

# Minnesota Journal of Law & Inequality

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Volume 3 | Issue 1

Article 3

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June 1985

## The Right of Women to Name Their Children

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## The Right of Women to Name Their Children

Priscilla Ruth MacDougall\*

|      |  |     |
|------|--|-----|
| I.   | Introduction .....   | 93  |
| A.   | English Common Law .....   | 102 |
| B.   | Erosion of the Common Law.....   | 110 |
| C.   | Contexts of Litigation .....   | 112 |
| D.   | Developments of the 1970s and Early 1980s....  | 113 |
| II.  | The Right of Married Parents in Agreement to<br>Name Their Children Without State Interference..   | 120 |
| III. | The Traditional Right of Women to Name<br>Nonmarital Children Without Interference from<br>the State or the Biological Fathers .....             | 123 |
| IV.  | Constitutional Challenges to Statutory<br>Requirements That Children Be Given Specified<br>Surnames on Their Birth Certificates .....            | 124 |
| V.   | Disputes Between Mothers and the Biological<br>Fathers over Naming Newborn or Infant Marital<br>and Nonmarital Children .....                    | 126 |
| VI.  | Disputes Between Parents Over Naming Older<br>Marital Children Originally Given Fathers' Names.  | 131 |
| A.   | Jurisdiction of Courts over Children's Names .   | 133 |
| B.   | Father's Primary Right to Require Marital<br>Children to Continue Using His Name .....   | 136 |
|      | 1. Duty of Support as the Basis of the<br>Father's Primary Right to Control the<br>Naming of Marital Children in Their<br>Mother's Custody ..... | 138 |

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|   |     |
|---|-----|
| 2. Requirement of Notice to the Father of<br>Statutory Name Change Proceedings .....  | 140 |
| C. Burden of Proof Required to Rebut Father's<br>Right and the Presumption That Marital<br>Children Should Continue to Bear the<br>Paternal Name .....                        | 141 |
| VII. Resolving Disputes over Naming Children at Birth<br>or Thereafter—The Developing Custodial Parent<br>Presumption .....   | 146 |
| VIII. Legal Recognition That a Name Does Not Imply<br>Illegitimacy or Paternity .....   | 152 |
| IX. The Need for Legislation, Constitutional<br>Challenges and the Equal Rights Amendment to<br>Guarantee Women Rights in Naming Children<br>Where the Fathers Disagree ..... | 154 |
| A. Legislation .....  | 154 |
| B. Constitutional Challenges and the Equal<br>Rights Amendment .....  | 157 |
| X. Conclusion .....   | 159 |

## 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 irrebuttable male prerogative to name marital children<sup>1</sup> 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."<sup>2</sup>

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.<sup>3</sup> In *Forbush*, the United States Supreme Court summarily affirmed an Alabama federal district court's determination that a conceded common law requirement,

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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 legitimization 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 everywhere<sup>4</sup> and women organized around the issue of a woman's right to control her own name.<sup>5</sup>

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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.<sup>6</sup> The League, however, expressly decided not to take on the issue of women's rights in naming children.<sup>7</sup>

In 1982 the Alabama Supreme Court repudiated the *Forbush* case as not accurately representing the common law or the law of Alabama.<sup>8</sup> 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.<sup>9</sup> Until a married or divorced woman's legal right to name

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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. Att'y 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. Att'y 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. Att'y 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 Miller*, 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. § 1981 (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-

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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.<sup>10</sup>

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 surname<sup>11</sup> 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-

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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,<sup>12</sup> 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*,<sup>13</sup> 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.<sup>14</sup>

Similarly, courts and legislatures are allowing unmarried fa-

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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.<sup>15</sup> 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.<sup>16</sup>

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 judiciary<sup>17</sup> 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.<sup>18</sup> 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 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,<sup>19</sup> expressly follow English

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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,<sup>20</sup> 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.<sup>21</sup> 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 Plainiol & 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 proceeded 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 *Plainiol, 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 *Wilt 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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 Parratt* (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 Benthan, *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. Ellison*, 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."<sup>25</sup>

At common law no one has a property right to a personal name such that she can keep another from using it.<sup>26</sup> Consistent with the right to change one's name is the right not to change it at marriage as most women traditionally have done.<sup>27</sup> 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); Lafflin 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.<sup>28</sup>

