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Married Women and the Name Game

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MARRIED WOMEN AND THE NAME GAME

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*To name is to possess, to make sure of one's hold over a person.*¹

The power and force of a name are often underestimated in today's society. For centuries, social and political struggles have often been reflected in struggles over names and the naming process. Names have often been used as a means of insuring allegiance and fealty, as when King John required conquered Welsh insurgents to adopt names identifying them as King John's subjects.² In the early 1900's, the resentment against immigrants resulted in strong pleas to prevent them from adopting more common names which disguised their immigrant ancestry.³ Today, the issue of a married woman's legal name reflects a continuing struggle over the status of married women in society and in the family structure. As married

1. Sarano, *Il ou Toi?*, PRÉSENCES (No. 82, 1st term 1973), quoted in P. TOURNIER, THE NAMING OF PERSONS 34 (1975).

2. Lanahan, *What's in a Name?: Family Surnames and Social Upheaval in Medieval England*, 65 THE SOCIAL STUDIES 218, 221 (1974) [hereinafter cited as LANAHAN].

3. See note 165 *infra* and accompanying text.

women who had adopted their husbands' surnames petition courts to reinstate their pre-marriage names, courts have wrestled with the issues of reinstatement.

In 1972, when the Supreme Court affirmed without opinion a lower court's rejection of constitutional challenges to a requirement that married women adopt their husbands' surname,⁴ the challenge drew increasing attention from legal periodicals across the country.⁵ Most of the articles published concerned the constitutional issues involved. Although there have been decisions discussing the merits of constitutional challenges, most courts since 1972 have found it unnecessary to reach constitutional issues. Instead, these recent decisions have re-examined the common law history of surnames. Since 1973, the highest courts in five states — Virginia,⁶ Maine,⁷ Tennessee,⁸ Wisconsin⁹ and Indiana¹⁰ — have rendered significant decisions which have reshaped this area of law.

This comment explores the impact of these recent developments. After examining the impact that a name may have, it focuses upon the English common law history of surnames, the marital surname requirement and the legal issues related to the reinstatement of a married woman's pre-marriage surname.

I. THE IMPACT OF A NAME

The importance of a name should not be underestimated. In many cultures the true name of a person is kept a secret, because to know it and to use it might enable another to gain power over him.¹¹ Thus a person often

4. *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972).

5. See generally Bysiewicz, *Married Women's Surnames*, 5 CONN. L. REV. 598 (1973); Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L. FORUM 552 (1971); Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 223 (1971); Karst, "A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency, 35 OHIO ST. L.J. 546 (1974); Lamber, *A Married Woman's Surname: Is Custom Law?* 1973 WASH. U.L.Q. 779; Comment, *Married Woman's Right to Her Maiden Name: The Possibilities for Change*, 23 BUFFALO L. REV. 243 (1973); Comment, *Pre-Marriage Name Change, Resumption and Registration Statutes*, 74 COLUM. L. REV. 1508 (1974); Comment, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, 32 MD. L. REV. 409 (1973); Comment, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665 (1973). See also Annot., 67 A.L.R.3d 1266 (1976); Daum, *The Right of Named Women to Assert Their Own Surnames*, 8 J.L. REFORM 63 (1974).

6. *In re Strikwerda*, 216 Va. 470, 220 S.E.2d 245 (1975).

7. *In re Reben*, 342 A.2d 688 (Me. 1975).

8. *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975).

9. *Kruzell v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

10. *Petition of Hauptly*, 312 N.E.2d 857 (Ind. 1974).

11. L.G. PINE, *THE STORY OF SURNAMES* 10-11 (1966) [hereinafter cited as PINE].

goes through life with a nickname or secondary name known by most acquaintances, while his real name is known by only a select few.¹² Primitive cultures often assume that a person is concentrated in his or her name.¹³ The importance of a name and the significance of changing it has been the subject of recent theological and philosophical discussion.¹⁴ In addition, there are several scientific studies indicating that names and forms of address lead to expectations which may shape a person's perceptions of the name bearer.¹⁵ An interesting study of expectations of college and high school students suggests that women instructors called by traditional titles (either "Miss" or "Mrs.") are at a significant disadvantage compared to teachers identified as "Ms."¹⁶ The preconceptions of others may shape a person's personality and identity.¹⁷

12. *Id.*

13. E. JACOB, *THEOLOGY OF THE OLD TESTAMENT* 43 (1958). Indeed, the name itself was often viewed as having an independent power "which exercises constraint upon the one who bears it." *Id.* Thus, a person tends to conform to the characteristics exemplified by his or her name. For example, a person named "Doolittle" might become a lazy person because of the name.

14. See, e.g., P. TOURNIER, *THE NAMING OF PERSONS* (1975), in which this prominent theologian notes that even though many are dissatisfied with their names, few persons adopt different ones.

What separates and distinguishes me from other people is the fact that I am called by my name; but what unites me with them is the very fact that they call me.

Id. at 5.

It seems, therefore, as if the usual name received from one's parents has a sacred character. It has some sort of magic power, so that one may fear or even hate it, but not dare to do anything about it. . . . And so to change one's name is to break one's continuity as a person, to cut oneself off from the whole of one's past, which has defined one's person up to that point. . . . The new name asserts that a new life is beginning.

Id. at 19.

Tournier calls upon the Biblical examples of Abram becoming Abraham, Jacob taking the name of Israel and Saul becoming Paul. Those converting to the Islamic faith often assume new names which reflect their new identity. The changing of one's name has traditionally signalled a change in identity.

15. See Buchanan & Bruning, *Connotative Meanings of First Names and Nicknames on Three Dimensions*, 85 *J. Soc. PSYCHOL.* 143-44 (1971); McDavid & Harari, *Stereotyping of Names and Popularity in Grade-School Children*, 37 *CHILD DEVELOPMENT* 453-59 (1966) (social attractiveness may be related to more frequently encountered names than infrequent ones).

16. Heilman, *Miss, Mrs., Ms., or None of the Above*, 30 *AM. PSYCHOLOGIST* 516-19 (1975). Undergraduates at Yale University and high school seniors in New York City were given identical course descriptions after which the instructor was identified as either "Mrs.," "Ms.," "Miss," "Mr. J.R. Erwin" or simply "J.R. Erwin." Courses taught by "Ms." instructors were comparably rated with "Mr." and "No Title" instructors. Students given identical nontechnical course descriptions expected the courses taught by "Miss" or "Mrs." instructors to be less popular and to offer less intellectual challenge than those taught by "Mr.," "Ms." or "No Title" instructors.

17. Schoenberg & Murphy, *The Relationship Between the Uniqueness of a Given Name*

The very fact that a married woman's right to use her pre-marriage name has evoked such strong reaction from both proponents and opponents indicates the importance of a person's name. Requiring the wife to adopt the husband's name implicitly symbolizes a certain understanding of the wife's relationship to the husband and to the outside world.¹⁸ Requiring husband and wife to have a common name, as others have suggested,¹⁹ is also indicative of a preconceived concept of the marriage bond.²⁰ Those who would allow a woman the freedom of retaining her pre-marriage name

and Personality, 93 J. Soc. PSYCHOLOGY 147-48 (1974) (males with common given names indicated more guilt, inferiority and timidity than those with uncommon names; no statistically significant differences among females with common and uncommon given names). Several social scientists hypothesize, but have not established, a relationship between surname length and mate selection by women. See Cabe, *Name Length as a Factor in Mate Selection: Age Controlled*, 22 PSYCH. RPTS. 794 (1968); Finch & Mahoney, *Name Length as a Factor in Mate Selection: An Age Controlled Replication*, 37 PSYCH. RPTS. 642 (1975).

18. This view is reflected in the judicial doctrine of coverture which decreed that a married woman had no legal identity apart from her husband. Thus the husband and wife were one, and the husband was considered "the one." *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting). The married woman could not sue or be sued, control property or make a contract.

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and relief. So great a favorite is the female sex of the laws of England. . . .

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (8th ed. 1778).

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . .

Id. at 445.

19. See, e.g., the dissent in *In re Reben*, 342 A.2d 688, 701-02 (Me. 1975), in which Chief Justice Dufresne argues:

She [the wife] is on the same footing as her prospective husband in that she may insist, as a premarital condition, that the family surname for her intended husband and herself be that of her choice. The husband has no greater right to change the family surname than she has, since her disability is equally his. . . . That there should be a single surname available to identify the spouses and children of a marriage is inherent in the very concept of marriage itself. . . . From that premise it follows that, absent specific authority to do so by legislative declaration, a married woman may not, during the existence of the marriage contract, adopt any other surname as her legal name, except with the concurrence of her husband in a judicial proceeding. . . . in which both seek a change of the family surname. . . .

20. The focus of those adopting this position is toward the bond of the marriage commitment itself rather than toward the wife's relationship to the husband. Many couples, realizing the significance that a common name-symbol can have in affirming the bond of marriage, have chosen to adopt common hyphenated names rather than retain antenuptial surnames. The mutuality within the commitment is expressed by having both partners relinquish former surnames.

assert that recognition of this freedom symbolizes the right of a wife to be a fully equal partner in marriage. These positions share a common recognition that a name functions as a powerful symbol of identity. The issue raised in cases where a married woman is seeking to use a maiden name is not whether a married woman is a "kind of odd ball."²¹ Rather, the issue is whether society has such a significant interest in a particular name-symbol of marriage that a married woman must bear a name which she feels does not reflect her true identity.

II. THE HISTORY OF SURNAMES

Surnames developed in England over a long period of time. Few, if any, surnames existed in England before the Norman Conquest of 1066. The Norman conquerors introduced surnames to England in addition to other elements of the Norman culture, according to the accepted theory.²² Only a few of the new Christian names introduced by the Normans were popular, consequently, this scarcity of Christian names led to the increasing use of surnames in order to distinguish persons bearing the same name.²³ By the early part of the fourteenth century, surnames had become common.²⁴ Many writers assert that increased commerce, communication

21. Brief for Appellee (State of Indiana) at 10, *Petition of Hauptly*, 312 N.E.2d 857, 861 (Ind. 1974). Among the characterizations in the state's brief, quoted by the court at 861, were the following:

Perhaps she is claiming the woman's privilege in that in an argument she does not have to use reasoning.

. . .

It can be reasonably inferred that she believes the fact that she is the breadwinner of the family should be publicized so that all will know her husband has been emasculated and that she is the head of the family.

. . .

. . . indicating that perhaps Mrs. Hauptly's need was not for a change of name but for a competent psychiatrist.

. . .

Namely a sick and confused woman, unhappy and unsatisfied with her marriage, unable to determine what she wants to do with her life.

312 N.E.2d at 861.

The reversal of the lower court decision may have reflected the court's disappointment with the character of the state's brief. *Id.*

22. LANAHAN, *supra* note 2, at 218.

23. P. REANEY, *THE ORIGINS OF ENGLISH SURNAMES* 314 (1967) [hereinafter cited as REANEY]; Arnold, *Personal Names*, 15 *YALE L.J.* 227 (1905) [hereinafter cited as ARNOLD]. Arnold estimates that there were no more than two hundred Christian names during the early portion of the fourteenth century. Reaney asserts that the paucity of Christian names has been overemphasized as a factor leading to general use of surnames.

24. ARNOLD, *supra* note 23, at 227.

and urbanization were responsible for the increased usage of surnames.²⁵ Reaney suggests that the primary impetus for the emergence of surnames was the need of various officials and lords to know the exact identification of each person.²⁶ The king had to know exactly what service each knight owed. Payments to and by the exchequer required that debtors and creditors be particularized. The parties to land transfers, those involved in criminal proceedings and those assessed in the Subsidy Rolls had to be described with precision. Surnames first became numerous and hereditary among those persons in the upper classes, persons with whom officials were chiefly concerned.²⁷

Surnames were developed from distinctive physical characteristics,²⁸ personalities,²⁹ occupations³⁰ and locations.³¹ Many names resulted from a person's relationship to either his father,³² mother³³ or other relative.³⁴

25. *Id.* Lanahan hypothesizes that serfs fleeing to the city in order to escape the lord of the manor heightened the pace of urbanization. The surname, according to Lanahan, resulted from the "gathering of strangers" who needed an easy means of identifying one another. LANAHAN, *supra* note 2, at 221-22.

26. REANEY, *supra* note 23, at 314. Often, however, officials required persons to adopt certain surnames for political purposes. Thus in 1465 King Edward, by a statute, required every Irishman living within a certain distance of Dublin to give up his Gaelic name by translating it into an English patronymic, nickname or trade name; in 1211 King John required conquered Welsh insurgents to adopt a name identifying themselves as King John's subjects. LANAHAN, *supra* note 2, at 221.

