmful to the future of the child" and gave the registrar the authority to refuse to register such names. 1973 Iowa S B 201. Michigan's similar name change statute was amended in the mid 1970s.

Several states have considered at-birth name selection statutes such as the Louisiana, Nebraska, North Carolina, and Tennessee statutes. *E.g.*, 1979-80 H B 639 (Ohio) (marital child to be registered in name mutually agreed upon by parents, and if they do not agree, a hyphenated surname with mother's name first, nonmarital child in mother's name unless both sign, then according to both parent's agreement), N C S B 306 (1979) (marital child given either parent's name or hyphenated name), N J A B 3368 (April 28, 1975) (birth certificate to include "surnames of the mother, the father, and the child, which names need not necessarily be the same").

263 N H Rev Stat Ann § 126 6-a(I)(a) (Supp 1983). Pennsylvania has a published regulation to such effect. See *supra*, notes 62, 218, 231-234 and accompanying text.

264 No 1677/7 Leg Ref Bureau. Conversations with Raymond Nashold, State Registrar of Vital Statistics, Edward Steichen, Bureau Chief and Kenna del Sol, Legislative Attorney (June, 1985).

265 63 Op Atty Gen Wis 501 (Oct 7, 1974).

custody. If, however, a court has awarded custody to another, the names selected by such person shall be registered.

If the parents were not married to each other from conception to birth, the bill provides for the mother to register the child's names unless a court has granted legal custody to another in which case that person selects the given and last names.

The proposal further provides that upon an acknowledgment of paternity (signed by both parents), the mother, or the father if a court has granted him legal custody, can change the names of a child under seven years of age. If the parents marry each other following the birth, the parents have the mutual right to change a child's name on its birth certificate, again if the child is under seven.²⁶⁶

Additionally, where the children are age seven or older, legislation could provide that children's preferences regarding any name change be admissible and that at age fourteen require their consent. Such provisions would give children a long-overdue voice in proceedings that purport to determine their best interest.²⁶⁷

Because of the spoken and unspoken fear that women will, as men have, impose their surnames on children irrespective of the children's best interests, it appears highly unlikely that legislatures will adopt a comprehensive custodial parent presumption.²⁶⁸ Legislatures should be encouraged to accept the presumption for the naming of infants, such as New Hampshire and Pennsylvania

266. The provision could go even further and provide for birth certificate name change by a custodial parent or person until a child reaches seven years.

Oregon and Maryland have considered statutes specifically providing for name changes of children at the time of divorce to the custodial parent's name. Ore. H.B. 2102 (1979); Md. S.B. 961 (1977) (only in cases of child legitimized by marriage being dissolved).

267. My experience with litigants indicates that children over seven years of age should be listened to. Because parents and children should openly discuss the issue I do not believe that their testimony should be sealed. To put children at ease, however, judges should generally interview children in chambers instead of open court, with parents and attorneys present unless the children object. For an in-depth discussion and analysis of questioning children in the context of custody and visitation proceedings, see Cathy Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 Family L.Q. 43 (1984).

268. Indeed, legislatures have proved to be reactionary. See, e.g., Louisiana's, North Carolina's, and Tennessee's recent legislation protecting the husband's control over naming at birth, La. Rev. Stat. Ann. § 40:34(a)(1) (West 1984); N.C. Gen. Stat. § 130A-101(e) (Supp. 1983); Tenn. Code Ann. § 53-445 (Supp. 1982), and Georgia's, Indiana's, and Louisiana's protection of men in state name change proceedings, Ga. Code Ann. § 19-12-1 (1982); Ind. Code Ann. § 34-4-6-4(d) (Burns Supp. 1982); La. Rev. Stat. Ann. § 13:4751(B) (West Supp. 1985). Similarly, in interpreting Pennsylvania's regulation providing for the custodial parent to name newborns, an appellate court fell short of adopting a custodial presumption for statutory name change petitions. *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985). See *supra* notes 231-234 and accompanying text.

have. Because the courts are giving such minimal support to women, legislatures must also be asked to address the custodial parent presumption as a solution to resolving disputes between parents over their children's names.

B. Constitutional Challenges and the Equal Rights Amendment

The right of women to name themselves is supported by centuries of common law and the fact that there is no case on record requiring a married woman to have the consent of her husband to use her own name. Children's names, however, bring to current litigation a virtually unblemished history of judicial encouragement of the perpetuation of the patrilineal naming system and of men's power to name marital children in parental dispute situations.

State and federal constitutional rights of women to name their children have only been raised in a few of the children's names cases involving disputes between parents.²⁶⁹ The courts have recognized a constitutional right of fathers to protect their "time-honored" superior naming right,²⁷⁰ and parents to name their children against state interference where they are in agreement.²⁷¹ The courts have not been receptive to recognizing independent women's or children's constitutional rights in this area.²⁷² At most, the courts express that parents have an equal right in naming children at birth.