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.<sup>29</sup> Clearly set forth in *Halsbury's Laws of England*,<sup>30</sup> this common law of personal names should by now be part of common legal knowledge.<sup>31</sup>

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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 words<sup>32</sup> which identify a person, the "designation or appellation used to distinguish one person from another."<sup>33</sup> 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."<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

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 fancy. 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

Minors' names at English common law were established by usage and could be changed at will, just as adults' names could be changed.<sup>40</sup> 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.<sup>41</sup> By custom, marital children were initially named with their fathers' surnames and thereafter known by them.<sup>42</sup> Children of married parents, however, sometimes took their mothers' surnames at birth or thereafter.<sup>43</sup> 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*:<sup>44</sup> "[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."<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup> 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 unconstitutional<sup>48</sup> or repealed and replaced.<sup>49</sup>

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 legitimization.<sup>50</sup> 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(l)(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 legitimization 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.<sup>51</sup>

Louisiana,<sup>52</sup> Nebraska,<sup>53</sup> and Tennessee<sup>54</sup> 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.<sup>55</sup> 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)(ii) (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 legitimization.<sup>56</sup>

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" right<sup>57</sup> 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.<sup>58</sup>

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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.<sup>59</sup>

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.<sup>60</sup> Statutes recognizing a superior naming right in the father generate litigation by women against the state.<sup>61</sup>

#### *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.<sup>62</sup>

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

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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 Bengeison, 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.<sup>63</sup>

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.<sup>64</sup> These officials also recognize an unmarried women's right to name newborn nonmarital children with any surname on their birth certificates.<sup>65</sup>

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 legitimization 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. Cedeno, 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 birth<sup>66</sup> after acknowledgement or determination of paternity,<sup>67</sup> or legitimization<sup>68</sup> 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.<sup>69</sup>

6. Courts have moved in the direction of recognizing new rights of men to name nonmarital children.<sup>70</sup> 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.<sup>71</sup>

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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); *Hurtz v. Hurtz*, 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.<sup>72</sup> Only one reported case has challenged a statute requiring the mother's name to be given a newborn 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.<sup>73</sup> 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,<sup>74</sup> however, courts have retreated from award-

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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); *Winkenhofer 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.<sup>75</sup>

The naming of children is necessarily an orchestration of the relative rights of parents against the state and each other.<sup>76</sup> 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.<sup>77</sup> The recent at-birth

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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*,<sup>78</sup> has expressly rejected this male power and overturned all the state's precedent<sup>79</sup> 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.<sup>80</sup> 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); Bilenkin v. Bilenkin, 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.<sup>81</sup> 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"<sup>82</sup> 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."<sup>83</sup> 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."<sup>84</sup>

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."<sup>85</sup> Similarly, absent objection from the father, the mother of a nonmarital child has "the same right to

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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.”<sup>86</sup>

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.<sup>87</sup> “Parents are free to choose whatever surname they please for their child,”<sup>88</sup> 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.”<sup>89</sup>

It is not unusual, however, for state registrars to resist change and to attempt to follow the traditional Model State Vital Statistics Act<sup>90</sup> or to make their own legal interpretations, rules or regulations.<sup>91</sup> Most registrars, however, follow the law that in the

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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.<sup>92</sup> Where no such statute exists, litigants have needlessly conceded to the record keeper's version of the law.<sup>93</sup> 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.<sup>94</sup>

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-

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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 short<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> This right stems from the unwed mother's status as sole parent and custodian of her

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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.*, *Winkenhofer 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.<sup>100</sup> Biological fathers, however, are now challenging this right of women, with some success.<sup>101</sup>

#### 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.<sup>102</sup> 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*,<sup>103</sup> which elevated the "common law right [of parents] to give their child any name they wish"<sup>104</sup> 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"<sup>105</sup> 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

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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.<sup>106</sup> The father's name requirement had been interpreted as not precluding a hyphenated name,<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup>

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 legitimization<sup>110</sup> or paternity<sup>111</sup> have similarly been invalidated in recent years. In an Indiana case,<sup>112</sup> 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."<sup>113</sup>

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(i)(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.<sup>114</sup> 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*,<sup>115</sup> 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."<sup>116</sup>

In the companion cases of *Application of Saxton*<sup>117</sup> and *Jacobs v. Jacobs*,<sup>118</sup> 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-

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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."<sup>119</sup> 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."<sup>120</sup>

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.<sup>121</sup> 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."<sup>122</sup> 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.<sup>123</sup> 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."<sup>124</sup>

