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# Surname Alternatives in Pennsylvania

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## I. Introduction

Relative to other Anglo-American customs, the practice of adding a second name to the Christian name is a recent development. The practice developed at the end of the fourteenth century in England[1] when it became necessary to distinguish between the several "Johns" and "Marys" in the same community.[2] At that time, needs of identification could be satisfied even though complete flexibility was permitted in the choice and use of a surname. Thus, husband, wife, and child were each likely to adopt their own individual surname and to change it, at will, several times in a lifetime.[3] Considerations of property ownership and inheritance, rather than appreciation of traditional sex roles, prevailed when the custom of the common family name evolved.[4] If the wife and mother was an heiress, for example, the husband and children adopted her name as the family name.[5] When the doctrine of coverture made it impossible, however, for the married woman to handle property, no reason existed for the family to bear any name but the paternal surname.[6]

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1. For a short review of the English common law roots of surnames, see Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947 (1910); *In re* Romm, 77 D. & C. 481 (C.P. Dauph. 1951). *See also* Comment, *Married Woman's Right to Her Maiden Name: The Possibilities for Change*, 23 BUFFALO L. REV. 243, 243-46 (1973); Note, *The Right of a Married Woman to Use Her Birth-Given Name for Voter Registration*, 32 MD. L. REV. 409, 412-16 (1973); Comment, *Women's Name Rights*, 59 MARQ. L. REV. 876, 882-85 (1975); Comment, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665, 665-68 (1973).

2. A person's given or Christian name was the most important name, since it was given at baptism and could only be changed at confirmation. 23 H. HALSBURY, LAWS OF ENGLAND 555 (2d ed. 1936); P. REANY, THE ORIGINS OF ENGLISH SURNAMES 83 (1967) [hereinafter cited as REANY]; Arnold, *Personal Names*, 15 YALE L.J. 227 (1905) [hereinafter cited as Arnold]. Arnold estimates that no more than two hundred given names are in common usage, and because of the paucity of Christian names, the need for second names developed. As examples of the early names Arnold offers the following: Strong, Wiley, Goodman, Archer, Kent, Wolf. They related to the individual's physical characteristics, occupation, place of birth, or resemblance—real or imagined—to an animal.

3. REANY, *supra* note 2, at 83; Arnold, *supra* note 2, at 227-28. Even if a person did not change names, rarely was that person's name transferred to a child.

4. REANY, *supra* note 2, at 84-85.

5. L. PINE, THE STORY OF SURNAMES 23-24 (1973) notes many examples of men dropping their own names for their wives' name to ensure inheritance through the wife's name. REANY, *supra* note 2, at 84-85 records that Reginald Damemale (son of Dame Maud) and Adam Damemagot (son of Dame Margot) are instances of men who probably inherited property from their mothers.

6. 1 W. BLACKSTONE, COMMENTARIES *442. Blackstone explains the doctrine of coverture as follows:

> 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: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our

Nevertheless, the English common law never required a woman to adopt her husband's name upon marriage;[7] it was merely a practical custom, considering that "the husband and wife are one, [and] the one is the husband."[8]

During the latter half of the nineteenth century the Married Women Property Acts[9] were enacted throughout the United States for the express purpose of abolishing the doctrine of coverture inherited from the English common law. While these acts granted women substantial legal rights,[10] most notably the right to manage the property they brought into the marriage, the legal unity of man and wife survived in a way that accorded the husband complete dominion over the family.[11] Despite the death blow

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law-french a *feme-covert, foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during the marriage is called her *coverture*.

*See also* 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 403-408 (1895). It is the consensus of the commentators that coverture gave birth to the custom whereby the married woman drops her own surname and assumes her husband's. *See* 62 OP. ATT'Y GEN. 172, 173-74 (1973); L. GREENE, HOW TO CHANGE YOUR NAME AND THE LAW OF NAMES 54-56 (1954); L. KANOWITZ, WOMEN AND THE LAW 41 (1969) [hereinafter cited as KANOWITZ]; S. Bysiewicz & G. MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 601 (1973); Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233, 235 (1971); J. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U.L.Q. 779, 781-82 [hereinafter cited as Lamber]; Comment, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, *supra* note 1, at 413-15; and Comment, *A Woman's Right to Her Name*, *supra* note 1, at 666-67.

7. Halsbury explained that

> [w]hen a woman on her marriage assumes as she usually does in England, the surname of her husband . . . it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage.