27. REANEY, *supra* note 23, at 315.

28. Examples include Blount (blond), Reid or Russell (red), Brown or Dunn (dark), Blake (black), Grey and White.

29. Examples include Doolittle (lazy), Curtis (courteous), Keen or Sharpe (shrewd), Quick and Savage. Many names no longer common are even more indicative of personalities. See C.W. BARDSLEY, *ENGLISH SURNAMES* (7th ed. 1901) [hereinafter cited as BARDSLEY]. "William Ryghtwys" was Vicar of Foulden in 1497. *Id.* at 463 "Joan Make-peace," sister of Henry III, was so named because her betrothal to the Scottish monarch brought peace. *Id.* "Ralph Full-of-Love" was Rector of West Lynn in 1462. *Id.* at 474. "Alicia Blissewenche," "Henry Parra-more," "Henry le Liere" and "William Gidyheved" (Gidyhead) are a few of the other names mentioned by Bardsley. *Id.* at 472-80.

30. Examples include Miller, Faulkner (falconer), Carpenter, Hooper (barrel-maker), Potter, Parson, Thatcher and Slater (roofing). Several surnames are feminizations of male occupational surnames. Webster represents a female weaver. Brewster represents a female brewer. Baxter represents a female baker. See LANAHAN, *supra* note 2, at 220.

31. Many names, which were at first simply "of" a certain place, became formal surnames. Thus "John of Salisbury" became "John Salisbury" and "Matthew of Paris" became "Matthew Paris." The surname of Thomas Aquinas was taken from the place of his birth, Aquinum, in order to distinguish him from other persons named "Thomas." PINE, *supra* note 11, at 42.

32. BARDSLEY, *supra* note 29, at 9; PINE, *supra* note 11, at 58.

33. REANEY, *supra* note 23, at 76; BARDSLEY, *supra* note 29, at 80.

34. REANEY, *supra* note 23, at 80.

Although Christian names were regarded by the law as of critical significance because of the sanction of baptism, a person could possess several surnames simultaneously.³⁵ Thus Sir Edward Coke noted: "And regularly it is requisite . . . that speciall heed bee taken to the name of baptism for that a man cannot have two names of baptism as he may have divers surnames."³⁶ The lack of significance of the surname in England is underscored by the fact that the British royal family did not officially have a surname until 1917.³⁷ In 1960, Queen Elizabeth varied the surnames of some future descendants so that many future royal surnames will be hyphenated.³⁸ Such hyphenation of names came to England in the eighteenth century when the joining of property became critical among the wealthy.³⁹

Scholars have failed to explain satisfactorily why surnames became hereditary after achieving common acceptance in the fourteenth century. The desire to preserve a family name and the close association of surnames with land seem to be critical factors, however. Thus sons adopted the surnames of mothers through whom they inherited property.⁴⁰ In one instance a wife, who had adopted the husband's surname at marriage, reassumed her father's name after inheriting property from him; her husband also changed to her father's name.⁴¹ Often the inheritance of property was conditioned upon the retention of the family name associated with that property.⁴²

35. ARNOLD, *supra* note 23, at 228.

36. Coke Litt § 3(a). "The law is not so precise in the case of surnames, but for the Christian name, this ought always be perfect." *Button v. Wrightman*, Poph. 56 (1682), *cited in* ARNOLD, *supra* note 23, at 228. The concern for Christian names has abated significantly. Presidents Grant and Cleveland were elected under different Christian names than those given at baptism. ARNOLD, *supra* note 23, at 229.

37. PINE, *supra* note 11, at 17. The common surname of Windsor was adopted because many members of the royal family had German names and titles which proved embarrassing during World War I.

38. PINE, *supra* note 11, at 19.

39. *Id.*

40. Examples include Reginald Damemalde (son of Dame Maud), Walter Damealis and Adam Damemagot. REANEY, *supra* note 23, at 84.

41. [W]hen heiresses marry, they so often keep their maiden names, while their husbands change theirs to their wives' names. . . . In one entry, a woman takes her husband's name but when her father dies and she inherits his property, they both change to the father's name. Hugh atte Clawe of Thorpe appears quite often as Hugh le Kach or Keach, because of his marriage to Alice le Keach; and when John atte Hethe of Cobham marries Lucy atte Grene, the remark is added 'He is now called atte Grene.' E. Toms, *COURT BOOK OF CHERTSEY ABBEY 38-39 (1937)*, *quoted in* REANEY, *supra* note 23, at 85.

42. PINE, *supra* note 11, at 19. The "family felt they ought to keep the name on the land." REANEY, *supra* note 23, at 85. Often this practice resulted in multiple hyphenated names such as Cave-Brown-Cave or Plunkett-Ernle-Erle-Drax. PINE, *supra* note 11, at 22-23.

Anyone at common law could change a surname at will and without legal proceedings, unless motivated by fraudulent purposes.⁴³ A new name was acquired by general usage in the community.⁴⁴ When a woman married she generally adopted the name of the husband by usage but she was not required to do so. Thus the Earl of Halsbury summarizes the long-standing rule in England: "When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of marriage."⁴⁵ There were significant instances in which the wife and the husband held different surnames.⁴⁶ It was even more common for the husband to adopt the wife's surname.⁴⁷

In *Cowley v. Cowley*, Lord Cowley sued to prevent his divorced wife from bearing his name and arms. Although the House of Lords enjoined her from using the title "Countess," it refused to require that she desist from using "Cowley" as a surname because a person may assume any name so long as not for fraudulent purposes.

Because a wife was not legally required to adopt the surname of the husband, the House of Lords found itself powerless to compel her to adopt her second husband's surname despite the protests of her previous husband.⁴⁸ The Marriage Act, 26 Geo. II 33, requiring that marriage banns⁴⁹

43. Many law review articles written before the current debate over a married woman's name either assume this fact to be too obvious to require citation of authority or contained long lists of old cases upholding this position. See Dwight, *Proper Names*, 20 YALE L.J. 387, (1911) ("There is not the slightest doubt that the decision [upholding the right to change a surname without legal proceedings] was correct upon the law as it stands to-day. By the common law of England a man was entitled to adopt a new name for himself as one changes a coat."); Gordon, *Change of Patronymic*, 56 CANADA L.J. 1, 2 (1920) (lengthy list of old English cases so holding is given); Savage, *Proper Designation of Married Women in Legal Proceedings*, 4 VA. L. REG. 720 (n.s. 1919) ("The right of a person to change his name at common law is too well recognized to need the citation of authority."); Note, *The Right to Change One's Name*, 5 J. FAMILY L. 220, 221 (1965). See also *Dunn v. Palermo*, 522 S.W.2d 679, 682 (Tenn. 1975).

44. An "alias" in our society often connotes criminal activity. Using the term in England became an innocent means of signalling the adoption of a new name. Thus one letter to a relative concludes "Your loving kinsman, Oliver Williams *alias* Cromwell." Williams had adopted the name Cromwell at the King's insistence. PINE, *supra* note 11, at 19.

45. 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957). *Accord*, C. EWEN, A HISTORY OF THE BRITISH ISLES 391 (1931); M. TURNER-SAMUELS, THE LAW OF MARRIED WOMEN 345 (1957).

46. PINE, *supra* note 11, at 23. Lady Hatton, the second wife of Sir Edward Coke, Lord Chief Justice of England, did not adopt the surname of her husband. M. TURNER-SAMUELS, THE LAW OF MARRIED WOMEN 345 (1957).

47. PINE, *supra* note 11, at 23. Compare note 40 *supra* and accompanying text.

48. *Cowley v. Cowley*, [1901] A.C. 450, 460. See note 43 *supra*.

49. Marriage banns are the public "notice or proclamation of a matrimonial contract, and

be made in the "true" names of the parties, often led to cases in which the "true" name of a woman was at issue. In 1823, the Kings Bench faced the question of the "true" name of a widowed woman who had resumed her pre-marriage name by repute and whose marriage banns had been published under her pre-marriage name.⁵⁰ The Kings Bench stated:

It has been asserted in argument, that a married woman cannot legally bear any other name than that which she has acquired in wedlock, but the fact is not so; a married woman may legally bear a different name from her husband and very many living instances might be quoted in proof of the fact.⁵¹

The common law heritage which has established roots for so much of American law never required a woman to adopt her husband's surname. While most married women did so, the numerous occasions in which this custom was not followed are significant. The guiding common law principle regarding surnames was that an individual has great freedom in determining his or her name.

III. ELEVATING CUSTOM INTO LAW?

A. EARLIER TRENDS: "IMMEMORIAL CUSTOM" AND LAW

Ironically, the marital surname custom, never legally required in England, was viewed initially as a legal requirement in the United States by several courts which confronted the question indirectly. In *Chapman v. Phoenix National Bank*,⁵² the New York Court of Appeals decided that publication in a woman's pre-marriage name was ineffective notice to a married woman. Chapman sought to recover dividends which the bank claimed had been confiscated in a prior judgment in a federal district court. The Court of Appeals decided that, since the previous suit had been brought in her pre-marriage name, Chapman did not receive adequate notice of the proceedings.⁵³ In dictum,⁵⁴ the court noted:

the intended celebration of the marriage of the parties in pursuance of such contract." BLACK'S LAW DICTIONARY 187 (4th rev. ed. 1968).

50. *The King v. The Inhabitants of St. Faith's Newton*, (K.B. 1823) Dowling and Ryland Reports 348.

51. *Id.* at 352. *Cf.* *Chipase v. Chipase* [1939] 3 All. E.R. 895, [1939] P.391; *Sullivan v. Sullivan*, 161 Eng. Rep. 728, at 733 (Con. 1818) (publication in true name is required unless overridden by usage of another name).

52. 85 N.Y. 437 (1881).

53. The court also relied upon the fact that Chapman could not have received notice of the stock seizure during the Civil War because she was "within the Confederate lines" and "could not have crossed the lines to respond thereto." *Id.* at 448.

54. This dictum was described by one court as a "triumph for this lady but a travesty and a tragedy for her sex." *Dunn v. Palermo*, 522 S.W.2d 679, 684 (Tenn. 1975).

For several centuries, by the common law among all English-speaking people, a woman upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants, and execute all legal documents. Her maiden name is absolutely lost, and she ceases to be known thereby.⁵⁵

Many courts later cited the *Chapman* statement as authority for the position that a married woman was required by law to forfeit her pre-marriage name. A majority of these cases involved the issue of whether a legal document or action is invalid if the woman is identified by her pre-marriage name.⁵⁶

In many cases, the requirement that a married woman must use her husband's surname has been directly attacked. The United States Comptroller-General once ruled that a married woman, who was employed by the government and who had consistently used her pre-marriage name, had to use her husband's surname on the payroll in order to draw pay.⁵⁷ In *People ex rel. Rago v. Lipsky*,⁵⁸ the court held that a married woman was required to register and vote under her husband's surname. As a lawyer, she had established a professional reputation under her pre-marriage name and was a member of the bar in her pre-marriage name. The court noted *Chapman* for its holding that

it is well settled by common law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname.⁵⁹

A federal district court in *In re Kayloff*⁶⁰ held that a professional musician seeking naturalization could not receive her naturalization certificate in

55. *Chapman v. Phoenix Nat'l Bank*, 85 N.Y. 437, 450 (1881).

56. See, e.g., *Bacon v. Boston Elev. Ry. Co.*, 256 Mass. 30, 152 N.E.35 (1926) (suit barred because automobile registered in maiden name is not legally registered); *Freeman v. Hawkins*, 77 Tex. 498, 14 S.W. 364 (1890) (court has no jurisdiction if suit is in wife's maiden name). Many courts facing this issue held that use of the maiden name did not void an otherwise valid transaction. See, e.g., *Roberts v. Grayson*, 233 Ala. 658, 173 So. 33 (1937); *Emery v. Kipp*, 154 Cal. 83, 97 P. 17 (1908); *Jones v. Kohler*, 137 Ind. 528, 37 N.E. 399 (1894); *Doyle v. Hays Land & Inv. Co.*, 80 Kan. 209, 102 P. 496 (1909); *Lane v. Duchac*, 73 Wis. 646, 41 N.W. 962 (1889) (married women may convey property in maiden name).

57. This decision was criticized in 73 U. PA. L. REV. 110 (1924). This article is perhaps the earliest of many articles to question the elevation of surname custom into law.

58. 327 Ill. App. 63, 63 N.E.2d 642 (Ct. App. 1945).

59. *Id.* at 67, 63 N.E.2d at 644. The effect of the *Rago* decision has been greatly diminished by the effect of a formal opinion issued by the Attorney General of Illinois on February 13, 1974, in which he states that the position taken in *Rago* should not be followed. See *Dunn v. Palermo*, 522 S.W.2d 679, 684-85 (Tenn. 1975).

60. 9 F. Supp. 176 (S.D.N.Y. 1934).

her pre-marriage name. The court seemed skeptical that any harm or loss would result from denying her request and decided to follow the language of *Chapman*.

