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And Then There Were Two

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> Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possetheth nothing during coverture To a married woman, her new self is her superior, her companion, her master.[1]

A NAME is a person's identity. It is an individual's link, however intangible, with his or her ancestral heritage. Traditionally, women have been denied this small portion of their self-identity. Under Roman Law, a married woman was merely a possession of her husband and did not share the family name.[2] Under English common law and the feudal doctrine of coverture, "a husband and wife are one [and] the one is the husband."[3] A wife took her husband's name as notice to the world that her legal existence was "incorporated and consolidated into that of [her] husband."[4]

Today, it is almost a universal rule in this country that upon marriage, as a matter of law, a wife's surname becomes that of her husband.[5] While a wife may continue to use her maiden name for numerous purposes (professionally, for example), her name as a matter of public record is that of her husband. In order to legally *retain* her maiden name, the wife must go through court proceedings to *change*

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1. Seventeenth century British case, *quoted in* SISTERHOOD IS POWERFUL 4 (R. Morgan ed. 1970).

2. R. SOHM, THE INSTITUTES § 93 (3d ed. J. Ledlie transl. 1907).

3. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

4. 1 W BLACKSTONE, COMMENTARIES *442.

5. *E.g.*, People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 70, 63 N.E.2d 642, 645 (1945); Chapman v. Phoenix Nat'l Bank, 85 N.Y. 437, 449 (1881); Freeman v. Hawkins, 77 Tex. 498, 500, 14 S.W. 364, 365 (1890); HAWAII REV. STAT. tit. 31, § 574-1 (1968); 1944 NEV. OP. ATT'Y GEN. 154.

her name back to the one with which she was born.[6] Recently, women have begun to react to this stiuation. As one approach, bills have been introduced in several state legislatures which would permit a woman to determine at the time of her marriage whether to retain her maiden name.[7] Variations of this proposal would allow a woman to choose her mother's maiden name,[8] to use a combination of her own name and that of her husband,[9] or to revert to her maiden name merely by filing a notice of intent, with no court proceeding necessary.[10]

Although none of the suggested legislation has passed, such proposals represent a significant step that must be taken before sexual discrimination can be completely eliminated. So long as society views women in terms of their husbands, full equality of the sexes will be impossible.[11] This article will discuss the constitutional objections to substituting a husband's name for that of his wife. The oft-mentioned difficulties in allowing a wife to retain her maiden name will

6. *E.g.*, CAL. CODE CIV. PROC. §§ 1275-79 (West 1955), *as amended* (West Supp. 1971).

7. Cal. Assembly Bill No. 729 (1971 Reg. Sess.); Ill. House Bill No. 2210 (77th Gen. Assembly, 1971); Wash. Senate Bill No. 503 (42d Reg. Sess. 1971); Wis. Assembly Bill No. 781 (1969).

8. Cal. Assembly Bill No. 729 (1971 Reg. Sess.).

9. Wash. Senate Bill No. 503 (42d Reg. Sess. 1971).

10. Mass. House Bill No. 4613 (1971).

11. Another form of subtle discrimination and example of defining women by their relationship with men exists when women are required to disclose their marital status by Miss or Mrs., while men merely indicate their maleness by the use of Mr. To relieve this situation, legislation has been introduced which prohibits any "instrumentality of the United States from using as a prefix to the name of any person any title which indicates marital status." H.R. 10121, 92d Cong., 1st Sess. (1971).

Additional legislation before the 92d Congress would eliminate any requirements that women designate their marital status as a requisite for voting in any federal election, if the same disclosure is not required of men. H.R. 4195, 92d Cong., 1st Sess. (1971). Currently a number of states require a woman to indicate whether she is a Miss or a Mrs. before she is permitted to vote. *E.g.*, CAL. ELEC. CODE § 310(b) (West Supp. 1971). In 1970, Austria took a step toward eliminating speculation over marital status by passing legislation that all women government employees must be addressed as "Frau." N.Y. Times, Aug. 2, 1970, at 8, col. 1. In France, custom, not law, dictates that all older women be called "Madame," whatever their marital status. For a discussion of the increasing tendency in this country to use a single form of address, Ms., for all women, see NEWSWEEK, April 26, 1971, at 61.

Neither Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-15, nor any State FEP law except New Jersey's, N.J. STAT. ANN. § 10:1-1 (1960), bars discrimination on the basis of marital status. Landau & Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L.R. 417, 478 (1971). *But see* 41 C.F.R. § 60-20.3(d) (1971) which prohibits all government contractors and subcontractors from distinguishing between married and unmarried persons of one sex unless the same distinction is made between married and unmarried persons of the opposite sex.

be balanced against the stability and clarity of identity that would result.