19 H. HALSBURY, HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957). Moreover, the common law right of an individual to use any name, so long as it was not done for fraudulent purposes, has always applied equally to men and women in England. Cowley v. Cowley, [1901] A.C. 450, 460; DuBoulay v. DuBoulay, [1869] L.R. 2 P.C. 430.

8. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting). By this famous quotation, Justice Black summarized many centuries of Anglo-American law.

9. The Pennsylvania acts are found at PA. STAT. ANN. tit. 48, §§ 33-72 (Purdon 1965).

10. [T]hese laws generally granted married women the right to contract, to sue and be sued without joining their husbands, to manage and control the property they brought with them to the marriage, to engage in gainful employment without their husbands' permission, and to retain the earnings derived from the employment.

KANOWITZ, *supra* note 6, at 40.

11. The law considered the husband head of the household. Broome v. Davis, 87 Ga. 584, 13 S.E. 749 (1891); Radermacher v. Radermacher, 61 Idaho 261, 100 P.2d 955 (1940); Appeal of Brookland Bank, 112 S.C. 400, 100 S.E. 156 (1919). The husband had the absolute right to choose the family domicile, *e.g.*, Yohey v. Yohey, 205 Pa. Super. Ct. 329, 208 A.2d 902 (1965); to decide what friends his wife might entertain in the home, *e.g.*, Mouille v. Schutten, 190 La. 841, 183 So. 191 (1938); and to supply the last name for his children, *e.g.*, Joyner v. McMurphy, 26 Ala. App. 549, 163 So. 533 (1935). *See also* Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552, 563-68 (1971).

The Pennsylvania Supreme Court specifically rejected the notion that giving married women the right to control their own property in any way affected the legal unity of husband and wife, and the husband's dominion over the family. *In re* Bramberry's Estate, 156 Pa. 628, 633, 27 A. 405, 408 (1893). Concomitant with the husband's rights was his absolute duty to support his wife and children, which arose by operation of law as an incident of the marriage relationship. Commonwealth v. Berfield, 160 Pa. Super. Ct. 438, 51 A.2d 523 (1947); Mallinger v. Mallinger, 197 Pa. Super. Ct. 34, 175 A.2d 890 (1961). *See also* SUMMARY OF PENNSYLVANIA JURISPRUDENCE, DOMESTIC RELATIONS §§ 286-87 (1954).

to coverture, the practice of a woman using her husband's name not only continued, but became a legal assumption that withstood challenge in the courtroom.[12]

Women first tried to assert a legal right to maintain their maiden names after marriage about a hundred years ago,[13] but they were unsuccessful in this fight—with a few exceptions— until recent years.[14] The theoretical bases for denying women the free choice of a surname have varied,[15] since the law of married women's surnames is not well established in the United States.[16] The majority of common law jurisdictions, following an erroneous understanding of the English common law,[17] holds that a married woman's legal name is her husband's name.[18] The minority, including Pennsylvania,[19] holds that the common law, as it evolved in England, never prevented a married woman from retaining her maiden name.[20] Despite the more favorable theoretical framework in the minority jurisdictions, the result for women who wished to retain their

12. *In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934); People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945); Bacon v. Boston Elevated Ry. Co., 256 Mass. 30, 152 N.E. 35 (1926); Application of Laurence, 128 N.J. Super. 312, 319 A.2d 793 (1974); Chapman v. Phoenix Nat'l. Bank, 85 N.Y. 537 (1881); Appeal of Hanson, 330 Pa. 390, 198 A. 113 (1938).

13. Lucy Stone was one of the first women to show an interest in maintaining her maiden name. She continued to use her own surname after her marriage to Henry Blackwell in 1855. Several attorneys, including the future United States Chief Justice Salmon P. Chase, assured her the common law permitted such a practice. Nonetheless, she was denied the right to vote in a school board election in Massachusetts in 1879 because she refused to register in her husband's name. *See* Comment, *Women's Name Rights, supra* note 1, at 884-85. *See also Name Game: Women's Objections to Using Husband's Surnames*, 103 TIME, May 13, 1974, at 79-80.

14. *See* note 22 and accompanying text *supra*.

15. Louisiana follows the civil law rule that a married woman retains her maiden name in law and uses her husband's name only as a matter of custom. Succession of Kneipp, 172 La. 411, 134 So. 376 (1931). *See also* notes 16-19 and accompanying text *infra*.