In 1972, the United States Supreme Court affirmed summarily the decision of a three-judge federal district court in *Forbush v. Wallace*.⁶¹ Petitioner Forbush challenged the refusal of the Alabama Department of Public Safety to issue a driver's license in her pre-marriage name. The federal district court interpreted earlier decisions by Alabama courts as holding that the wife is required to adopt the husband's surname.⁶²

Initially only a few courts refused to elevate English custom into American law. In Ohio, two courts held that a woman took her husband's surname as a matter of custom and not by requirement of law. In *State ex rel. Bucher v. Brower*,⁶³ the court rejected the contention of the Board of Elections of Montgomery County that a married woman must re-register with the Board because her name had been changed by marriage. The court placed great emphasis upon the ease with which a person could change a name at common law and upon the antenuptial contract executed between this couple which provided that the wife would retain her pre-marriage name.⁶⁴ The Court of Appeals for Cuyahoga County expressly adopted the decision of the *Bucher* court in *State ex rel. Krupa v. Greer*.⁶⁵ In *Krupa*, the court held that because Krupansky had used her pre-marriage name consistently after marriage and pursuant to an antenuptial contract with her husband, she could not be forced to adopt her husband's surname. In both *Bucher* and *Krupa*, the courts emphasized the consent

61. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972).

62. The court referred to *Roberts v. Grayson*, 233 Ala. 658, 173 So. 38 (1937), and *Bentley v. State*, 37 Ala. App. 463, 465, 70 So. 2d 430, 432 (Ct. App. 1954). The *Roberts* court had held that a "married woman's name consists, in law, of her own Christian name and her husband's surname." 233 Ala. at 660, 173 So. at 39. The thrust of the court's holding was that the pre-marriage name used in a claim against an estate was sufficient to give notice stimulating inquiry. *Roberts* "does not raise the question or discuss or decide the issue of whether a married woman automatically, and as a matter of law, assumes the surname of her husband." *Dunn v. Palermo*, 522 S.W.2d 679, 684 (Tenn. 1975). The *Bentley* decision, which concerns the prosecution of a wife for removing furniture, merely reports that the husband "furnishes the name" for a family. There is no discussion of whether a wife is required to adopt a husband's surname.

63. 7 Ohio Supp. 51, 21 Ohio Op. 208 (Montgomery County C.P. 1941).

64. Marriage being a civil contract in the state of Ohio, what was to prevent Gertrude A. Bucher and Charles L. Marshall . . . from entering into a separate and distinct contract that Gertrude A. Bucher should retain the surname of Bucher at the time and after the consummation of the marriage contract. . . . The court fails to see where it would be contrary to public morals or in any manner contrary to public policy. 21 Ohio Op. at 214.

65. 114 Ohio App. 497, 117 N.E.2d 616 (Ct. App. 1961).

of the husband to the retention of the pre-marriage name, as expressed through antenuptial contracts.

The *Bucher* and *Krupa* decisions were for a considerable time the only American common law decisions⁶⁶ indicating that married women were not required to adopt their husbands' surnames. As time has passed and scholars have more carefully researched the custom surrounding marital surnames in England, it has become increasingly clear that the *Bucher* and *Krupa* decisions were more reflective of the important common law principles than the majority view.

B. RECENT DEVELOPMENTS: CUSTOM ONLY

Since 1972, the number of cases dealing with the question of whether a woman is required to adopt her husband's surname has increased dramatically. There has been a significant shift of opinion regarding the marital surname custom as well. Today a clear majority of courts holds that English surname custom does not create American law. Courts are holding that American married women are as free as their common law English counterparts to deviate from custom if they so wish. Only a dwindling number of courts is indicating that a woman is required by law to adopt her husband's surname.

In *Stuart v. Board of Maryland Supervisors of Elections*,⁶⁷ the Maryland Court of Appeals held that a woman may retain her pre-marriage name by evidencing "a clear intent to consistently and nonfraudulently use her birth given name subsequent to her marriage."⁶⁸ The Board of Supervisors of Elections for Howard County had cancelled Stuart's voter registration because she had refused to re-register under her husband's surname after marriage. The lower court held that since a woman's name changed by force of law upon her marriage, Stuart's registration should be cancelled

66. The civil law rule seems to be that a married woman retains her pre-marriage name at law and uses her husband's surname solely as a matter of custom. See *Succession of Kneipp*, 172 La. 411, 134 So. 376 (1931). A later Louisiana case, *Wilty v. Jefferson Parish Democratic Executive Comm.*, 245 La. 145, 157 So. 2d 718 (1963), has often been interpreted as having adopted the rule that a married woman adopts the husband's surname at marriage. Comment, *A Woman's Right to Her Name*, 21 U.C.L.A.L. Rev. 665, 667 n.14 (1973). The *Wilty* case resulted in five opinions and it is not clear that a majority deviated from the *Kneipp* decision. The concern of the court appears to have been the fairness of elections rather than the correctness of a married woman's name. See *Dunn v. Palermo*, 522 S.W.2d 679, 685-86 (Tenn. 1975).

67. 266 Md. 440, 295 A.2d 223 (1972).

68. *Id.* at 447, 295 A.2d at 227. As in *Krupa* and *Bucher*, the wife had executed an antenuptial contract with her husband which indicated their agreement that she use her maiden name exclusively. See the discussion of these cases at notes 63-65 *supra* and related text.

unless she re-registered under her husband's surname. The court of appeals noted the split of authority regarding the marital surname custom but held that the principles in *Krupa* more adequately reflected the common law history of surnames.⁶⁹ After noting several earlier Maryland decisions which indicated that a person may adopt any name through usage absent a fraudulent intent,⁷⁰ the court concluded that "the mere fact of marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all."⁷¹ The *Stuart* court as well rejected arguments, which an Illinois court had earlier found persuasive,⁷² that allowing a married woman to register in her pre-marriage name might result in fraud. By cross-reference notation of the marriage and change of name, the Board of Supervisors could prevent the possibility of dual registration by a voter.⁷³

In *Custer v. Bonadies*⁷⁴ a Connecticut court dealt with the seemingly endless battle between voter registrars and married women wishing to retain their maiden names. As in *Stuart*, the registrar in *Custer* refused to accept the registration of a married woman who had not used her husband's surname. After noting those cases holding that "custom is law," the court concluded that it would adopt common law rules only when they are suited to present circumstances.⁷⁵ The court held that specific Connecticut statutes were a mere reflection of prevailing custom and did not require a

69. *Id.* at 445-47, 295 A.2d at 225-26.

70. *Erie Ins. Exch. v. Lane*, 246 Md. 55, 227 A.2d 231 (1967); *Romans v. State*, 178 Md. 588, 16 A.2d 642 (1940).

71. 266 Md. at 447, 295 A.2d at 227.

72. *People ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (Ct. App. 1945).

73. 266 Md. at 450, 295 A.2d at 228.

74. 30 Conn. Supp. 385, 318 A.2d 639 (Super. Ct. of Hartford County 1974).

75. It hardly seems the time for the Connecticut courts to accept an outdated rule of common-law requiring married women to adopt their spouses' surnames contrary to our English common-law heritage and to engraft that rule as an exception to the recognized right of a person to assume any name that he or she wishes to use. 318 A.2d at 641.

Cf. Dunn v. Palermo, 522 S.W.2d 679, 688 (Tenn. 1975), in which the Tennessee Supreme Court said:

[M]arried women have labored under a form of societal compulsion and economic coercion which has not been conducive to the assertion of some rights and privileges of citizenship. The application of a rule of custom and its conversion into a rule of law, would stifle and chill virtually all progress in the rapidly expanding field of human liberties. We live in a new day. We cannot create and continue conditions and then defend their existence by reliance upon the custom thus created. Had we applied the rules of custom during the last quarter of a century, the hopes, aspirations and dreams of millions of Americans would have been frustrated and their fruition would have been impossible.

woman to adopt a husband's surname upon marriage.⁷⁶ Thus, the registrar was required to register Custer under her pre-marriage name.

Several courts since 1972 have encountered requests by married women to resume use of pre-marriage names after having adopted the surnames of their husbands. These courts have often commented upon whether a woman is legally required to adopt the husband's surname upon marriage. These statements are, of course, dicta because the courts did not confront directly the issue of whether marriage automatically results in a change in the woman's name. Most of the statements reflect the view that no change in name is compelled by law. In *Application of Lawrence*,⁷⁷ a New Jersey appeals court concluded that a wife is not legally compelled to assume her husband's surname. In *Petition of Hauptly*⁷⁸ and *Walker v. Jackson*,⁷⁹ courts concluded that when a woman marries she assumes her husband's surname; both courts held, however, that a wife could resume her pre-marriage name by consistent usage.⁸⁰ *In re Mohlman*⁸¹ held that there was no common law requirement that the wife adopt the husband's surname. Most recently, the Virginia Supreme Court in *In re Strikwerda*⁸² indicated in dicta that "although a married woman may, as she customarily does, assume her husband's surname, she is under no legal compulsion to do so."⁸³

One of the most significant decisions reflecting recent trends of courts regarding marital surnames is *Kruzel v. Podell*.⁸⁴ In *Kruzel*, an art teacher,

76. 318 A.2d at 643. Statutes reflecting the prevailing custom in the United States have often been seized upon by those who assert the wife is required to adopt the husband's surname. These statutes relate to such matters as notification to licensing or registration officials "when a name is changed by marriage" (TENN. CODE ANN. § 59-708(d) (1968) cited in *Dunn v. Palermo*, 522 S.W.2d 679, 680 (Tenn. 1975)) and court allowance of the resumption of a pre-marriage name upon divorce (VA. CODE ANN. § 20-107 (Cum. Supp. 1976) cited in *In re Strikwerda*, 216 Va. 470, 472, 220 S.E.2d 245, 246 (1975)). Research has uncovered no case in which such an argument has been the basis for denying a woman's right to retain or reassume use of her pre-marriage name. Cf. *Dunn v. Palermo*, 522 S.W.2d 679, 680 (Tenn. 1975); *In re Strikwerda*, 216 Va. 470, 472, 220 S.E.2d 245, 246 (1975); *Kruzel v. Podell*, 67 Wis. 2d 138, 151, 226 N.W.2d 458, 464 (1975).

77. 133 N.J. Super. 408, 412, 337 A.2d 49, 51 (App. Div. 1975), *rev'g* 128 N.J. Super. 312, 319 A.2d 793 (Bergen County Ct. 1974).

78. 312 N.E.2d 857, 860 (Ind. 1974), *rev'g* 294 N.E.2d 833 (Ind. Ct. App. 1973) ("under the common law and by tradition in this country a married woman assumes the surname of her husband").

79. 391 F. Supp. 1395, 1402 (E.D. Ark. 1975) (the name change by law "was based upon immemorial custom and usage in England and in this country").

80. *Petition of Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974).

81. 26 N.C. App. 220, 216 S.E.2d 147 (Ct. App. 1975).

82. 216 Va. 470, 220 S.E.2d 245 (1975).

83. *Id.* at 472, 220 S.E.2d at 246.

84. 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

whose teaching certificate was under her pre-marriage name and who had exhibited her works of art under her pre-marriage name, was required by the Milwaukee school system to use her husband's surname for group insurance purposes. She petitioned a court to reinstate her pre-marriage name through the Wisconsin statute allowing for name changes. The trial court denied her request because the statute allowed judges to exercise considerable discretion in acting upon such petitions.⁸⁵ The Wisconsin Supreme Court found it unnecessary to discuss fully the issue of a possible abuse of discretion by the judge⁸⁶ because it held that the petitioner's name had never changed. Marriage, the court said, does not automatically result in a name change.⁸⁷ The marital surname rule was only a custom and custom in this instance had not ripened into common law.⁸⁸ The court noted that the use of legal encyclopedias and heavy reliance upon *Chapman v. Phoenix National Bank*⁸⁹ had led many courts to blithely accept the assertion that marriage changed a woman's name.⁹⁰ Other Wisconsin statutes could not be construed as requiring that a woman change her name upon marriage.⁹¹ Instead, they represent a recognition of prevailing custom. The court rejected the contention that *Lane v. Duchac*⁹² recognized a requirement that the wife adopt the husband's surname. The court concluded that the issue of whether a woman's name is automatically changed by marriage was not reached in *Lane*.⁹³ By failing to discuss such a requirement, *Lane* implicitly recognizes that there was no such common law requirement.⁹⁴ Thus, the common law rule prevailed: a woman may, but is not required to, adopt her husband's surname. Such adoption is only one example of the well known common law rule that, absent a fraudulent intent, a person may change his or her name by usage of the desired name.⁹⁵

Dunn v. Palermo,⁹⁶ decided by the Tennessee Supreme Court, followed shortly after the *Kruzel* decision. The *Dunn* court extensively explored the

85. The amount of discretion a judge may exercise is discussed in section IV.B. *infra*.

86. 67 Wis. 2d at 153, 226 N.W.2d at 464-65.

87. *Id.* at 152, 226 N.W.2d at 463-65.

88. *Id.*, 226 N.W.2d at 463.

89. 85 N.Y. 437 (1881). This and other earlier decisions are discussed in section III.A. *supra*.

90. 67 Wis. 2d at 145-46, 226 N.W.2d at 460.

91. *Id.* at 151-52, 226 N.W.2d at 465. See note 76 *supra*.

92. 73 Wis. 646, 41 N.W. 962 (1889).

93. 67 Wis. 2d at 147, 226 N.W.2d at 463. *Lane* concerned the issue of whether a document bearing the wife's pre-marriage name was legally sufficient.