The Present State of the Law

In our culture, a married woman is expected to take her husband's name. By law she is required to do so in nearly all states.[12] This rule was established early by a fictitious common law doctrine which recognized a merger between husband and wife upon marriage.[13] The traditional civil law view, on the other hand, was that the wife retained her maiden name as her legal name and bore her husband's name only as a matter of custom.[14]

The 1931 Louisiana case of *Succession of Kneipp*[15] followed the civil law approach. The testatrix's marriage license to her second husband bore her maiden name rather than the name of her first husband. The court held that this did not tend to prove that her first marriage was invalid. However, the most recent Louisiana case in point, *Wilty v. Jefferson Parish Democratic Executive Committee*,[16] apparently abandoned the civil law approach and instead adopted that of the common law without reference to the earlier decision. Laura Wilty was a candidate for Assessor of Jefferson Parish as an opponent of the incumbent, her husband, Vernon Wilty. It was the position of Vernon Wilty, the plaintiff, that his wife's correct legal name was "Mrs. Laura Verret Wilty," and not "Mrs. Vernon J. Wilty, Jr.," the name under which his wife had qualified as a candidate. The Supreme Court of Louisiana agreed and ordered the wife recertified under her Christian name and her husband's surname.

The only common law state showing any deviation from the normal rule is Ohio. In *State ex rel. Krupa v. Green*[17] a prominent woman attorney was permitted to run for the office of Judge of the Cleveland Municipal Court under her maiden name. The court noted that the candidate was well known in the area under her maiden name, that she had signed an antenuptial agreement with her husband by which they mutually agreed that she would continue to use her maiden name, that upon marriage she notified the Board of Elections of her intention to retain her maiden name, and that previous to the suit she had already voted and run for public office under her maiden name, although

12. See authorities cited in note 5 *supra*.
13. 1 W. BLACKSTONE, COMMENTARIES *442-44.
14. M. PLAINOL, TRAITÉ ELEMENTAIRE DE DROIT CIVIL, No. 513 (4e éd. 1948).
15. 172 La. 411, 134 So. 376 (1931).
16. 245 La. 145, 157 So. 2d 718 (1963).
17. 114 Ohio App. 497, 177 N.E.2d 616 (1961).

she was married. The court concluded:

> It is only *by custom*, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. The State of Ohio follows this custom, but there exists no law compelling it.[18]

A statute[19] which provided that when a person changes his name "by marriage or otherwise . . . such elector is required to register under the new name before he will be eligible to vote" was held inapplicable[20] as the court was of the opinion that the candidate had *not* changed her name upon marriage.[21]

In sharp contrast to *Krupa* is the holding of an Illinois court in a case involving a Chicago woman attorney. The court, in *People ex rel. Rago v. Lipsky*,[22] held that the provisions of the Illinois Election Code[23] providing that "any registered voter who changes his or her name by marriage or otherwise, shall be required to register anew" were mandatory.[24] The plaintiff had filed a petition for a writ of mandamus to compel the Board of Elections to permit her to vote under her maiden name, notwithstanding her subsequent marriage. Although the plaintiff had her husband's express approval to continue using her maiden name, the writ was denied. The court concluded:

> [The election statute] expressly recognizes a change of name by marriage . . . . [I]t must logically follow that when the Legislature expressly referred to the fact that the name of a registered voter might be changed by marriage it had in mind the long-established custom, policy and rule of the common law among English-speaking peoples whereby a woman's name is changed by marriage and her husband's surname becomes *as a matter of law* her surname.[25]

The common law does recognize the right of a person to acquire another name simply by using it consistently.[26] Statutory procedures by which one may change his or her name are merely for recording purposes and do not abrogate the right to change one's name without legal proceedings.[27] Yet many states have made married women excep-

18. *Id.* at 501, 177 N.E.2d at 619.

19. OHIO REV. CODE ANN. § 3503.18 (Page 1960).

20. 114 Ohio App. at 502, 177 N.E.2d at 620.

21. *Id.*

22. 327 Ill. App. 63, 63 N.E.2d 642 (1945).

23. ILL. REV. STAT. ch. 46, § 6-54 (1969).

24. 327 Ill. App. at 75, 63 N.E.2d at 647.

25. *Id.* at 70, 63 N.E.2d at 645 (emphasis added).