16. One reason for uncertainty in the law of surnames is that there are few cases that have litigated the subject. Moreover, often the question of a married woman's surname was only incidental to the primary issue in the case and did not, therefore, undergo a thorough analysis by the court. In Boston v. Elevated Ry Co., 256 Mass. 30, 152 N.E. 35 (1926), for example, a married woman, injured in an auto accident caused by defendant's negligence, was denied recovery because her auto was registered in her maiden name and, thus created a "nuisance on the highway." This decision was reached, typically, in disregard or without awareness of what name the common law permitted a woman to choose.

17. For authority, these jurisdictions rely on the leading cases Chapman v. Phoenix Nat'l. Bank, 85 N.Y. 437 (1881), and People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945). Neither decision was reached by thorough investigation of the legal history of surnames, but upon an assumption about English common law. In *Chapman* the court determined,

> 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 surname is absolutely lost, and she ceases to be known thereby.

85 N.Y. 437, 449 (1881).

18. *See* cases listed at note 12 *supra*. *See also* Comment, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665, 665 (1973); 57 AM. JUR. 2d *Name* § 9 (1971); 65 C.J.S. *Names* § 3c (1966).

19. 62 OP. ATT'Y. GEN. 172, 173 (1973).

20. *See, e.g.*, State *ex rel*, Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); Rice v. State, 37 Tex. Crim. 36, 38 S.W. 801 (1897); Lane v. Duchac, 73 Wis. 646, 41 N.W. 962 (1889).

maiden names after marriage was often the same. In Pennsylvania, only two cases[21] have dealt with the question of a married woman's right to retain her maiden name, and both concluded that a married woman can be compelled to change her name to her husband's.

The current trend of cases, however, supports the right of married women to retain their maiden names.[22] In Pennsylvania it is not recent

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21. Appeal of Hanson, 330 Pa. 390, 198 A. 113 (1938); Second Legislative Dist. Elec. Contest (No. 2), 4 Pa. D. & C.2d 93 (C.P. Luz. 1954). *Hanson* acknowledged that the common law permits a married woman to use her maiden name for many purposes, but nevertheless upheld the Board of Examiners' refusal to permit a married woman to practice law in her maiden name. The petitioner contended that it was a denial of equal protection and of due process to force her to practice law in her married name. She argued that since she had been known in the community for twenty-four years by her maiden name, she had a property interest in the name which the fourteenth amendment protected. The Supreme Court decided that it was a privilege, not a right within the meaning of the Constitution, to practice law, and, therefore, the Court has the discretionary power to promulgate rules as it deems necessary "to discipline, disbar or admit persons to practice." 330 Pa. at 391, 198 A. at 114.

*Second Legislative District* dealt with a challenge to an election result on the basis of voting irregularities. Its consideration of a married woman's surname was tangential to the main issue. A challenge was made to the ballot of a married woman who had voted in her maiden name, but it was overruled because there was no question of the voter's identity. The court of common pleas noted, however, that the voter should have changed her registration after her marriage.

> The registration remained as originally entered and Mrs. Burnoff voted as Mary Surovitz.
>
> We are satisfied that this was irregular and contrary to instructions given to election officers . . . . Blank affidavits were furnished the election boards to be filled out by women who marry subsequent to their registration so that the records will reflect the correct status of the elector.

4 Pa. D. & C.2d 93, 104 (C.P. Luz. 1954).

These cases demonstrate that although the common law in Pennsylvania did not require a married woman to use her husband's name, court rules and statutes could impose this requirement. Moreover, the fourteenth amendment did not invalidate this state action. The failure of the Pennsylvania Supreme Court to accept petitioner's constitutional argument in *Hanson* was criticized soon thereafter. *See* Note, 12 TEMP. L.Q. 512 (1938).

22. Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d 639 (1974); *In re* Hauptly, 262 Ind. 150, 312 N.E.2d 857 (1974); Stuart v. Board of Supervisors, 266 Md. 440, 295 A.2d 223 (1972); *In re* Reben, 342 A.2d 688 (Me. 1975); *In re* Natale, 527 S.W.2d 402 (Mo. App. 1975); *In re* Halligan, 46 App. Div. 2d 170, 361 N.Y.S.2d 458 (1974); State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); Dunn v. Palermo, — Tenn. —, 522, S.W.2d 679 (1975); Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458 (1975). *But cf.* Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971) (Alabama regulation requiring married woman to have driver's license in husband's surname upheld) *aff'd per curiam*, 405 U.S. 970 (1972); Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, — U.S. —, 97 S. Ct. 654 (1976); *In re* Lawrence, 128 N.J. Super. 312, 319 A.2d 793 (1974).