94. *Id.* at 148, 226 N.W.2d at 463.

95. *Id.* at 154, 226 N.W.2d at 465.

96. 522 S.W.2d 679 (Tenn. 1975).

common law history of surnames and the American case law relating to the surnames of married women. Several of the earlier American cases which had been viewed as establishing a legal change requirement were distinguished as relating solely to the issue of notice or other tangential matters.⁹⁷ The court noted that the effect of *People ex rel. Rago v. Lipsky*⁹⁸ had been diminished by an opinion of the Attorney General of Illinois.⁹⁹ *Forbush v. Wallace*¹⁰⁰ was interpreted as holding that it was only customary and traditional for the wife to adopt the husband's surname.¹⁰¹ On the basis of recent cases and research, the Tennessee court concluded that at common law "a [married] woman acquired a new name by repute and that her name was thus changed *in fact and not in law*."¹⁰² Even if the common law contained such a requirement, the Tennessee Supreme Court indicated that it would depart from such a view.¹⁰³ Finally, the court rejected the policy argument that allowing women to retain their pre-marriage names would result in fraud, confusion and serious administrative problems.

In point of fact, permitting a married woman to retain her own name would eliminate substantial administrative problems incident to a change of name. With the rapid increases of divorces and re-marriages in America today, with attendant name changes, we may reach the point of having to forbid a change of name by marriage in order to bring about stability, reduce confusion, and preserve the identity of women who acquire a different name from each successive husband.¹⁰⁴

In *Weathers v. Superior Court for the County of Los Angeles*,¹⁰⁵ a woman petitioned for the right to use her pre-marriage name in divorce proceed-

97. *Id.* at 683-86. *Chapman v. Phoenix Nat'l Bank*, 85 N.Y. 437 (1881), *Roberts v. Grayson*, 233 Ala. 658, 173 So. 38 (1937), and *Wilty v. Jefferson Parish Democratic Executive Comm.*, 245 La. 145, 157 So. 2d 718 (1963), were thus discounted.

98. 327 Ill. App. 63, 63 N.E.2d 642 (Ct. App. 1945). See notes 58 & 59 *supra* and accompanying text.

99. *Dunn v. Palermo*, 522 S.W.2d 679, 684 (Tenn. 1975).

100. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972).

101. 522 S.W.2d at 686.

102. *Id.* at 687 (emphasis in original). "It was windblown across the Atlantic Ocean in the same form and has become a universal practice in this country. But it has never had the force of law in Tennessee either under our common law or statutes." *Id.*

103. The common law does not have the force of Holy Writ; it is not a last will and testament, nor is it a cadaver embalmed in perpetuity, nor is it to be treated like the sin of Judah — 'written with a pen of iron and with the point of a diamond.' Jeremiah 17:1.

Id. at 688. See also note 75 *supra*.

104. *Id.*

105. 54 Cal. App. 3d 286, 126 Cal. Rptr. 547 (Ct. App. 1976).

ings. The petitioner had used her pre-marriage name consistently during the marriage, but this fact did not sway the judge hearing the case. He first asserted that marriage itself changed the wife's name¹⁰⁶ and confessed, "I have never divorced people with two different names; never have."¹⁰⁷ The judge dismissed the case because the petitioner would not file for divorce under her husband's surname;¹⁰⁸ the petitioner appealed the judge's refusal to hear her case under her pre-marriage name. The court of appeals issued a writ of mandate directing the superior court to vacate its order. "[W]hen a woman marries, she may choose to be known by the surname of her husband or by her maiden surname,"¹⁰⁹ the court concluded.

In *Davis v. Roos*¹¹⁰ a Florida appeals court held that a married woman's application for a driver's license issued in her pre-marriage name must be processed. The court crystallized the issue clearly¹¹¹ and determined that "[a]lthough it is the general custom for a woman to change her name upon marriage to that of the husband, the law does not compel her to do so."¹¹² An earlier Florida Supreme Court decision,¹¹³ which had held that "at marriage the wife takes the husband's surname . . . but otherwise her name is not changed,"¹¹⁴ was viewed as inapplicable¹¹⁵ since the sole question before that court had been whether a suit styling the defendant as "Mrs." established that she was a married woman at the time of the suit.¹¹⁶ The district court next examined the *Chapman* decision and its progeny and determined that "history or precedent fails to support the *Chapman* enunciations."¹¹⁷ Finally, the court concluded that the decision in *Forbush v. Wallace*¹¹⁸ was based upon the belief that Alabama had adopted an

106. When the judge was informed that the petitioner had never adopted the husband's name, he replied, "That doesn't matter whether you've assumed it or not" and "The marriage certificate makes you Mrs. Grippa." When the petitioner disagreed, the judge responded, "They must have an awful novel wedding certificate in Oklahoma [the place of marriage] if it doesn't." *Id.* at 288, 126 Cal. Rptr. at 548.

107. *Id.*

108. *Id.* at 289, 126 Cal. Rptr. at 549.

109. *Id.*

110. 326 So. 2d 226 (Fla. Dist. Ct. App. 1976).

111. "Did the recitation of marriage vows between Roos and Burke legally change her name to that of Burke, even though she rejected it?" *Id.* at 227.

112. *Id.* at 229.

113. *Carlton v. Phelan*, 100 Fla. 1164, 131 So. 117 (1939).

114. *Id.* at 1170, 131 So. at 119.

115. *Davis v. Roos*, 326 So. 2d 226, 227 (Fla. Dist. Ct. App. 1976).

116. *Id.*

117. *Id.* at 228.

118. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972).

operation-of-law approach to marital surnames.¹¹⁹ This interpretation of common law suggested by the Alabama courts was rejected by the Florida court.

In summary, these recent decisions have recognized that the conclusions of *Chapman* and its progeny are founded upon a false historical premise. The *Chapman* progeny failed to distinguish between prevailing custom and binding common law.¹²⁰ Recent decisions have parted with *Chapman* because they recognize this important distinction between custom and law. At no time was an English wife required by law to assume the surname of her husband. Once this critical historical determination has been made, other issues are relatively easy to resolve. Courts are understandably reluctant to hold that non-binding English custom should be considered binding American law. Adherence to English common law should not result in a greater diminution of freedom for American women today than English women have had for centuries. Precisely because English women had the freedom to retain their pre-marriage names, American courts are increasingly recognizing that American married women have a similar right.

C. CONSTITUTIONAL CHALLENGES

If a court interprets the common law as legally requiring that a married woman adopt the surname of her husband, women wishing to retain their pre-marriage names may challenge the constitutionality of applying such a rule to women in the United States. There is very little recent case law on such constitutional challenges, however, since nearly all recent decisions have rejected such an interpretation of the common law.¹²¹

1. *Forbush And The "Rational Basis" Test Of Equal Protection*

Any constitutional challenge to the marital surname rule must focus upon the United States Supreme Court's summary affirmance of *Forbush v. Wallace*.¹²² Petitioner *Forbush* claimed that Alabama's unwritten policy

119. The conclusion that Alabama has adopted an operation-of-law approach to marital surnames can be challenged, however, as not bearing upon the issue of whether or not a wife is required by law to adopt the husband's surname. See note 62 *supra*.

120. See, e.g., the conclusory statement found in 57 AM. JUR. 2d *Name* § 9 (1971): "It is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname." See also the conclusion of *Chapman*: "For several centuries, by common law among all English-speaking people, a woman upon her marriage, takes her husband's surname." (emphasis added).

121. Thus most courts have not had an occasion to reach constitutional questions involving application of a marital surname requirement. See *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 450, 295 A.2d 223, 228 (1972); *Matter of Natale*, 527 S.W.2d 402, 407 (Mo. Ct. App. 1975); *Kruzell v. Podell*, 67 Wis. 2d 138, 154, 226 N.W.2d 458, 466 (1975).

122. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972).

of requiring married women to obtain drivers' licenses in their husbands' surnames was a denial of equal protection under the fourteenth amendment. The three-judge federal district court applied a "rational basis" test to the claim: "a law is not violative of the Fourteenth Amendment, despite the existence of discrimination in the technical or broad sense, where the law at issue maintains some rational connection with a legitimate state interest."¹²³ The court noted "the custom of the husband's surname denominating the wedded couple" is a "tradition extending back into the heritage of most western civilizations."¹²⁴ In light of "administrative inconvenience and the cost of a change" to Alabama's licensing program, the plaintiff's equal protection claim was rejected.¹²⁵ The Supreme Court affirmed without opinion the decision of the lower court.¹²⁶

Persons and groups displeased with the affirmance have stated that such a summary affirmance without opinion cannot be considered of the same precedential weight as a decision made after the submission of briefs and oral argument.¹²⁷ The Supreme Court in *Edelman v. Jordan*,¹²⁸ indicated that a summary affirmance is "not of the same precedential value as would be an opinion of this Court treating the question on the merits."¹²⁹ A summary affirmance *does*, however, have significant precedential value. The Supreme Court's recent decision in *Hicks v. Miranda*¹³⁰ indicates that summary affirmances or dismissals by the Supreme Court are binding on inferior courts "until such time as the Court informs [them] that [they] are not."¹³¹ The primary focus of inquiry in any subsequent case appears to be whether or not the issues raised in the new case had been presented to the Court earlier so that its earlier decision constitutes precedent on the issue to be raised.¹³²

123. *Id.* at 222.

124. *Id.*

125. *Id.* at 222-23.

126. 405 U.S. 970 (1972).

127. we are attempting to limit the potential harm by urging that a Supreme Court *per curiam* affirmance without opinion has scant, if any, precedential value. . . . We analogize it to be a denial of *certiorari*. The disposition was made without briefs and without hearing argument. Respectable scholarly opinion supports the proposition that nowadays the Supreme Court manages its obligatory jurisdiction much as it does its discretionary jurisdiction, so that a disposition of the Forbush kind tells us nothing of the Court's views on the merits.

R.B. Ginsburg, *WOMEN TODAY* 7, April 17, 1972, cited in Bysciewicz, *Married Women's Surnames*, 5 *CONN. L. REV.* 598, 612 (1973).

128. 415 U.S. 651 (1974).

129. *Id.* at 671.

130. 422 U.S. 332 (1975).

131. *Id.* at 345.

132. In a footnote, the Court noted that an earlier Supreme Court dismissal for want of a

While the *Hicks* decision seems to undermine any significant weight which might be given to *Edelman*, "subsequent doctrinal developments" may weaken the precedential value of an earlier summary affirmance.¹³³ Supreme Court rulings since *Forbush* on administrative convenience and gender classifications may have already undermined the *Forbush* summary affirmance. Even though a majority of the Court has not yet considered gender classification to be a suspect classification meriting strict judicial scrutiny,¹³⁴ the *Forbush* affirmance may be questioned. Recently the Supreme Court has transformed the "rational basis" test in equal protection analysis from an unquestioning acceptance of hypothetical justifications into a test demanding more rigorous scrutiny than was previously applied.¹³⁵ Furthermore, administrative convenience has been viewed as an unacceptable reason for discriminating between the sexes.¹³⁶ A Connecticut court in *Custer v. Bonadies*¹³⁷ relied upon these developments in holding that a voter registration requirement that married women register under their husbands' surnames violated the equal protection clause.

One federal district court has held that requiring women to register for voting under the prefix of "Miss" or "Mrs." violated the equal protection clause in that it imposed a disclosure of marital status requirement on women while not likewise imposing such a disclosure requirement upon men.¹³⁸ A Catholic nun and three other women had asked for registration

substantial federal question is decisive only if the issues raised in the two cases are sufficiently similar that the earlier decision may be considered controlling precedent. "Ascertaining the reach and content of summary actions may itself present issues of substance, and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court." *Id.* at n.14.

133. *Id.* at 344.

134. See *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which a plurality of the Court drew similarities between classifications by sex and race.

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concepts of our system that legal burdens should bear some relationship to individual responsibility. . . .

Id. at 686.

A majority of the Court still does not consider sex to be a suspect classification. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). Some state courts have done so. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

135. Compare *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (equal protection clause "offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective"), with *Reed v. Reed*, 404 U.S. 71 (1971) (disallowing preference for men as administrators of estates). See also *Stanton v. Stanton*, 421 U.S. 7 (1975).

136. *Reed v. Reed*, 404 U.S. 71 (1971).

137. 30 Conn. Supp. 385, 318 A.2d 639 (Super. Ct. of Hartford County 1974).

138. *Walker v. Jackson*, 391 F. Supp. 1395 (E.D. Ark. 1975).

in terms other than "Miss" or "Mrs." The district court concluded that such a prefix requirement could not even withstand "rational basis" scrutiny.