26. *E.g., In re* Ross, 8 Cal. 2d 608, 67 P.2d 94 (1937); Reinker v. Reinker, 351 Ill. 409, 410, 184 N.E. 639, 640 (1933); *In re* Cohen, 142 Misc. 852, 255 N.Y.S. 616 (Sup. Ct. 1932).

27. *E.g., In re* Useldinger, 35 Cal. App. 2d 723, 726, 96 P.2d 958, 960 (1939); *In re* Cohen, 142 Misc. 852, 255 N.Y.S. 616 (Sup. Ct. 1932).

tions to the rule. The election statute involved in the *Lipsky* case is one example.[28] Another was the refusal to issue a certificate of naturalization in the *In re Kayaloff* case.[29] Despite the fact that the applicant was a musician well known professionally by her maiden name, the federal district court would permit issuance of the certificate only in the surname of her husband. The court relied heavily on the New York case of *Chapman v. Phoenix National Bank.*[30] Yet that case involved a woman seeking to have confiscation proceedings set aside because they were conducted under her maiden name. The plaintiff argued not that she had adopted her maiden name through consistent use, but that the proceedings were invalid because she had been deprived of all notice.[31] The California Elections Code requires one registering to vote who has changed his name within one year of such registration to state the fact in the affidavit of registration, but the statute specifically excludes change of name by marriage.[32] When an elector changes his name after registration, the code declares that the elector "*may* reregister under his new or changed name."[33] The statute is clearly permissive, not mandatory. Also, the California Vehicle Code prohibits the use of false or fictitious names on drivers licenses, or in the registration of motor vehicles,[34] but places no restrictions on a woman who wishes to consistently use her maiden name. Certain professional and vocational regulations require compliance with specific name change procedures but that is a part of their licensing function.[35] While it appears that the logic of the Ohio *Krupa* case could be used to argue that the vocational regulations should not apply—since when a woman

28. ILL. REV. STAT. ch. 46, § 6-54 (1969). The Attorney General of Nevada interpreted a similar Nevada statute as follows: "Under NRS 293.517, which provides the manner of registering the name of married female electors and requires change of name of registration upon change of name, and NRS 293,177, which requires a declaration of candidacy to include an averment of registration, married women must file as a candidate using her own given name and her husband's surname, but may insert her maiden name for identification." 1966 NEV. OP. ATT'Y GEN. 311.

29. 9 F. Supp. 176 (S.D.N.Y. 1934).

30. 85 N.Y. 437 (1881).

31. *Id.* at 440 (appellant's statement of the case).

32. CAL. ELEC. CODE § 214 (West 1961).

33. *Id.* § 215.

34. CAL. VEH. CODE §§ 4750, 12809(d) (West 1971). A fictitious name is one used to describe an individual in only one phase of his or her life. *See* Ray v. American Photo Player Co., 46 Cal. App. 311, 314, 189 P. 130, 131 (1920).

35. CAL. ADM. CODE, tit. 16, § 310 (1970) (chiropracteric); CAL. ADM. CODE, tit. 16, § 512.5 (1971) (dry cleaning); CAL. ADM. CODE, tit. 16, § 1348 (medicine, with specific provisions for change of name by marriage); CAL. ADM. CODE, tit. 16, § 1917 (1970) (pest control); CAL. BUS. & PROF. CODE § 4094 (West 1962) (pharmacy); CAL. BUS. & PROF. CODE § 1654 (West 1962) (dentistry).

consistently uses the one name she was born with there is no change of name—any woman planning to retain her maiden name would be wise to comply with statutory change of name proceedings.[36] The resulting court order is of particular value when a married woman must deal with a governmental agency reluctant to accept her maiden name.[37]

It has been declared that the courts should encourage the filing of petitions for change of name, so that these changes can become a matter of public record.[38] Statutory proceedings have been held to be merely "in aid and affirmance"[39] of the common law rule, with the advantage of being speedy and definite.[40] Thus, the general rule is that some substantial reason or peculiar circumstance must exist before the court is justified in denying an application for a change of name.[41] One justification is that the change would be detrimental to the interests of another person.[42] In Massachusetts, no name change will be granted unless "for a sufficient reason consistent with public interest."[43]

Whether such exceptions to the general rule could be used to prevent a married woman from retaining her maiden name over the objections of her husband is not known since no cases dealing directly with this point could be found.[44] In one recent California case, a wife challenged the trial judge's arbitrary ruling that she needed her husband's written consent in order to change her name through court proceedings; but, in the face of the challenge, the judge retreated

36. There is considerable doubt whether the common law rule would apply over the objection of a married woman's husband. *See* L. KANOWITZ, WOMEN AND THE LAW 43 (1969) [hereinafter cited as KANOWITZ].