It is difficult to explain the recent successes, since the arguments presented on both sides are not new. The controlling issue in these cases has been "[w]hat constitutes the correct legal name of a married woman under common law principles . . . ." Stuart v. Board of Supervisors, 226 Md. 440, 446, 295 A.2d 223, 225 (1972). One commentator evaluated the success in *Stuart* as follows:

> The decision of the Maryland Court of Appeals in *Stuart* is a careful and accurate interpretation of the common law of personal names, but it has a more significant aspect as well. It is an indication that courts may be beginning to treat questions involving the legal status of women with the seriousness which these questions deserve.

*The Right of a Married Woman to Use Her Birth-Given Surname For Voter Registration*, *supra* note 1, at 411. Considering earlier failures by courts to undertake this kind of analysis, the author concludes as follows:

> It is impossible to attribute these failures either to malice or to lack of competence on the part of the courts which accepted the view that the common law requires a married woman to adopt her husband's surname as her legal surname. The social

case law, but three attorney general opinions[23] that have largely resolved the controversy of a married woman's surname. Nevertheless, the law of surnames includes many intricacies that have not been clarified by the attorney general. Moreover, the question of what name a child, who traditionally bears his father's name, is required by law to adopt must be examined in light of the equal rights amendment to the Pennsylvania constitution.[24] This comment will survey the law of surnames in Pennsylvania, unique in several ways,[25] and thereby, it is hoped, resolve heretofore unanswered questions.

## II. Surname Alternatives for Married Women

### *A. Retention of Maiden Name*

Neither Pennsylvania nor any other state requires by statute that a woman adopt her husband's name upon marriage.[26] Moreover, the Pennsylvania attorney general has interpreted three administrative statutes as allowing married women to retain their maiden names.[27] The pivotal opinion was issued in 1973, when the attorney general was asked[28] to construe those sections of the Vehicle Code[29] providing that vehicle registrations and operator's licenses be issued in a person's "actual name." The attorney general ruled that "'[a]ctual name' . . . means either a woman's name at birth or her married name, at her option."[30]

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and legal inequalities which have been the traditional portion of married women, coupled with the almost universal abandonment by married women of their birth-given surnames, have created an environment in which the assumption that this abandonment is a legal requirement can be readily understood.

*Id.* at 422.

23. 8 OP. ATT'Y. GEN. 28 (1974); 72 OP. ATT'Y. GEN. 209 (1973); 62 OP. ATT'Y. GEN. 172 (1973).

24. PA. CONST. art. I, § 28 [hereinafter cited as ERA].

25. The Pennsylvania Name Change Proceeding Law, PA. STAT. ANN. tit. 54, §§ 1-6 (Purdon 1964), contains two unusual provisions. *See* notes 35, 50 and accompanying text *infra*. Moreover, the Pennsylvania ERA, which has much relevance to surname law, has been interpreted strictly by the courts. *See* notes 66-68, 84-86, 108 and accompanying text *infra*.

26. Hawaii was the last state to repeal a statute that required a woman to assume her husband's surname after marriage. A state circuit court declared the statute unconstitutional as a violation of the equal rights amendment to the state constitution. Cragum v. Hawaii and Kashimoto, Civ. No. 43175 (1st Cir. Ct. of Hawaii, Jan. 27, 1975), *cited in* 1 WOMEN L. REP. 162 (1975). Currently Hawaii has a statute providing for name selection at marriage by men and women. HAWAII REV. STAT. ch. 574.1 (1975 Supp.).

Administrative statutes exist in many jurisdictions, however, that by regulating driver's licenses, professional licensing and voter registration require a married woman to re-register in her husband's name. For a table of various administrative statutes and how they affect the rights of married women to choose their own names, see *A Married Woman's Surname: Is Custom Law?*, *supra* note 6, at 809-19. These are the kinds of statutes that are the subject of litigation today. *E.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972); Stuart v. Board of Supervisors, 266 Md. 440, 295 A.2d 223 (1972).

27. 8 OP. ATT'Y. GEN. 28 (1974); 72 OP. ATT'Y. GEN. 209 (1973); 62 OP. ATT'Y. GEN. 172 (1973).

28. Arline Lotman, Executive Director of the Commission on the Status of Women requested that the attorney general clarify the meaning of a person's "actual name" as used in The Vehicle Code, PA. STAT. ANN. tit. 75, § 101 (Purdon 1971). See 62 OP. ATT'Y GEN. 172 (1963).