Conceding that the burden that the prefix requirement places upon the female applicants for registration is slight . . . , the trouble that we have with the requirement is that the State has no conceivable interest in imposing it. It has no reasonable or rational basis [W]e cannot see anything that the State has to gain by knowing whether a female voter is single, married, divorced, or a widow. Her marital status is simply irrelevant as far as her qualifications to vote are concerned.¹³⁹

However, in *Allyn v. Allison*,¹⁴⁰ the California Court of Appeals sustained a voter registration requirement that women identify themselves as "Miss" or "Mrs." against a challenge that it violated the fourteenth amendment. The court held that the state had a rational basis for such a requirement because "under our law the woman upon marriage takes the name of the husband."¹⁴¹ In order to discover previous registrations, a registrar may require identification by the titles "Miss" or "Mrs."¹⁴² The fact that a man is not required to disclose his marital status raises no equal protection problem because a man's name does not change at marriage.¹⁴³ One judge concurred but noted that a woman might use either "Miss" or "Mrs." regardless of marital status.¹⁴⁴ The California legislature later alleviated the problem by allowing a third category of "Ms."¹⁴⁵

Notwithstanding the *Allyn* decision, it appears that prefix and marital surname requirements are subject to vigorous constitutional challenge even under the "rational basis" test. Although the precedential value of the *Forbush* affirmance may have been strengthened by *Hicks*, various

139. *Id.* at 1403.

140. 34 Cal. App. 3d 448, 110 Cal. Rptr. 77 (Ct. App. 1973).

141. *Id.* at 452, 110 Cal. Rptr. at 80.

142. *Id.*

143. *Id.*

144. Apart from general custom I find no essential connection between marital status and use of the titles, MISS and MRS. Actresses today, even those who have married as many times as the sands of the sea, use the title MISS. In past centuries the practice was the precise opposite, and actresses and authoresses used the title MRS. regardless of marital status. . . . Nor was this custom limited to women of public life, for during the 17th and 18th centuries usage of the title MRS. by unmarried women in private life was common. . . . In my view a female voter registrant is free to use either of the two authorized descriptive titles, MISS or MRS., regardless of marital status.

Id. at 454-55, 110 Cal. Rptr. at 81.

145. See Karst, "A Discrimination So Trivial": A Note on the Law and the Symbolism of Women's Dependency, 35 OHIO ST. L.J. 546, 554 (1974).

courts seem unwilling to reject the equal protection challenge to such requirements.

2. *Other Constitutional Challenges*

In the aftermath of the Supreme Court's summary affirmance of *Forbush v. Wallace*, many writers suggested several constitutional rights as being associated with the right to retain a pre-marriage name.¹⁴⁶ These constitutional claims have not been fully tested because courts have been able to grant relief without reaching the constitutional issues.¹⁴⁷

In addition to equal protection, other constitutional rights have been considered as possible grounds for attacking marital surname requirements. Some writers have suggested that any marital surname requirement arguably deprives a married woman of a property interest in her name and reputation without due process.¹⁴⁸ Others have argued that a marital surname requirement is an abridgment of freedom of speech¹⁴⁹ or an invasion of the right of privacy.¹⁵⁰ In light of the recent trend, indicating that no common law marital surname requirement exists, it seems increasingly unlikely that many courts will have to address these constitutional issues. Instead, courts will most likely follow this recent trend which renders moot constitutional issues associated with the right to retain a pre-marriage name.

IV. REASSUMING THE PRE-MARRIAGE NAME

Those women who have adopted their husbands' surnames through usage¹⁵¹ or by operation of law may nevertheless be able to regain the use

146. See articles cited in note 5 *supra*.

147. Because these various constitutional challenges have been adequately explored elsewhere and remain fundamentally unchanged, no attempt is made here to discuss them exhaustively. The reader is referred to articles cited *passim*.

148. See Comment, *Married Woman's Right to Her Maiden Name: The Possibilities for Change*, 23 BUFFALO L. REV. 243, 254-55 (1973); Comment, *Pre-Marriage Name Change, Resumption, and Registration Statutes*, 74 COLUM. L. REV. 1508, 1513 (1974); Comment, *A Woman's Right to Her Name*, 21 U.C.L.A.L. REV. 665, 685-87 (1973).

149. See, e.g., Comment, *A Woman's Right to Her Name*, 21 U.C.L.A.L. REV. 665, 683-85 (1973).

150. See Comment, *The Right of Women to Use Their Maiden Names*, 38 ALBANY L. REV. 105, 123 (1973); Comment, *Pre-Marriage Name Change, Resumption and Registration Statutes*, 74 COLUM. L. REV. 1508, 1513 (1974) (acknowledging that such an interpretation would require an extension of the right of privacy); Comment, *A Woman's Right to Her Name*, 21 U.C.L.A.L. REV. 665, 680-83 (1973).

151. At common law any person could adopt a new name by consistently and exclusively using it. The wife adopted the husband's surname by usage and not by operation of law. See notes 43-45 *supra* and accompanying text.

of their pre-marriage names as their "legal names" through a state's procedures for changing a name. All states have statutes providing for change of name petitions. These statutes, as interpreted by state courts, vary significantly from state to state. There is, however, remarkable similarity in the questions discussed by various state courts which have interpreted such statutes.

Generally, an appellate court reviewing a lower court's decision on a change of name petition will find it necessary to address the following questions: (1) Is the change of name statute intended to be in abrogation of the common law right of adoption by usage? (2) How much, if any, judicial discretion may be exercised in reviewing petitions for a change of name? and (3) What factors should affect a court's decision?

A. IS THE STATUTE IN ABOGATION OF COMMON LAW RIGHTS?

As discussed above,¹⁵² at common law surnames were never viewed as immutable; a person could adopt a new surname without legal formalities by merely using that name exclusively, consistently and nonfraudulently. The relationship between this common law right to change a surname at will and state statutes outlining statutory methods for changing a name is of critical importance. Courts must clearly determine whether the statute providing for change of names was intended to be in abrogation of the common law right. If the statute merely supplements the common law right, a person may still change his or her name by usage without resorting to the statutory machinery. If, however, the statute is viewed as abrogating the common law right, a person must follow statutory procedures in order to change his or her legal name.

1. *Majority View: Statutes Supplement Common Law*

Prior to the flurry of decisions regarding a married woman's name, most courts had already interpreted statutes prescribing a procedure for the change of names as merely supplementary of the common law right to change a name without legal proceedings.¹⁵³ Such statutes were held to

152. See notes 43-45 *supra* and accompanying text.

153. *Clinton v. Morrow*, 220 Ark. 377, 247 S.W.2d 1015 (1952); *Application of McGehee*, 174 Cal. App. 25, 304 P.2d 167 (Dist. Ct. App. 1956); *Don v. Don*, 142 Conn. 309, 114 A.2d 203 (1955); *Degenberg v. McCormick*, 184 A.2d 468 (Del. Ch. 1962); *Reinken v. Reinken*, 351 Ill. 409, 184 N.E. 639 (1933); *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *Petition of Buyarsky*, 322 Mass. 335, 77 N.E.2d 216 (1948); *Petition of Merolevitz*, 320 Mass. 448, 70 N.E.2d 249 (1946); *In re Taminosian*, 97 Neb. 514, 150 N.W. 824 (1915); *In re Slobody*, 173 N.Y.S. 515 (Sup. Ct. 1918); *Kay v. Kay*, 65 Ohio Abstr. 472, 112 N.E.2d 562 (C.P. Cuyahoga County 1953); *In re Everetts Appeal*, 392 S.W.2d 781, 783 (Tex. Ct. Civ. App. 1965) (acknow-

provide a method for recording a change so that the name change might occur quickly and efficiently. Most legislatures did not indicate whether the statutory procedure was intended to be the exclusive means of changing one's name. Thus, state courts were reluctant to infer an intent to abrogate the common law right of surname flexibility.¹⁵⁴

Courts reviewing petitions from married women wishing to reassume their pre-marriage names have held that change of name statutes do not abrogate the common law right of adoption through usage in the following states: Missouri,¹⁵⁵ California,¹⁵⁶ Connecticut,¹⁵⁷ Indiana,¹⁵⁸ New York,¹⁵⁹ Arizona¹⁶⁰ and New Jersey.¹⁶¹ Other state courts have adopted this position

leding general rule without commenting upon it). Cf. *Petition of Falcucci*, 355 Pa. 558, 50 A.2d 200 (1947) (individual must use statutory method).

154. The court in *Smith v. United States Casualty Co.*, 197 N.Y. 420, 90 N.E. 947 (1910), one of the earlier decisions discussing the relationship between a change of name statute and this common law right, concluded:

[T]his legislation is simply in affirmance and aid of the common law to make a definite point of time when the change shall take effect. . . . It does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name. The statutory method [of effecting a change] has some advantages, because it is speedy, definite, and a matter of record so as to be easily proved even after the death of all contemporaneous witnesses.

Id. at 429, 90 N.E. at 950.

155. *Matter of Natale*, 527 S.W.2d 402, 405 (Mo. Ct. App. 1975) ("The primary difference between the two methods is, therefore, the speed and certainty of the change of name under the statutory procedure. . . . While no Missouri case has yet considered the relationship between the common law and statutory methods of name change, the court's view that the common law and statutory methods of changing name coexist is consistent with the language of . . . [the statutory provision] since. . . [it] does not expressly abrogate the common law or invalidate the common law by inconsistency.").

156. *In re Marriage of Banks*, 42 Cal. App. 3d 631, 637, 117 Cal. Rptr. 37, 41-42 (Ct. App. 1974) (statute "enacted in affirmation of this common law right"; anyone may change a name through nonfraudulent usage). *Accord*, *Weathers v. Superior Ct.*, 54 Cal. App. 3d 286, 288, 126 Cal. Rptr. 547, 549 (Ct. App. 1976).

157. *Custer v. Bonadies*, 30 Conn. Supp. 385, 318 A.2d 639, 640 (Super. Ct. Hartford County 1974) ("Connecticut has adopted this common law rule, which operates independently of any court order.").

158. *Petition of Hauptly*, 312 N.E.2d 857, 859-60 (Ind. 1974) (" . . . there is no legal requirement that any person go through the courts to establish a legal change of name.").

159. *Application of Halligan*, 46 App. Div. 2d 170, 171, 361 N.Y.S.2d 458, 459 (1974) ("The statute affirms this [common law] right and the two procedures exist side by side supplementing each other. . . .").

160. *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277, 1279 (Ct. App. 1975) (change of children's name to hyphenated form reflecting the surnames of both wife and husband; statutes "merely affirm and are in aid of the common law rule. They do not repeal the common law by implication or otherwise, but afford an additional method of affecting a name change.").

161. *Application of Lawrence*, 133 N.J. Super. 408, 411, 337 A.2d 49, 50 (App. Div. 1975), *rev'g* 128 N.J. Super. 312, 319 A.2d 793 (Bergen County Ct. 1974) (statutory procedure "has

when reviewing other types of petitions.¹⁶² Some courts have stated that the statutory procedure should be interpreted in a manner which would not minimize the common law right; it is nevertheless unclear whether these decisions view the statutory procedure as the exclusive means of changing one's name.¹⁶³

Whether or not a statutory procedure is the sole method of changing a name affects significantly a court's determination of the proper amount of judicial discretion. Courts holding that the common law change of name rights are not abrogated are reluctant to vest significant discretionary powers in judges. A person whose request for a change of name had been denied could, in a dual method jurisdiction, legally adopt the desired name by usage. A state's best interests are served by having a record of all changes of names. Therefore, in dual method jurisdictions, a judge's discretion is frequently limited to determining whether the request for a change of name is fraudulent.¹⁶⁴

2. *A Vociferous Minority: Abrogation*

For many years, it has been suggested that the common law right of adoption by usage without requiring legal proceedings should be significantly restricted or abandoned altogether. Three very distinct reasons have been presented by these critics of the common law right.

First, it is argued that a person has a property interest in his or her name which should not be subject to appropriation by another. This position was forcefully articulated with unfortunately racist overtones when immigration to North America resulted in significant resentment against those immigrants who adopted "reputable surnames."¹⁶⁵ These unfortunate

been construed consistently in light of and not in derogation of the common law, which it does not supercede.").

162. See note 153 *supra* and accompanying text.

163. See, e.g., *Kruzel v. Podell*, 67 Wis. 2d 138, 153, 226 N.W.2d 458, 465 (1975) ("the statutes merely affirm, and do not abrogate, the common law."). The *Kruzel* court stated that a judge should grant any request unless it is fraudulent. One could argue that the statutory procedure was thus intended to replace the common law method of usage by providing an exclusive statutory form of the common law principles. See also *Ogle v. Circuit Court*, 227 N.W.2d 621, 624 (S.D. 1975) (statutes do not supplant this [common law] right but aid it by the official recordation of those changes).