37. See text accompanying notes 61-65 *infra*.

38. *In re* Useldinger, 35 Cal. App. 2d 723, 727, 96 P.2d 958, 961 (1939).

39. *In re* Cohen, 142 Misc. 852, 255 N.Y.S. 616, 617 (Sup. Ct. 1932), *quoting* Laflin & Rand Power Co. v. Steytler, 146 Pa. 434, 442, 23 A. 215, 217 (1892); *accord, In re* Useldinger, 35 Cal. App. 2d 723, 726, 96 P.2d 958, 960 (1939).

40. See authorities cited in note 39 *supra*.

41. *In re* Ross, 8 Cal. 2d 608, 67 P.2d 94 (1937); *In re* Kastenbaum, 44 N.Y.S.2d 2 (Sup. Ct. 1943).

42. Don v. Don, 142 Conn. 309, 312, 114 A.2d 203, 205 (1955); Reinken v. Reinken, 351 Ill. 409, 413, 184 N.E. 639, 640 (1933); *In re* Wing, 4 Misc. 2d 840, 157 N.Y.S.2d 333, 335 (N.Y. City Ct. 1956); COLO. REV. STAT. ANN. § 20-1-1 (1963).

43. MASS. GEN. LAWS ANN. ch. 210, § 12 (1958).

44. Kanowitz is of the opinion that under statutes such as those existing in Colorado or Ohio a court would refuse to change a married woman's surname if her husband objected. KANOWITZ, *supra* note 36, at 44. *But see* Converse v. Converse, 30 S.C. Eq. 535 (1856) where the court declared a wife may change her name against the wishes of her husband, but rejected the application since the husband and wife were separated and to grant the application would, in the court's opinion, close the door to reconciliation.

from his earlier position and the woman was allowed to change her name without the issue being decided.[45] A number of states expressly prohibit a married woman from having a surname different from her husband's.[46] In those states, a wife's surname can be formally changed only if the husband goes through court proceedings to change his own surname.[47]

Proposed Legislation

In all states, a woman is subjected to the expenses of filing fees, probable attorney's fees, and court appearances, merely to assert a right that is her husband's automatically—the right to retain her own name after marriage. Recent, proposed legislation would do much to ease her burden.

A bill introduced in the 1969 Wisconsin Assembly, later vetoed by the governor, was especially well-worded. It read as follows:

> (1) Any woman named on a marriage license may, at the time the license is issued, elect to retain her maiden name or another permissible previous name. Such election shall be made in writing and signed by her on a form provided under S. 245.20 and shall be attached to the copy of the marriage license retained by the county clerk.
> (2) A name retained by a women under the section shall be that woman's name for all legal purposes including business affairs and elections to public offices.[48]

Another proposed bill, introduced in the State of Washington, would permit a married woman to use some combination of her own and her husband's name.[49] It would also permit either or both of the spouses to choose as their legal names "any name he, she, or they wish to be known by . . . ."[50] This last subsection would have been an unfortunate addition to the laws of Washington. Without

45. *In re* Camera, No. 125025 (Super. Ct. Cal., July 2, 1971).

46. "Every married woman shall adopt her husband's name as a family name." HAWAII REV. STAT., tit. 31, § 574-1 (1968). "Any person, under no civil disabilities, who has attained his or her majority *and is unmarried, if a female,* desiring to change his or her name, may do so as provided in this chapter." IOWA CODE ANN. § 674.1 (1950) (emphasis added). "Any person at least eighteen years of age, *who is not a married woman,* may have his name changed by the county court of the county in which he resides." KY. REV. STAT. ANN. § 401.010 (1969) (emphasis added).

47. Iowa expressly recognizes this natural implication of her statute by the following language: "The surname of such new name shall become the legal surname of the wife and minor children of such person." IOWA CODE ANN. § 674.10 (1950). This is the general rule in this country. KANOWITZ, *supra* note 36, at 45; 1 THE CALIFORNIA FAMILY LAWYER § 9.12, at 324 (Cal. Cont. Educ. Bar ed., 1962).