In 1980 the California Supreme Court rendered a landmark decision. *In re Schiffman*<sup>125</sup> held that "the rule giving the father, as against the mother, a primary right to have his child bear his surname should be abolished."<sup>126</sup> 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."<sup>127</sup>

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.<sup>128</sup> 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."<sup>129</sup> 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.<sup>130</sup>

Similarly, in 1983, the Montana Supreme Court<sup>131</sup> stated that parents have an equal right to name their children but then de-

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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 Appeals<sup>132</sup> 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."<sup>133</sup> 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.<sup>134</sup>

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,<sup>135</sup> Indiana,<sup>136</sup> Minnesota,<sup>137</sup> New York,<sup>138</sup> Ohio,<sup>139</sup> and Texas.<sup>140</sup> 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 father<sup>141</sup> 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.<sup>142</sup>

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*,<sup>143</sup> 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."<sup>144</sup>

In *In re G.L.A.*,<sup>145</sup> 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-

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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.<sup>146</sup>

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."<sup>147</sup> Unfavorable precedent<sup>148</sup> 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,<sup>149</sup> 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.

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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.<sup>150</sup>

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,<sup>151</sup> hyphenated names of the mother's and father's birth names,<sup>152</sup> as well as remarried names.<sup>153</sup> 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.<sup>154</sup> Most appellate cases involve children reintegrating into a family with a stepfather whose name the mother has adopted. Consequently, making a distinction as to

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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. Nassau 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.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup>

Courts exercise jurisdiction to determine children's names in three situations: 1) pursuant to state general name change statutes;<sup>158</sup> 2) in personal equity injunctive actions to protect a father's personal interests in controlling the naming of his child;<sup>159</sup> 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 McGeehee*, 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,<sup>160</sup> divorce or dissolution,<sup>161</sup> adoption,<sup>162</sup> and paternity proceedings.<sup>163</sup> Although appellate courts in Kentucky, Ohio, and Washington have declined jurisdiction over children's names in divorce matters,<sup>164</sup> 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. *E.g.*, *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 R.S.13:4751 through R.S.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. denied*, 105 S. Ct. 785 (1985); *Nellis v. Pressman*, 282 A.2d 539 (D.C. 1971), *cert. denied*, 405 U.S. 975 (1972); *Solomon v. Solomon*, 5 Ill. App. 2d 297, 125 N.E.2d 675 (1955); *Weinert v. Weinert*, 105 Ill. App. 3d 56, 433 N.E.2d 1158 (1982); *In re Presson*, 102 Ill. 2d 303, 80 Ill. Dec. 294, 465 N.E.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 N.E.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 (N.D. 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 N.E.2d 1283 (1985). *In re G.L.A.*, 430 N.E.2d 433 (Ind. Ct. App. 1982). *D.R.S. v. R.S.H.*, 412 N.E.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 N.E.2d 495 (1966); *Dolgin v. Dolgin*, 1 Ohio App. 2d 430, 205 N.E.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.”<sup>165</sup>

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.<sup>166</sup> 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,<sup>167</sup> 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,<sup>168</sup> courts have expressly rejected the father’s right in naming his marital children as a constitutional property right.<sup>169</sup> They have, however, accepted the father’s prerogative as a liberty right, similar to the rights ac-

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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.<sup>170</sup> 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."<sup>171</sup>

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."<sup>172</sup>

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.<sup>173</sup>

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."<sup>174</sup>

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*,<sup>175</sup> 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."<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> 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-

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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.”<sup>180</sup>

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.<sup>181</sup>

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.<sup>182</sup> 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.<sup>183</sup> Misconduct usually means felonious activity leading to incarceration or child abuse, not merely bad parenting.<sup>184</sup>

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.<sup>185</sup> 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.”<sup>186</sup>

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.*

feit a father's naming right.<sup>187</sup>

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.<sup>188</sup>

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.<sup>189</sup> Courts also avoid dealing with the issue by dismissing petitions brought by children themselves.<sup>190</sup> Because a father is entitled to notice, he can usually cause a statutory name change to be voided for lack of

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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 Yessner*, 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 *Bilenkin v. Bilenkin*, 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.<sup>191</sup> Men can even enforce their rights by enjoining women from using name change statutes which contain notice requirements.<sup>192</sup> 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.<sup>193</sup>

*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.<sup>194</sup> 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,<sup>195</sup> 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.<sup>196</sup> 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.<sup>197</sup>

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.<sup>198</sup> In contrast, the mother has to prove "not by a mere preponderance of the evidence, but by *evidence satisfactory to the trial court*,"<sup>199</sup> 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*,<sup>200</sup> 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."<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup>

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

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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,<sup>205</sup> yet a series of Texas cases rejected such a requirement.<sup>206</sup> 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.<sup>207</sup> 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*,<sup>208</sup> 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."<sup>209</sup>

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.<sup>210</sup> 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 147.