164. See note 193 *infra* and accompanying text.

165. One writer roused his audience with this memorable rhetoric:

Was such a [noble and highly regarded] name one on which an alien should be allowed to wipe his dirty feet? . . . Have the legitimate owners of a patronymic no right to protect it from theft by those who possess no natural claim upon it? Can no family nest throw out those foreign cuckoo eggs?

comments reflect, however, the principle of the civil law that a person does have a property interest in his or her name.¹⁶⁶ Consequently, in nations following the civil law, the appropriation of another person's name is discouraged.¹⁶⁷ In common law jurisdictions, a person's petition for a change of name is not generally denied on the basis of property interest in a personal name.¹⁶⁸

Second, it is often suggested that allowing a person to adopt a new name, especially without requiring legal proceedings, creates chaos and confusion in an extremely mobile society.¹⁶⁹ It is important, of course, to distinguish

Gordon, *Change of Patronymic*, 56 CANADA L.J. 1, 6 (1920). Gordon continues his argument in the following fashion:

In England, America and Canada there exist family names which have been consecrated in the history of our race, and which are repeated with reverence whenever referred to. In most American States any one of these honored names can be assumed by any citizen who, perhaps in his dealings with the police, judges it desirable to adopt a new alias; or by any unwashed immigrant from Central Europe who finds that his cognomen too clearly reveals his ancestry and race to make living among loyal communities pleasant.

Id. at 6-7.

A less rousing, but nonetheless similar argument is found in Dwight, *Proper Names*, 20 YALE L.J. 387 (1911). Dwight posits:

A very familiar illustration of one aspect of this fact [of the importance of a name] is found in the way we associate names with racial skill and capacity to an extent probably known nowhere else in the world. . . . While socially the names peculiar to the stocks, Anglo-Saxon, Dutch and Huguenot, that founded the nation and still predominate command a prestige that is undeniable. Moreover, this advantage inheres not so much in any one name as in the sound. It is the suggestion of race affiliation that counts, not the belonging to one particular branch of family.

Id. at 389.

Dwight suggests that no one be allowed to assume a name already born by others but instead be compelled to "coin one" by translation or "by the arbitrary assemblage of letters."

Id. at 392.

166. ARNOLD, *supra* note 23, at 230-31.

167. *Id.*

168. Hence, a person who is proud of the heritage of his name may not prevent another from adopting his name unless the use of his name is fraudulent. "[T]his is one of the incidents of living in a world in which there are not a sufficient number of distinctive patronymics to allow each individual to monopolize one." *Petition of Falcucci*, 355 Pa. 588, 592, 50 A.2d 200, 202 (1947). *Accord, In re Useldinger*, 35 Cal. App. 2d 723, 96 P.2d 958 (Dist. Ct. App. 1939); *Petition of Buyarsky*, 322 Mass. 335, 77 N.E.2d 216 (1948); *Application of Ferris*, 178 Misc. 534, 34 N.Y.S.2d 909 (Sup. Ct. 1942).

169. The importance of names "accrues only as civilization becomes complex, with a greatly increased mingling of people, the multiplication of written records, and the growing necessity for preserving identities." Dwight, *Proper Names*, 20 YALE L.J. 387, 389 (1911).

The common law rule is often considered to be . . . totally without any rational justification in an age when so much depends on written records and courts are readily

between requiring that a person initiate legal proceedings in order to obtain a change of name and imposing additional requirements before such a change is granted. It is, for example, possible for a state to codify the common law rule as the exclusive method of changing a name. In order to do this, a state must limit denials of requests to instances where the petition is motivated by fraud. The jurisdictions, however, which seemingly hold that such a statutory method is exclusive have often added other requirements which must also be met.¹⁷⁰

The third group of critics are those who believe that requirements in addition to a lack of fraudulent intent should be imposed. This group often argues that changes of names are disruptive to society even when a record of the changes is made. Persons who are not before a court which is reviewing a proposed change of name may not be protected if the court only examines the issue of fraudulent intent. Thus, additional criteria should be imposed in order to protect these parties.¹⁷¹ The exact nature of these added factors is considered later in this article.¹⁷²

A few jurisdictions clearly hold that the statutory procedure is the sole means available for changing a name. A Louisiana statute,¹⁷³ which begins "Whenever any person . . . desires to change his or her name," has been interpreted by the Louisiana Attorney General as providing the only procedure for changing one's name.¹⁷⁴ The Maine Supreme Court held in *In re Reben*¹⁷⁵ that similar language in the Maine statute outlining name change procedures indicated that the statutory method was exclusive. The Maine court indicated that other statutes which had been interpreted by courts in other jurisdictions as establishing a second method of changing a name seem to impose criteria in addition to the common law requisite.¹⁷⁶ The Maine statute was viewed as an incorporation of "the essential philosophy of the earlier practice."¹⁷⁷ Thus, the common law method was no longer

accessible. As transportation facilities improve and communities become more fluid, identities of individuals and their whereabouts conceivably could be lost to members of their families, creditors, and others desiring to locate them unless public records are kept of all name changes.

Comment, *The Right to Change One's Name*, 5 J. FAMILY L. 220, 227 (1965).

170. See notes 205-09 *infra* and accompanying text.

171. See, e.g., Comment, *The Right to Change One's Name*, 5 J. FAMILY L. 220, 224-26 (1965).

172. See section IV.C. *infra*.

173. LA. REV. STAT. ANN. § 13:4751 (Cum. Supp. 1976) (emphasis added).

174. 1942-1944 OP. ATT'Y GEN. LA. 963.

175. 342 A.2d 688 (Me. 1975).

176. *Id.* at 694.

177. *Id.* at 693. Yet the court construed "the *present* statute as necessarily including several implied standards in addition to that of absence of fraudulent intent." *Id.* at 695 (emphasis in original).

useful or desirable. The North Carolina Court of Appeals seemingly held in *In re Mohlman*¹⁷⁸ that the statutory procedure constituted the exclusive method of changing a name. The court first concluded that the common law was in force in North Carolina when not abrogated or repealed by statute or repugnant to North Carolina's form of government.¹⁷⁹ It then found it "interesting to note" that the Constitution of North Carolina gave the General Assembly the power to pass general laws regulating the alteration of names.¹⁸⁰ Although it took notice of the fact that "it is generally held that these statutes do not abrogate the common law rule,"¹⁸¹ the court seemed to indicate that the North Carolina statute abrogated the common law right of usage.¹⁸²

Other states have statutes which have been interpreted by state attorneys general as providing the exclusive method for changing a name, including Georgia¹⁸³ and Virginia. The Virginia Attorney General has indicated that a woman who has adopted her husband's surname "may obtain a reinstatement of her maiden name only by proceedings in accordance with" the Virginia statute outlining procedures for a change of name.¹⁸⁴ Although the Virginia Supreme Court in *In re Strikwerda*¹⁸⁵ did not reach this question, it seems that Virginia may have by statute abrogated the common law method of adoption by usage.¹⁸⁶ Most state attorneys general

178. 26 N.C. App. 220, 216 S.E.2d 147 (Ct. App. 1975).

179. *Id.* at 225, 216 S.E.2d at 150.

180. *Id.*

181. *Id.*

182. However, with the increasing mobility of our society, and the growing dependence upon credit cards, automated check cashers, charge accounts, computerized record keeping both in commerce and in government, numerous name changes can lead to chaotic confusion. Thus, it appears completely obvious that to provide a procedure whereby one can secure a change of name through legal procedure with a provision for proper recordation thereof among the public records is desirable and far less objectionable, than the common law provision. . . . Our General Assembly, recognizing there are circumstances under which a legally sanctioned change of name may be warranted . . . has provided *the* procedure [for changing a name].

Id. at 227-28, 216 S.E.2d at 151 (emphasis added).

An old Alabama decision, *Comer v. Jackson*, 50 Ala. 384, 387 (1839), indicates in dicta that "a party may not change his name, without a proper proceeding in court . . . but he may adopt as many other names as he pleases." A person thus may assume various names but cannot change his legal name without court proceedings in Alabama.

183. See OP. ATT'Y GEN. GA. 74-33 (March 15, 1974) ("the only way in which [the individual involved] could legally change his name").

184. See 1972-1973 REPORTS OF THE ATTORNEY GENERAL OF VIRGINIA 182 (June 6, 1973).

185. 216 Va. 470, 220 S.E.2d 245 (1975).

186. VA. CODE ANN. § 8-577.1 (Cum. Supp. 1976) states that "[i]f any person residing in this State changes his name or assumes another name unlawfully, he shall be guilty of a misdemeanor." It is possible to read this statute as meaning that any assumption of a new

have adopted the position that statutes outlining procedures for changes of names do not abrogate the common law right of adoption by usage.¹⁸⁷

3. *Implications of Abrogation*

A conclusion that persons may change surnames only by using the statutory procedure would seem to require that a woman wishing to adopt her husband's surname go through the statutory procedure as well. In order to accomplish the statutory purpose of having a record of each name change, it would be necessary to record all changes. Because it is not legally required that a wife adopt her husband's surname, such adoption is accomplished in most jurisdictions by nonfraudulent usage. If the common law right of adoption by usage has been abrogated by the statutory procedure for changing a name, the only method available for a woman wishing to adopt her husband's surname is the utilization of the statutory procedure. In a jurisdiction holding that adoption by usage has been abrogated, a wife would retain her pre-marriage name as her legal name *regardless of* her usage of the husband's surname unless she went through the statutory procedures.¹⁸⁸

The decision of whether or not the common law right of adoption by usage has been abrogated is clearly a decision with many consequences. A jurisdiction which allows for two methods of changing names — the common law and statutory methods — will generally be pressured to pattern the statutory method after the common law principles. In order to encourage people's utilization of the statute, the basis for denial of a petition may

name unless authorized by statutory proceedings is illegal. It is also possible to read the passage narrowly, as only forbidding the fraudulent use of another's name. Although the Supreme Court of Virginia made reference to this portion of the statute in *In re Strikwerda*, 216 Va. 470, 473, 220 S.E.2d 245, 247 (1975), it is unclear how the court interpreted this language of the statute.

187. See, e.g., OP. ATT'Y GEN. ILL. S-695 (February 13, 1974) and S-711 (February 25, 1974); OP. ATT'Y GEN. MICH. No. 4834 (October 2, 1974); OP. ATT'Y GEN. PA. Nos. 62 (August 20, 1973) ("The notion that a woman loses her prior identity [sic] by marrying is a weed that has flourished too long in this society."), 72 (October 25, 1973) and 8 (January 31, 1974); OP. ATT'Y GEN. S.C. No. 3796 (June 6, 1974) (can either use court proceeding "or by the common law right to adopt a name you desire by general usage"); OP. ATT'Y GEN. VT. No. 179 (February 4, 1974) ("Importantly this statute is not exclusive, on its face; it does not purport to abrogate the common law of names."); 63 OP. ATT'Y GEN. WIS. 501 (October 7, 1974).

188. Many states have for this reason added exceptions to their statutes which allow for women to change their names by usage upon marriage. See, e.g., MASS. ANN. LAWS ch. 210 § 12 (1969) (except upon adoption or a woman's marriage or divorce, no change of name is lawful unless made by a court for a sufficient reason); KY. REV. STAT. ANN. § 401.010 (1972) (change of name statute excludes married women; state attorney general holds that married women may change their names without legal proceedings); OKLA. STAT. ANN. tit. 12 § 1637 (1961) (statutory procedure is exclusive; may change a name upon marriage, however).

be restricted significantly. Otherwise, people who could not obtain a name change by statute would merely avail themselves of the common law method, which is neither precise nor requires a record of any name change. If a state wishes to obtain a record of all name changes or wishes to impose prerequisites in addition to the absence of fraud for all name changes, it may be necessary to abrogate the common law method. A jurisdiction holding that the common law right has been abrogated may restrict changes in legal names more easily, for a person must meet any criteria specified in the statutory method in order to change his or her legal name. Yet these jurisdictions, in order to be consistent, may have to require that a married woman wishing to adopt her husband's surname go through statutory procedures in order to change her name. Consistency may also require that such jurisdictions impose the same criteria upon such a woman as is done in other change of name petitions.¹⁸⁹ It is possible that an exclusively "statutory method" state, wishing to restrict the number of name changes, could inadvertently impose statutory prerequisites that a married woman wishing to adopt the husband's surname could not meet. Clearly, before a state court or legislature decides to abrogate the common law right, it should carefully assess the probable ramifications of its decision.

B. HOW MUCH JUDICIAL DISCRETION?

The issue of how much discretion a judge has in reviewing a petition requesting a change of name has troubled many courts. Courts have interpreted statutes which seemingly allow considerable discretion in such a fashion that little discretion is actually given. While court rulings and statutes allow for varying degrees of discretion, it is possible to categorize discretionary powers into three forms: minimum, intermediate and maximum judicial discretion.

1. *Minimum Judicial Discretion*

Many court decisions and statutes clearly envision the granting of any change of name petition unless it appears that the request is motivated by fraud. In these jurisdictions, a judge's discretion is limited to a determination of whether the request is fraudulent. Absent any evidence that the

189. If North Carolina has in fact abrogated the common law method, then a married woman wishing to adopt her husband's name would have to demonstrate "good and sufficient reasons" for the contemplated change. *In re Mohlman*, 26 N.C. App. 220, 216 S.E.2d 147 (Ct. App. 1975), would seem to require that such a petitioner offer evidence in order to establish "good and sufficient reasons." Averments that the request is made for "personal and professional reasons" would not be sufficient. *Id.* at 228, 216 S.E.2d at 152.

request is fraudulent, the judge must grant a petition requesting the change.