48. Wis. Assembly Bill No. 781 (1969).

49. Wash. Senate Bill No. 503, § 1 (42d Reg. Sess. 1971).

50. *Id.* § 2.

the safeguards of a court proceeding, a couple could choose any name they desired and could, with impunity, deliberately capitalize on the name of some eminent person.

A bill very similar to the Wisconsin bill has been introduced into the 1971 California Assembly.[51] It significantly departs from the Wisconsin bill at two points. First, the proposed addition to the California Civil Code would permit a woman to employ her *mother's* maiden name as her legal name upon marriage.[52] Secondly, any unmarried person upon attaining the age of 21 could elect to bear the maiden name of his or her mother.[53]

A proposal before the Massachusetts legislature takes a slightly different tack. That bill would permit a woman to use her maiden name for all legal purposes simply by filing a notice of intent to do so.[54] The proposed Massachusetts legislation has the advantage of allowing a woman the option of reverting to her maiden name at any time after her marriage. The decision need not be made at the time she signs the marriage license.

The most poorly worded proposal relating to the choice of a name by a married woman was introduced in the Illinois Assembly. It read as follows:

> Except as otherwise expressly provided by Illinois or federal statute, a married woman may choose to continue to use her maiden name, may use her husband's name or may adopt any other name, and may use the name so chosen for all legal purposes.[55]

The bill was subject to two interpretations. As has already been seen, the common law rule permited one to use any name he or she chose, so long as the name was used consistently and was not detrimental to the interests of anyone else.[56] Since that common law rule has been adopted in the United States, subject to certain statutory exceptions,[57] the Illinois proposal adds nothing. If, however, one's interpretation was that the legislation would somehow expand the common law rule then it would be clearly discriminatory against single women and men. To

51. Cal. Assembly Bill No. 729 (1971 Reg. Sess.).
52. *Id.* § 1(a).
53. *Id.* § 1(b).
54. Mass. House Bill No. 4613 (1971).
55. Ill. House Bill No. 4613 (1971).
56. See text accompanying notes 26, 41-43 *supra.*
57. *E.g.*, People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 69, 63 N.E.2d 642, 645 (1945) which involved the Illinois election statute exception to the common law rule, declared: "There is nothing . . . in any of the Illinois cases which indicates any lack of adherence by Illinois courts to the established principles of the long and well-settled common law."

formally change their names, they would have to resort to court proceedings, while married women could legally choose "*any*" name they wished.

The Objection to Change

In his message vetoing the bill which would have permitted a married woman to retain her maiden name, the governor of Wisconsin summarized many of the current objections to such proposals.

> To my knowledge, this legislation is unique. Both by custom and legally, since the time of Edward IV, the wife has taken her husband's surname as her own.
>
> . . .
>
> Our property, commercial and domestic relations law is based on this premise. The enactment of this legislation would necessitate alteration of law, legal forms, contracts and data processing procedures. It could lead to practical difficulties in landlord and tenant relations, service of papers, determination of claim of title and ability of law enforcement agencies to determine the whereabouts of individuals.[58]

Although these historical and legal traditions which dictate that a married woman must take her husband's surname are based on notions that are repugnant to us today, the traditions continue. The question which must be answered is whether out-moded concepts of male dominance have become so entrenched in our society that it would be unduly burdensome to eliminate them. The objections raised are similar in theme to those raised by opponents of integration, so the answer may be found in the same framework, that of equal protection. Courts have begun to recognize sex as a suspect criterion,[59] so the remaining issue is whether states have a "compelling interest" in requiring a woman to use her husband's surname upon marriage.[60]

Governmental Interests Involved

Most of the limitations on a person's right to change his or her name, whether imposed by common law or added by statutes, have been designed to protect and safeguard other people. For instance, statutes provide strict procedures for the attorney[61] or the physician[62] who wishes to change his or her name; in business, true ownership

58. WISC. LEGISLATIVE REFERENCE BUREAU, BULL. NO. 70-3, THE 1969 EXECUTIVE VETOES IN WISCONSIN, 24 (1970).

59. United States v. York, 281 F. Supp. 8, 14 (D. Conn. 1968); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).

60. *Cf.* Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting).

61. *See, e.g.*, WIS. STAT. ANN. § 296.36 (1958).