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.<sup>211</sup>

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."<sup>212</sup> 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

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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 obeyance 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 patriarchal 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."<sup>213</sup> 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.<sup>214</sup> 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!<sup>215</sup>

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.<sup>216</sup> Until then, women must continually

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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. 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.<sup>217</sup> New Hampshire recently adopted the presumption statutorily as a means to resolve disputes over naming newborn marital children on their birth certificates.<sup>218</sup> Pennsylvania promulgated and published regulations to such effect in 1975.<sup>219</sup>

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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. N.H. 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 § 1.7(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.<sup>220</sup> A mother's right to name nonmarital children is based on her right as guardian and custodian.<sup>221</sup> Parental rights claimed by joint custodians in ongoing marriages to name their children against the state are also based on the presumption.<sup>222</sup> 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.<sup>223</sup> Excellent law review commentary has also discussed the presumption favorably.<sup>224</sup>

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."<sup>225</sup> Until recently, this represents the most recognition any court has made of a wo-

or separated at the time of the child'd 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 Kathrynn Urbonya, *No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes the Paternal Right to Name a Child*, 58 N.D. 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 (W.D. 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.<sup>226</sup>

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.<sup>227</sup>

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.<sup>228</sup> 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

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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.<sup>229</sup> 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.<sup>230</sup>

In a recent decision, *In re Schidlmeier*,<sup>231</sup> 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.<sup>232</sup>

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 accordin a presumption in favor of either parent.<sup>233</sup>

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."<sup>234</sup>

Appellate courts have not expressly adopted the custodial parent presumption, and one court to which it has been argued has expressly rejected it.<sup>235</sup> 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.<sup>236</sup> 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."<sup>237</sup> 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*.<sup>238</sup> 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.<sup>239</sup> Recently, the Colorado Court of Ap-

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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.<sup>240</sup>

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.<sup>241</sup> 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.<sup>242</sup> 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."<sup>243</sup> 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.<sup>244</sup> Until May 14, 1985 no appellate no court had accepted the notion as reason to deny a child its mother's name.<sup>245</sup>

In *Doe v Dunning*,<sup>246</sup> 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."<sup>247</sup> 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."<sup>248</sup> 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."<sup>249</sup>

In another case,<sup>250</sup> the trial court denied a woman's petition

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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."<sup>251</sup> 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."<sup>252</sup>

Still, in the West Virginia case of *In re Harris*,<sup>253</sup> 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."<sup>254</sup> 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."<sup>255</sup> 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."<sup>256</sup> 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."<sup>257</sup> 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.<sup>258</sup>

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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."<sup>259</sup> 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.<sup>260</sup>

Although courts may refer to a name representing membership in a family unit,<sup>261</sup> 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

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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,<sup>262</sup> 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.<sup>263</sup>

A proposal in Wisconsin goes further.<sup>264</sup> 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.<sup>265</sup> 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

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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.<sup>266</sup>

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.<sup>267</sup>

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.<sup>268</sup> Legislatures should be encouraged to accept the presumption for the naming of infants, such as New Hampshire and Pennsylvania

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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.<sup>269</sup> The courts have recognized a constitutional right of fathers to protect their "time-honored" superior naming right,<sup>270</sup> and parents to name their children against state interference where they are in agreement.<sup>271</sup> The courts have not been receptive to recognizing independent women's or children's constitutional rights in this area.<sup>272</sup> 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. Nassau 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 legitimization 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*,<sup>273</sup> 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,<sup>274</sup> courts should eliminate men's superior right to name marital children. However, as Ruth Hale pointed out fifty years ago,<sup>275</sup> 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 Amendment<sup>276</sup> 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.

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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?<sup>277</sup>

*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.

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277. *What to Call What's-His-Name*, Virginian Pilot, Jan. 5, 1981, at A-10, col. 1.