A significant number of jurisdictions have held that a judge's discretion is limited to a determination of fraudulent intent. The Tennessee Supreme Court in *Dunn v. Palermo*¹⁹⁰ seemingly went even further by indicating that any petition which enumerates the reasons for the proposed change should be granted.¹⁹¹ The Indiana Supreme Court, in interpreting a statutory provision that a judge "may change the names of natural persons on application by petition,"¹⁹² concluded that

[t]he only duty of the trial court upon the finding of such a petition is to determine that there is no fraudulent intent involved. Once having so found, we hold it is an abuse of judicial discretion to deny an application for a change of name under the statute.¹⁹³

The Virginia Supreme Court in 1975 stated that the inclusion within the relevant statute of criminal penalties for one who assumes another name unlawfully "suggests that, in the absence of an illegal purpose, a change of name petition should be granted."¹⁹⁴ The court drew this conclusion after noting that the statute (allowing a court "in its discretion" to order changes of names) provided no guidelines for the exercise of discretion.¹⁹⁵ Several states, such as Oklahoma,¹⁹⁶ Alabama¹⁹⁷ and Vermont¹⁹⁸ have by statute limited a judge's discretion in reviewing petitions.

2. *Intermediate Judicial Discretion*

Most jurisdictions have statutes which, as interpreted by the courts, vest considerably more discretion with the court than a mere determination of

190. 522 S.W.2d 679 (Tenn. 1975).

191. All that is required is that a live person file a sworn application in the proper court of the county of his residence "giving his reasons for desiring the change." There is no requirement that the reasons be good and sufficient; just that they be given.

Id. at 680.

192. IND. ANN. STAT. § 34-4-6-1 (1973).

193. *Petition of Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974).

194. *In re Strikwerda*, 216 Va. 470, 473, 220 S.E.2d 245, 247 (1975).

195. *Id.* The Virginia Supreme Court concluded that the absence of guidelines was a statutory omission that "may deserve consideration by the General Assembly." *Id.*

196. OKLA. STAT. ANN. tit. 12, § 1634 (1961) states that all petitions should be granted unless the "court finds that the change is sought for an illegal or fraudulent purpose or that a material allegation in the petition is false."

197. ALA. CODE tit. 13, § 278 (1958), allowing for changes of names, does not include any language suggesting that a court has discretion in granting such requests.

198. VT. STAT. ANN. tit. 15, § 811 (1974), allowing for changes of names, does not include any language suggestive of discretion.

whether the petitioner is motivated by fraud. The California statute,¹⁹⁹ providing that a judge should grant a petition if it "may seem right and proper," is typical of this intermediate discretion. While this statute and others similar to it vest seemingly significant discretionary powers, courts have determined that in the absence of any evidence that harm will result, the judge should grant such petitions.²⁰⁰ Some states shift the burden of proof to third parties objecting to the petition.²⁰¹ Petitions which are unopposed are often presumed to be valid.²⁰² Often statutes which convey an uncertain amount of discretionary power are construed in such a fashion as to limit a judge's discretion.²⁰³

A judge within a state allowing for intermediate discretion either by statute or court decision may properly consider factors other than the possible fraudulency of the petition. At the same time, however, the judge's discretion is bridled in the various methods outlined above. The fact that the petitioner usually does not bear the burden of proving "good cause" is perhaps the most significant limitation upon the judge's discretion.

3. *Maximum Judicial Discretion*

Some jurisdictions require that the petitioner establish sufficient justification for the proposed change of name. The Alaska statute outlining procedures for a change of name is typical:

[N]o change of name of a person may be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interests.²⁰⁴

The North Carolina Court of Appeals in 1975 determined that the relevant North Carolina statute,²⁰⁵ providing that a person may have a name

199. CAL. CIV. PRO. CODE § 1278 (West 1972).

200. See, e.g., *Matter of Natale*, 527 S.W.2d 402 (Mo. Ct. App. 1975) (must have evidence that third parties will be harmed in order to deny requests); *Kruzel v. Podell*, 67 Wis. 2d 138, 153, 226 N.W.2d 458, 466 (1975) (interpreting statute requiring that requests be granted "if no sufficient cause is shown to the contrary").

201. See, e.g., *In re Banks*, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (Ct. App. 1974).

202. See, e.g., *Application of Halligan*, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (App. Div. 1974).

203. See, e.g., *Marshall v. State*, 301 So. 2d 477, 478 (Fla. D. Ct. App. 1974) (request should be granted unless filed for an illegal purpose or unless it invades another's property interest).

204. ALAS. STAT. § 09.55.010 (Supp. 1975). It is noteworthy that the Alaska statute adds that a ". . . change of name upon marriage or divorce meets these requirements." See also ARK. REV. STAT. ANN. §§ 34-801 to -803 (1962) ("upon good reasons shown").

205. N.C. GEN. STAT. §§ 101-02 (1972).

changed if "good cause [is] shown," imposed upon the petitioner a burden of going forward with evidence establishing that the change would be justified.²⁰⁶ A mere averment by the petitioner that she wishes to reassume her pre-marriage name for "personal and professional reasons" is not sufficient even if it is clear that the petition does not result from fraudulent motives.²⁰⁷ States which impose a burden of proof upon the petitioner may considerably enlarge a court's discretion in reviewing petitions. Discretion is seemingly unbridled by evidence submitted²⁰⁸ or limitation upon conjecture²⁰⁹ precisely because it is the petitioner who must convince the court of the petition's merits.

Many state statutes use language that a judge "may make an order changing the name. . . ."²¹⁰ While these statutes seemingly vest significant discretion in the court, statutes similar to these have often been interpreted as vesting little discretion.²¹¹ In the absence of a state court ruling actually defining the nature and extent of the judge's discretion, the amount of discretion conveyed may remain unclear.

It is, of course, obvious that the amount of discretion which a court may exercise is of critical importance in determining whether a petition should be granted. Before determining the issue of discretion, it is advisable that a court examine the underlying policy considerations which are operative. Courts in jurisdictions which have not abrogated the common law right to change a legal name by usage without legal proceedings will generally wish to minimize a judge's discretion.²¹² Courts in jurisdictions which have abrogated the common law right should determine whether the statutory procedure was provided in order to restrict the number of name changes or merely to provide a record of any changes.²¹³ If the statute was intended to restrict name changes, judicial discretion should be maximized. A stat-

206. *In re Mohlman*, 26 N.C. App. 220, 228, 216 S.E.2d 147, 151-52 (1975).

207. *Id.*

208. *Cf. Matter of Natale*, 527 S.W.2d 402, 406 (Mo. Ct. App. 1975).

209. *Cf. Petition of Hauptly*, 312 N.E.2d 857, 860 (Ind. 1974) (mere speculation that children will be embarrassed by mother's change of name). In instances where the petitioner would carry the burden of showing "good cause," she might have to present evidence that the children would not be harmed.

210. IDAHO CODE ANN. § 7-804 (Supp. 1975). *See also* ARIZ. REV. STAT. § 12-601 (1956); DEL. CODE ANN. tit. 10, §§ 5901-05 (Supp. 1975); KY. REV. STAT. ANN. § 401.010 (1972); ME. REV. STAT. ANN. 19 § 781 (Cum. Supp. 1976).

211. *See* notes 192-95 *supra* and accompanying text.

212. *See Petition of Hauptly*, 312 N.E.2d 857 (Ind. 1974). Other courts interpreting statutes not abrogating the common law have restricted the amount of judicial discretion significantly. *See* cases cited in notes 155-61 *supra*.

213. *See* discussion of the criticism of the common law rule at notes 169-72 *supra* and accompanying text.

ute, however, solely intended to provide a record of change should be interpreted as allowing for very little judicial discretion.

C. WHAT FACTORS MAY BE CONSIDERED?

Those courts deciding that factors in addition to possible fraudulent motives may be considered must determine whether the interests of third parties not before the court might be adversely affected. Three factors have been frequently examined by courts reviewing petitions to restore a woman's pre-marriage name.

1. *Burden To Recordkeeping*

Several courts, concerned with questions of administrative agencies' abuse of discretion in denying women the right to use pre-marriage names, have held that the added burden to recordkeeping justified a denial of women's petitions.²¹⁴ More recent decisions have, however, demonstrated the weakness of this argument, especially when used as a basis for denying a petition for a change of name. Confusion "is a normal concomitant of any name change"²¹⁵ rather than an impediment justifying denial of requests to resume use of a pre-marriage name. More importantly, the logical extension of this type of reasoning would mitigate against any request for a change of name, including those of women wishing to adopt their husbands' surnames. Indeed, the rising divorce rate and increasing rate of remarriage might eventually lead to "forbid[ding] a change of name by marriage in order to bring about stability, reduce confusion and preserve the identity of women who acquire a different name from each successive husband."²¹⁶ The rights of creditors are not necessarily jeopardized by the reassumption of the pre-marriage name.²¹⁷ Indeed, the current practice of wives adopting the surnames of husbands seems much more burdensome than the retention or resumption of pre-marriage surnames by married women.²¹⁸ Thus, the concern for possible confusion or a burden to record-

214. See, e.g., *Forbush v. Wallace*, 341 F. Supp. 217, 222 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972) ("The confusion which would result if each driver were allowed to obtain licenses in any number of names he desired is obvious."); *People ex rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (Ct. App. 1945) (allowing voter registration of woman in her pre-marriage name would promote fraud and confusion).

215. *Application of Halligan*, 46 App. Div. 2d 170, 172, 361 N.Y.S.2d 458, 460 (1974); *accord*, *Application of Lawrence*, 133 N.J. Super. 408, 337 A.2d 49, 52 (App. Div. 1975).

216. *Dunn v. Palermo*, 522 S.W.2d 679, 688 (Tenn. 1975).

217. *Matter of Natale*, 527 S.W.2d 402, 406 (Mo. Ct. App. 1975).

218. Those courts reasoning that the burden to recordkeeping is a justification for denying petitions fail to explain adequately why the administrative burden of a change they condone (the adoption by a wife of her husband's surname) is less than that of the change they oppose (the resumption of the pre-marriage name by a married woman).

keeping should not ordinarily be a reason for denying a woman's petition to reassume her pre-marriage name.

2. *The Consent Of The Husband*

Not very many courts have directly confronted the issue of whether the spouse's consent to a change of name can be made a prerequisite for the change. Most husbands in reported cases have actively supported their wives' decisions to resume use of their pre-marriage names.²¹⁹ Other courts have inferred that the husband has consented to a change of name.²²⁰ Earlier cases placed some emphasis on the husband's consent as witnessed in an antenuptial contract which provided that the woman was to retain her pre-marriage name.²²¹ More recent cases have either not considered the husband's consent²²² or seemingly considered it as almost an incidental factor.²²³ No recent reported decision has been forced to decide the merits of a married woman's petition to change her name over the objections of her husband.

It is important to note that this issue of consent does not necessarily involve policy questions of whether the husband and wife should have common surnames in order to foster a symbol of family unity.²²⁴ Those courts which have recently mentioned the question of consent have been

219. See *Matter of Natale*, 527 S.W.2d 402, 406 (Mo. Ct. App. 1975) ("Since the petitioner's husband joined in her petition, no harm to him can be presumed."); *Application of Lawrence*, 133 N.J. Super. 408, 414, 337 A.2d 49, 52 (App. Div. 1975) ("We conclude that, in circumstances such as here where the husband consents to his wife's resumption of the maiden name, the denial of the plaintiff's application was without warrant. . ."); *In re Strikwerda*, 216 Va. 470, 473, 220 S.E.2d 245, 247 (1975).

220. *In re Reben*, 342 A.2d 688, 695 (Me. 1975) ("If one spouse has the right to object to the other's petition, Mr. Reben's appearance here as her attorney clearly demonstrates his nonopposition.").

221. *State ex rel. Krupa v. Green*, 114 Ohio App. 497, 177 N.E.2d 616 (Ct. App. 1961); *State ex rel. Bucher v. Brower*, 7 Ohio Supp. 51, 21 Ohio Op. 208 (Montgomery County C.P. 1941).

222. *Weathers v. Superior Court*, 54 Cal. App. 3d 286, 126 Cal. Rptr. 547 (Ct. App. 1976); *Davis v. Roos*, 326 So. 2d 226 (Fla. D. Ct. App. 1976); *Application of Halligan*, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (1974); *Dunn v. Palermo*, 522 S.W.2d 679 (Tenn. 1975); *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

223. *Stuart v. Board of Supervisors of Elections*, 266 Md. 440, 442, 295 A.2d 223, 224 (1972); *In re Strikwerda*, 216 Va. 470, 473, 220 S.E.2d 245, 247 (1975).