62. *See, e.g.*, CAL. ADM. CODE, tit. 16, § 1348 (1967); WIS. STAT. ANN. § 296.36 (1958).

must be determinable to prevent fraud of creditors;[63] in the interests of safety on its highways, a state may require that all drivers who change their names by marriage or otherwise, notify the states;[64] and, in order to further the free alienability of property, a state may require that records of a name change be attached to the conveyance of any property.[65]

Records of name changes are needed not only for the protection of others, but also to aid in the smooth functioning of governmental administrative agencies. The modern bureaucracy requires an uninterrupted record of the identification of each of its citizens. Would the right of a married woman to maintain her maiden name after marriage in all affairs interfere with either the protection or recording functions of government? The answer is clearly no. If a woman consistently uses the one name with which she was born, there would be no problems. The woman would hold herself out to the public, commercially and professionally, as the same person for her entire life. Creditors would in no way be decieved; title of ownership would be easily traced since the name of the woman remains the same even after marriage; and state licensing regulations requiring that the licensee notify the state upon the change of name would not really be applicable since there would be no name change.

The ultimate means of identification under the federal bureaucracy is the social security account number.[66] That number remains constant throughout a person's life. Name changes are routinely accepted by the Social Security Administration office so long as the new name corresponds to the name used in employment.[67] With the advent of data processing, everyone has been assigned a number. Rather than making it more difficult for a married woman to retain

63. MASS. GEN. LAWS ANN., ch. 209 § 10 (1958) specifically provides that when a woman does business under a name other than her husband's she must complete a certificate and pay a fee. "[T]he statute was intended to allow creditors to gain information as to title so that they could regulate the mercantile transactions accordingly; thus the statute was intended solely to regulate the affairs of husband and wife with respect to creditors." 1966 MASS. OP. ATT'Y GEN. 40.

64. *E.g.*, COLO. REV. STAT. § 13-4-17 (1964); FLA. STAT. ANN. § 322.19 (1968).

65. *E.g.*, CONN. GEN. STAT REV. § 47-13 (1958) provides: "Any married woman who conveys property acquired prior to her marriage shall state in the instrument of conveyance the name under which she acquired such property, and the town clerk shall index the record of such instrument in the name under which such property was acquired and in the name under which it was transferred."

66. *E.g.*, the social security account number is identical to an employee's taxpayer identification number. 5A CCH 1971 STAND. FED. TAX REP. ¶ 5229.03.

67. *Compare* 20 C.F.R. § 404.1242(b) (1971) *with* Social Security Administration Form OAAN-7003 (1-67).

her maiden name, as was suggested by the governor of Wisconsin,[68] computerization makes such a choice more practical than was previously possible.

The Names of Children

The chief obstacle which prevents a married woman from retaining her maiden name concerns what name the children shall take. A father is generally held to have a protectible interest in having the children bear his surname, even after divorce actions where custody of the children has been awarded to the mother.[69] A father will be deprived of his "natural"[70] or "primary"[71] rights only if his misconduct is sufficiently great to forfeit his right to object,[72] or if the benefit to the child from having his name changed substantially outweighs the "natural" rights of the father.[73] Nearly all cases granting name changes are decided on the basis of the father's misconduct or neglect of his children, since benefit to the children is difficult to prove.[74] Mere embarrassment, convenience, or sentiment generally bear no weight in determining the child's best interest.[75] Furthermore, the courts have adopted the principle that "the best interest of a child is usually not served if the change of name contributes to a further estrangement from his father who desires to preserve the parental relationship."[76]

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68. See text accompanying note 58 *supra.*

69. Worms v. Worms, 252 Cal. App. 2d 130, 134-35, 60 Cal. Rptr. 88, 90 (1967); King v. Newman, 421 S.W.2d 149, 150-51 (Tex. 1967); *both citing* 53 A.L.R.2d 914, 915 (1957).

70. Worms v. Worms, 252 Cal. App. 2d 130, 135, 60 Cal. Rptr. 88, 91 (1967); *In re* Baldini, 17 Misc. 2d 195, 183 N.Y.S.2d 416, 417 (N.Y. City Ct. 1959); King v. Newman, 421 S.W.2d 141, 151 (Ct. of Civ. App. Tex. 1967).

71. *In re* Larson, 81 Cal. App. 2d 258, 262, 183 P.2d 688, 690 (1947).

72. *In re* Fein, 51 Misc. 2d 1022, 274 N.Y.S.2d 547 (N.Y. City Civ. Ct. 1966) (father convicted of murder declared civilly dead); *In re* Almosnino, 204 Misc. 53, 122 N.Y.S.2d 277 (N.Y. City Ct. 1952) (father showed indifference to son by failing to visit him over four year period, although boy hospitalized twice); *In re* Proman, 63 N.Y.S.2d 83 (N.Y. City Ct. 1946) (nonsupport and father visited child only once in eight years).