If litigants successfully force the courts to deal with constitutional issues, the failure of the Equal Rights Amendment may not have much effect. Courts should invalidate any superior naming

269. *E.g.*, *In re Saxton*, 309 N.W.2d 298 (Minn. 1981), *cert. denied*, 455 U.S. 1034 (1982); *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975); *In re Warschberger*, 8 F.L.R. 2514 (N.Y. Sup. Ct. Naussau County, June 21, 1982); *Overton v. Overton*, 674 P.2d 1089 (Mont. 1983) (particularly Application To Suspend the Rules to Rehear and Reconsider the Appeal and Decision). *In re Schidlmeier*, No. J. 27018-85, slip op. (Pa. Super. Aug. 9, 1985).

270. *In re Tubbs*, 620 P.2d 384 (Okla. 1980); *Carroll v. Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978).

271. *E.g.*, *Sydney v. Pingree*, 564 F. Supp. 412 (S.D. Fla. 1982) (Order granting Plaintiff's Motion for Summary Judgment); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979); *Doe v. Hancock County Board of Health*, 436 N.E.2d 791 (Ind. 1982) (Hunter, J., dissenting).

272. *But see* *Jones v. McDowell*, 53 N.C. App. 434, 281 S.E.2d 192 (1981) (invalidating a statute mandating that a child's surname automatically change to its father's at legitimation over the mother's objection and irrespective of the age of the child); *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277 (1975); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981); *Doe v. Hancock County Board of Health*, 436 N.E.2d 791 (Ind. 1982) (Hunter, J., dissenting). *Saxton*, 309 N.W.2d at 298, expressly rejected constitutional right of women to name their children.

right of the father over marital children. In *Kirchberg v. Feenstra*,²⁷³ the United States Supreme Court held that a Louisiana statute giving the husband exclusive control over community property violated the equal protection clause of the Constitution. The Louisiana, North Carolina, and Tennessee birth naming statutes are ripe for challenge on this basis. These statutes represent the type of gender-based discrimination that the United States Supreme Court could be expected to strike down on equal protection grounds.

Under existing standards of equal protection,²⁷⁴ courts should eliminate men's superior right to name marital children. However, as Ruth Hale pointed out fifty years ago,²⁷⁵ men do not give up the right to brand what they consider their property easily. Local family lawyers are apt not even to fight for a woman client's desire to name her children over the father's objection. Courts at all levels rarely evidence a judicial detachment in ruling on the issue. To the contrary, they all but openly express their clear desire to retain the traditional presumption of the paternal surname, particularly where children are older. The failure of the Equal Rights Amendment will consequently make achievement of equal rights in naming children considerably more difficult.

Unquestionably, the Equal Rights Amendment²⁷⁶ would invalidate any superior naming right of the father over children of any age. It should invalidate any presumption that continued use of the father's name, when the father wants it retained, is in the children's best interests. Acceptance of criteria to determine children's interests which protect the father's traditional right would similarly become invalid. Until the federal amendment becomes a reality, state equal rights provisions should be employed to invalidate the power of men to name children.

273. 450 U.S. 455 (1981).

274. *Id.*; *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Craig v. Boren*, 429 U.S. 190 (1976); *Orr v. Orr*, 440 U.S. 268 (1979); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

275. Hale, *supra* note 6 (referring to men imposing their names on their wives as property).

276. "Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." Proposed Amendment to the United States Constitution, Section 1, S.J. Res. 8, S.J. Res. 9 and H.R.J. Res. 208, 92d Cong. 1st Sess. (1971).

See *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2nd Sess., Part 2, 375-77 (1984) (letter to Senator Orrin G. Hatch from Priscilla Ruth MacDougall, August 5, 1983).

X. Conclusion

The right of women to determine their children's names is at a crossroads. After the landmark case of *In re Schiffman*, a newspaper editorialized:

Sure it smacks of discrimination to require that a woman assume her husband's surname upon marriage and that children she bears also go by her husband's name. But it is tidy. In a culture that developed as a male-dominated society, it was natural that the family name follow the male line of descent. . . . [W]hy don't we leave well enough alone and hope the California Supreme Court ruling becomes a forgotten footnote in legal history?²⁷⁷

Forbush had to become a footnote in legal history in order for women to have the right to control their own names. *Schiffman* should become a guiding light for the future in order for women to have any bona fide right to name their children. Whether it will or not depends on the next decade of advocacy.

277. *What to Call What's-His-Name*, *Virginian Pilot*, Jan. 5, 1981, at A-10, col. 1.