224. *Cf. In re Reben*, 342 A.2d 688, 702 (Me. 1975) (dissenting opinion) (" . . . the State has a significant and compelling interest in requiring the maintenance of a unitary family surname."); *Kruzel v. Podell*, 67 Wis. 2d 138, 159, 226 N.W.2d 458, 468 (1975) (dissenting opinion) ("That there be such single name available to spouses, and identifying their children, is inherent in the concept of marriage as partnership. The roles of the partners may vary, but the identity of the partnership as a viable and functioning unit or entity is not served by its having no name.").

willing for the husband and wife to bear different surnames. Rather, the sole issue is whether anyone should be given the power to veto any change of name by his or her marital partner. The most significant case discussing the issue, *In re Taminosian*,²²⁵ concerned a husband who wished to adopt a new surname reflecting his Islamic faith over the objection of his wife. The Nebraska Supreme Court noted that the wife and children had "acquired a standing in the family, in the schools, and in the community" by their present name and that "[i]njuries to the feelings and sensibilities of innocent women and children may result in greater suffering and damage than the fraudulent invasion of property rights."²²⁶ The majority decided to deny the petition because of the wife's objection. It seems, from the comments of the dissenting opinion²²⁷ and the majority opinion itself, that the majority thought that the change of the husband's name resulted in a change in the name of all family members. If the wife was required to adopt the husband's name, her standing to object to a change of the husband's surname would be considerably stronger.

The arguments against consideration of a spouse's objections to a proposed change of name are strong. Where the husband and wife are not required to have a common surname,²²⁸ the spouse's name is unaffected by the decision of his or her partner to change a surname. The dissent in *Taminosian* pointed out that consideration of a spouse's consent reflected a significant retreat from the common law rule that anyone may adopt a new name through usage of the new name without a fraudulent intent.²²⁹ In an amicus curiae brief the Attorney General of Virginia has argued that, although notification of the spouse "may be desirable," common law principles dictate that the spouse's consent not be required.²³⁰ Courts which

225. 97 Neb. 514, 150 N.W. 824 (1915).

226. *Id.* at 515, 150 N.W. at 824.

227. The change of the husband's name does not necessarily change the name of his wife. . . . In the case at bar there is and can be no party named, except the petitioner himself. No one is supposed to join issue with him.

Id. at 518, 150 N.W. at 825.

228. There are presently no state statutes requiring husband and wife to have a common surname. Some states have, however, enacted statutes which require the consent of the spouse before a change of name petition is granted. See note 235 *infra*.

229. *In re Taminosian*, 97 Neb. 514, 516-17, 150 N.W. 824, 825 (1915).

230. It cannot be stressed enough, however, that such a notice should not be required in order to obtain the permission of a spouse. Absent an illegal purpose, married individuals have the right to a change of name regardless of their spouses' predilections.

Brief for the Attorney General of Virginia as Amicus Curiae at 7, *In re Doris Ann Kaufman Tyler* (an unreported decision of the circuit court of Richmond, Va.). This brief was considered by the Virginia Supreme Court when it decided *In re Strikwerda*, 216 Va. 470, 220 S.E.2d 245 (1975), and is on file at the clerk's office of the Virginia Supreme Court.

must follow the common law rule cannot consider the predilections of the spouse because there is no indication that the common law did so.

Those courts which are not bound to the common law principles may wish to consider the Supreme Court's discussion of consent of a husband in *Planned Parenthood of Central Missouri v. Danforth*.²³¹ While *Danforth* involved the issue of whether a state could forbid an abortion not acquiesced in by the woman's husband, much of the language seems applicable to the issue of spousal consent in general. After noting its appreciation of "the importance of the marital relationship in our society,"²³² the Court stated

it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.²³³

The marital unit is not a single entity with a single mind, but rather an association of two individuals committed to one another through marriage.²³⁴ Once there has arisen a conflict over the surname of the wife, it seems, at best, doubtful that the husband has a greater interest than the wife in which name she will bear.

Some states have enacted statutes which require the consent of the spouse to the proposed change of name.²³⁵ Because these statutes represent an abrogation of the common law, an argument that the common law did not consider a spouse's consent will be fruitless. A constitutional attack would seem to be the only possible method of challenging such consent requirements.²³⁶ If, however, a state legislature has not explicitly imposed

231. 96 S. Ct. 2831 (1976).

232. *Id.* at 2841. The Court also noted the appellee's argument that consent of both partners is often required by the states in many areas of the marriage relationship. *Id.* at 2840-41.

233. *Id.* at 2842.

234. The Court referred to its earlier comment in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." *Id.* at 2841 n.11.

235. IOWA CODE ANN. § 674.6 (Supp. 1976); VT. STAT. ANN. tit. 15, § 811 (1974).

236. Such an attack might resemble that mounted in *Planned Parenthood of Central Missouri v. Danforth*, 96 S. Ct. 2831 (1976). It should be remembered, however, that the Supreme Court before *Danforth* had determined that the right to an abortion was of constitutional magnitude. It will be necessary to convince the court that the right to a name is also of constitutional significance. If the statute fails to burden women more than men, an equal protection argument is virtually precluded.

consent as a prerequisite to a change of name, courts should be reluctant to impose such a requirement themselves for the reasons outlined above.

3. *The Problem of Children*

The most frequently mentioned factor with which courts have dealt is the effect of children upon a married woman's right to reassume use of her pre-marriage name. Many decisions which denied the petitions of married women concluded that use of different surnames by parents would have a "traumatic effect" upon their children²³⁷ and subject the children to needless embarrassment. As of this writing, all such recent decisions relying on possible harm to children as a basis for denying change of name petitions have been reversed.²³⁸ Reversal, however, has been grounded upon a variety of reasons.

*Kruzel v. Podell*²³⁹ reversed a lower court opinion without discussing the problem of children because of the common law right to change a name by usage if not motivated by a fraudulent purpose. Those states which clearly have adopted the common law right without reservation are not free to consider the question of children; if no fraudulent purpose is evident, a change of name must be granted.

*In re Strikwerda*²⁴⁰ notes that the two childless petitioning couples had reached an agreement that any children would bear the husbands' surnames. The Virginia Supreme Court apparently considers *the fact* of an agreement (rather than its substance) to be significant, for it concludes "[t]hus, there is little likelihood that a name change would have a disruptive effect on the family."²⁴¹ The fact that parents bear different surnames does not per se have a "disruptive effect on the family." It is unclear whether *Strikwerda* would have been decided differently if the couple had not reached an agreement. If a lack of agreement is determinative, the husband is given a subtle power to veto any proposed change of name. Moreover, consideration for a couple's agreement may be speculative, because a husband and wife may alter their thinking considerably before children are born.

237. Application of Lawrence, 128 N.J. Super. 312, 328, 319 A.2d 793, 801 (Bergen County Ct. 1974), *rev'd*, 133 N.J. Super. 408, 337 A.2d 49 (App. Div. 1975).

238. *E.g.*, Petition of Hauptly, 312 N.E.2d 857 (Ind. 1974), *rev'g* 294 N.E.2d 833 (Ind. Ct. App. 1973); Application of Lawrence, 133 N.J. Super. 408, 337 A.2d 49 (App. Div. 1975), *rev'g* 128 N.J. Super. 312, 319 A.2d 793 (Bergen County Ct. 1974); *In re Strikwerda*, 216 Va. 470, 220 S.E.2d 245 (1975).

239. 67 Wis. 2d 138, 226 N.W.2d 458 (1975).

240. 216 Va. 470, 220 S.E.2d 245 (1975).

241. *Id.* at 473, 220 S.E.2d at 247.

Several courts have indicated that mere speculation of a possible harm to children would not justify denial of a petition to resume a pre-marriage name.²⁴² The Maine Supreme Court in *In re Reben*²⁴³ inferred from the record that there were "no children with possible adverse interests" and refused to speculate about any future children which might result from the marriage.²⁴⁴ The Indiana Supreme Court rejected the argument that the change of name "may cause embarrassment to her child" as "mere speculation."²⁴⁵ Thus, many courts may require those opposing the petition to come forward with concrete evidence indicating possible harm to the children.

The court in *Application of Lawrence*²⁴⁶ reversed a lower court ruling which had relied heavily upon a conclusion that a change of name might have "a traumatic effect upon any children they may have."²⁴⁷ The appeals court concluded that the trial judge's concerns were "in conflict with the established constitutional right of parents to raise children as they choose."²⁴⁸ The extent of the constitutional right of parents to raise children as they choose, and whether the right has any significance in the context of the changing of a parental surname, is not settled, however.²⁴⁹

242. See *Matter of Natale*, 527 S.W.2d 402, 406 (Mo. Ct. App. 1975) (no evidence of harm to children).

243. 342 A.2d 688, 695 (Me. 1975).

244. Cf. *Application of Lawrence*, 128 N.J. Super. 312, 327-28, 319 A.2d 793, 801 (Bergen County Ct. 1974), *rev'd*, 133 N.J. Super. 408, 337 A.2d 49 (App. Div. 1975) ("Plaintiff and her husband are both of youthful age. Although they have no children at this time, it is not at all improbable that they will eventually raise a family.").

245. We cannot see how as a matter of law this can have any bearing on the case.

There is certainly no direct or positive evidence in this regard, and the mere speculation by the State that such would occur is not sufficient to justify the trial court's denial of the appellant's petition.

Petition of Hauptly, 312 N.E.2d 857, 860 (Ind. 1974), *rev'g* 294 N.E.2d 833 (Ind. Ct. App. 1973).

246. 133 N.J. Super. 408, 337 A.2d 49 (App. Div. 1975), *rev'g* 128 N.J. Super. 312, 319 A.2d 793 (Bergen County Ct. 1974).

247. 128 N.J. Super. at 328, 319 A.2d at 801.

248. 133 N.J. Super. at 414, 337 A.2d at 52. The court noted that, of course, such protected parental control could not violate criminal laws.

249. The court cited *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), for its holding. In *Pierce*, the freedom of parents to send their children to private schools was upheld. The *Pierce* opinion, however, is limited to a prohibition of unreasonable governmental interference in the education of children. The freedoms involved in the education and upbringing of children "are subject to some control by the police power." *Roe v. Wade*, 410 U.S. 179, 211 (1973)

These recent decisions thus reflect an unwillingness to ascribe harm or embarrassment to children in the absence of concrete evidence indicating that a change of name would result in harm. If a court considers a couple's agreement on surnames for children, it should concern itself with the fact, rather than the substance, of the agreement. To require that the children bear the husband's surname would raise serious equal protection questions²⁵⁰ and would conflict with important common law principles. A mere difference of surnames between a child and a parent (either father or mother) should not per se be a basis for denying a married woman's petition to reassume her pre-marriage name.²⁵¹

V. CONCLUSION

At common law a person was free to adopt a new name by consistent and nonfraudulent usage of the name, even without legal proceedings. It was never required by common law that a woman bear the surname of her husband.

Once the veracity of these historical claims is shown, as has been done by most recent decisions, the remaining issues are rather easily resolved. Courts are quite reluctant to hold that adherence to English common law should result in a greater diminution of freedom for American women today than English women have had for centuries. This nonbinding English custom was not "windblown across the Atlantic Ocean"²⁵² with such impact that it should have the force of law.

Courts receiving petitions of married women wishing to reassume pre-marriage names must determine whether the statutory method of changing names abrogates the common law method of adoption by usage and how much discretion a court should have in reviewing these petitions. The answers to these questions can be derived only by examining the intent of the legislature. If the clear intent of the legislature was to provide a recodation of all changes of name, the statutory method should be viewed as exclusive. If the intent of the legislature is not clear, courts should be

(Douglas, J., concurring). See also *Runyon v. McCrary*, 96 S. Ct. 2586 (1976). The government's interference, however, must not be unreasonable.

250. See *Laks v. Laks*, 25 Ariz. App. 58, 540 P.2d 1277, 1280 (Ct. App. 1975).

251. Courts have been willing to allow children to bear different surnames from those with whom they live because of a "natural right" of the "parents" [translate: father] to have "their" children bear "their" name. Possible embarrassment to the child has not mitigated this "natural right" and generally a child's name is not changed if the father has maintained an active interest in the child. See *Carlsson, Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552 (1971).

252. Cf. *Dunn v. Palermo*, 522 S.W.2d 679, 687 (Tenn. 1975), discussed in notes 96-104 *supra* and accompanying text.

reluctant to determine that the common law right of adoption by usage is not a coexisting method of changing a name. The amount of discretion a judge should exercise is dependent upon whether the legislature wished to restrict the number of changes of names. If the common law is followed, a judge should have little discretion at all.

The determinative issue in the battle over a married woman's name is whether a state has so significant an interest in a particular name-symbol of marriage that a woman should bear a name which she does not desire. There is no common law requirement that husband and wife bear the husband's (or even a common) surname. No state statute requires such.²⁵³ Courts, therefore, should be reluctant to impose a requirement which legislatures have not chosen to impose. Although a state may have significant interests in marriage, couples ought to be free to choose name-symbols which reflect their understanding of the marital relationship and their commitment to one another.

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253. The one remaining state which had such a requirement has amended its statute so that a person may choose which name he or she will adopt after marriage. Compare HAWAII REV. STAT. § 574-1 (1968) ("Every married woman shall adopt her husband's name as a family name.") with § 574-1 (Supp. 1975) ("Upon marriage each of the parties shall declare the surname each will use as a married person.").