73. Worms v. Worms, 252 Cal. App. 2d 130, 135, 60 Cal. Rptr. 88, 91 (1967).

74. See cases cited in note 72 *supra. But see In re* Epstein, 121 Misc. 151, 200 N.Y.S. 897 (N.Y. City Ct. 1923), holding that even though father deserted family, mother still had to show benefit to child by change of name.

75. Kay v. Kay, 112 N.E.2d 562 (C.P., Cuyahoga County, Ohio, 1953); *In re* Epstein, 121 Misc. 151, 200 N.Y.S. 897 (N.Y. City Ct. 1923). *But see* Binford v. Reid, 83 Ga. App. 280, 63 S.E.2d 345 (1951); *In re* Rothstein, 28 Pa. D. & C.2d 665 (1962).

76. King v. Newman, 421 S.W.2d 149, 151 (Ct. of Civ. App. Tex. 1967), *citing* Degerberg v. McCormick, 41 Del. Ch. 46, 187 A.2d 436 (Ch. 1963) *and* Mark v.

Thus, there is definite precedent in divorce law condoning different surnames for a child and his or her natural mother, even though that child may live with the mother. Courts have concluded that a father's parental rights in most instances outweigh any embarrassment that might flow to a child. At least one court has suggested that if there is any embarrassment in the situation it is probably directed at the mother rather than the child.[77] A married woman, in enforcing her right to her own name, should be free to willingly accept any embarrassment that might result from having a child with a different surname. Actually, any embarrassment would be slight, especially for the child, if the father remains in the household.

Another solution would be to allow the child, once it reaches the age of volition, to choose its own name. Such a change could be accomplished through court proceedings when the child is old enough to petition on his or her own behalf,[78] or through the common law right to change one's name by adopting another.[79] When no minimum age to petition for a name change is provided, or the common law method is used, courts must be convinced that the proposed change "is really an expression of the *child's* volition . . . and not just a product of maternal influence."[80]

A third way of dealing with the problem is to give the child a surname that is a combination of the names of both parents. This is the traditional method of assigning surnames in Spain. There, is however, strong dictum in at least one California case that the father's protectible interest in his child's surname means that it shall be unadulterated by hyphens or combinations with other names.[81]

No solution regarding the children's surname is completely satisfactory. On the whole, the difficulties encountered by a married woman with children who retains her maiden name are small compared to the difficulties of a divorced woman with custody of children who bear a different surname. The law has accepted the latter situation

Kahn, 131 N.E.2d 758 (Mass. 1956) *and In re* Shipley, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. 1960).

77. *In re* Epstein, 121 Misc. 151, 151-52, 200 N.Y.S. 897 (N.Y. City Ct. 1923).

78. *E.g.*, ARIZ. REV. STAT. ANN. § 12-601 (1956) (16 years); CAL. CODE CIV. PROC. § 1276 (West Supp. 1971) (male: 21 years, female: 18 years); N.M. STAT. ANN. § 22-5-1 (1954) (14 years).

79. Bruguier v. Bruguier, 12 N.J. Super. 350, 79 A.2d 497 (Ch. 1951) (the common law right of change available to minors as well as adults). *But see* Trower v. Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (1968).

80. 44 CORNELL L.Q. 144, 149 (1958).

81. Trower v. Trower, 260 Cal. App. 2d 75, 78, 66 Cal. Rptr. 873, 875 (1968).

through the doctrine of the father's "natural right." Ideally the law should abandon that doctrine and accept the proposition that the surname of a child should represent a process of agreement between mother and father. Until that time, women will have to accept different surnames than their children if they wish to maintain their maiden names.

Benefits to the Married Woman

The consistency of identity that would develop if women were permitted to retain their maiden names after marriage would more than outweigh any incident complexities that might develop. The sense of pride one develops in one's name would not be lost upon marriage. More importantly, self-identity would be retained even in divorce. In a majority of jurisdictions, when a woman is granted a divorce, the courts may upon request restore her maiden name or the name of a previous husband.[82] It is generally discretionary with the courts whether the woman's request will be granted.[83]

Statutes in a number of states expressly deny courts the power to make a name change in divorce cases under certain circumstances. For instance, in some states a court is permitted to restore a wife's maiden name only when she successfully brought the divorce action and was not the defendant.[84] Kanowitz states the following about such statutes:

> In addition to other penalties for her misconduct leading to her husband's divorce, [the wife] is "punished" by being required to bear her husband's name until she remarries and thus submerges that name in that of a new husband.[85]

Another group of states discriminates against the divorced women seeking restoration of her maiden name by granting such requests only when there are no minor children from the marriage,[86] or when the wife is not given custody of the children.[87] Wisconsin contains the

82. *E.g.*, ARIZ. REV. STAT. ANN. § 25-319 (1956); CONN. GEN. STAT. REV. § 46-21 (1958); IND. ANN. STAT. § 3-1225 (1968); NEV. REV. STAT. § 125.130 (1967); ORE. REV. STAT. § 107.100 (1969). In California, the court in a divorce proceeding may restore a wife's maiden or former name without any request by the wife. CAL. CIV. CODE § 4362 (West Supp. 1971).

83. See authorities cited in note 82 *supra.*

84. GA. CODE ANN. § 30-121 (1969); MASS. GEN. LAWS ANN. ch. 208, § 23 (1958); MINN. STAT. ANN. § 518.27 (1969); MO. ANN. STAT. § 452.100 (1952); OKLA. STAT. ANN. tit. 12, § 1278 (1961); VT. STAT. ANN. tit. 15, § 557 (1958).

85. KANOWITZ, *supra* note 36, at 44.

86. MICH. COMP. LAWS ANN. § 552.391 (1967); W. VA. CODE ANN. § 48-2-23 (Supp. 1971).

87. S.D. COMPILED LAWS ANN. § 25-4-47 (1967); WIS. STAT. ANN. § 247.20 (Supp. 1971).

unique statutory restriction that a wife will be permitted to resume her maiden name only if she receives no alimony.[88] Thus a divorced woman is forced to make a choice between a basic right afforded her by statute, and the even more fundamental one of using the name with which she was born. These restrictive statutes reflect a blatant sexual bias. Needless to say, if a woman had been permitted to retain her maiden name throughout the marriage, she would not be offended by a discriminatory statute, nor be required to rely on the discretion of a judge.[89]

Solutions

Currently, married women are denied the fundamental right to continue using the name with which they were born, with which they grew up, and with which they formed their identity. Three solutions to this situation exist.

First, judical proceedings for the purpose of changing one's name should be made available to all women. The lack of any compelling state interest in having a married woman bear her husband's surname clearly dictates that the judicial procedure for name changes be made equally available to wife and husband. Any state statute which prohibits a married woman from taking a different name than her husband, or conditions her right to change her name on her husband's consent, violates the equal protection clause of the Fourteenth Amendment.

Second, state legislatures should enact legislation giving a married woman the option of retaining her maiden name without going through any court proceeding. No state should use the excuse of administrative convenience to defeat such legislation. Once the advantages of permitting a married woman to retain her maiden name are fully recognized, the difficulties in such proposals seem slight.

The third solution would be for courts to abandon the whole social and legal tradition which declares that upon marriage a wife's legal name becomes that of her husband. If the courts were to declare that a married woman has a constitutional right to use her maiden

88. WIS. STAT. ANN. § 247.20 (Supp. 1971).

89. A great many women continue to use their husband's names for the sake of convenience, and to avoid embarrassment. They faced an identification crisis and loss of personality when they changed their names at the time of marriage and would prefer not to go through the ordeal again. Divorce is a traumatic situation for a woman. It is coupled with the loss of one's marital partner, disruption of family life, status, and "station in life." Thus the additional burden of reverting to her maiden name may be too much for a woman to bear.

name for any legal purpose,[90] the civil law view would come close to being adopted. Without the aid of legislation or court proceedings a married woman would be free to consistently use her maiden name for all purposes so long as neither fraud nor deceit were involved. It is too late in history to argue that all women should be required to use their maiden names as their legal names and bear their married names only as a matter of custom. Too many women would want to continue using their husband's surname for all purposes. But if a married woman continues to use her maiden name in all her affairs, it can be forcefully argued that she has not changed her name at all. No one is deceived by such an arrangement. In fact, the opposite is true. A woman's public identity would remain constant. The recognition of a married woman's constitutional right to retain her maiden name would represent a momentous advance in the struggle for her separate identity.

90. Such a contention was recently rejected by a federal district court. The plaintiff sought an injunction to compel Alabama state officials to issue her a driver's license in her maiden name. The injunction was denied on the basis that "the administrative inconvenience and cost of a change far [outweighed] the harm caused." N.Y. Times, Sept. 30, 1971, at 3, col. 1.