29. PA. STAT. ANN. tit. 75, §§ 407, 612 (Purdon 1971).

30. 62 OP. ATT'Y. GEN. 172, 173 (1973).

The basis of this ruling was that neither Pennsylvania common law nor statute deprives a woman of the right to continue to use her maiden name after marriage. Moreover, a married woman's right to retain her maiden name is "compelled by the enactment of the Equal Rights Amendment to the Pennsylvania Constitution, Article I, § 28."[31] The attorney general interpreted the amendment to mean that

> in Pennsylvania the equality of women must be an official fact, not an academic fact. It is self evident that there can be no such equality if a marriage ceremony abridges a female's right to use the name by which she was always known.[32]

Incorporating this reasoning by reference, the attorney general ruled in two subsequent opinions that a married woman had the right to use her maiden name as her "surname" for purposes of voter registration[33] and professional licensing.[34] By doing nothing, then, a married woman can retain her maiden name as her legally-recognized surname.

### *B. Change of Name*

Not all women, of course, wish to retain their maiden name. Many still prefer to assume their husbands' names; some others may wish, along with their husbands, to adopt a combination of both names or an entirely new name. Furthermore, some married women who have been using their husbands' names may desire to resume the use of their maiden names. Several methods exist whereby such changes may be effected.

#### *1. Statutory Name Change.*

*(a) Title 54 Name Change Act.*—In order to expedite and record changes of name, a formal name change procedure has been implemented by statute.[35] Under this statute, an individual must first petition the court of common pleas of the county in which he or she is a resident.[36] Notice of the proposed change must then be published in two local newspapers. After the court conducts a hearing at which objections[37] to the change may be presented, it decides whether or not to grant the petition.

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31. *Id.* at 175.
32. *Id.*
33. 72 OP. ATT'Y. GEN. 209 (1973). *See* PA. STAT. ANN. tit. 25, §§ 623-20(f), § 951-18(c) (Purdon 1963).
34. 8 OP. ATT'Y. GEN. 28 (1974). *See, e.g.*, The Professional Nursing Law, found at PA. STAT. ANN. tit. 63, § 211 (1968).
35. PA. STAT. ANN. tit. 54, §§ 1-6 (Purdon 1964).
36. The statute requires that the petitioner present a list of affidavits that show county residences over the prior five years. It is presumed that "county" means Pennsylvania counties; therefore, a five-year Pennsylvania residency is needed to avail oneself of the statutory name change procedure. *Id.* at § 2. This requirement is exceptional; other statutes require from six months to three years. L. GREENE, HOW TO CHANGE YOUR NAME 14-15 (1954).
37. *See, e.g., In re* DeRanzo, 44 D. & C. 699 (C.P. Blair 1942), in which the court refused a petition for a change of name. It was shown by certificate that there were outstanding judgments against petitioner, and "it was admitted by the petitioner that a scire

This statutory method of name change entails several disadvantages. Persons wishing to use it may be discouraged by the expense of going to court, the exceptionally long five-year residency requirement, or the possibility that someone may object to the proposed name change. In some cases, for instance, so-called eminent families have objected to the adoption of "their" name by another.[38] Even though such objections have always been denied, they are nonetheless time-consuming and to the disadvantage of the petitioner. An even more serious problem is presented by "lawful" objections that charge that the petitioner is attempting to defraud the public.[39] Even in the absence of such a "lawful" objection, the court has wide discretion in deciding whether or not to grant the petition.[40] Although the existence of this discretion might pose problems in the case of an unusual request (as some courts might characterize a petition for a hyphenated surname),[41] it has been the practice in Pennsylvania to grant name change petitions unless a lawful objection is raised.[42]

*(b) Divorce Act.*—In some cases, married women in the process of divorce can avoid the disadvantages of the Name Change Act by utilizing certain provisions of the Divorce Act.[43] This Act provides that any woman who elects to resume either her maiden name or her prior married

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facias to revive one of the judgments included in the certificate has been regularly issued and is now pending in the court. These are lawful objections." *Id.* at 700.

In Colorado, a husband can intervene in his wife's petition for a name change. COLO. REV. STAT. ANN. ch. 20, art. 1, § 20-1-1 (1963). In contrast, it is clear from the attorney general's opinion and from the existence of the Pennsylvania ERA that a husband could not lawfully object to his wife's petition for change of her married to her maiden name. Moreover, the General Assembly could not amend the Name Change Act to forbid married women to use the formal name change procedure as two state legislatures have done. IOWA CODE ANN. § 674.1 (1950); KY. REV. STAT. § 401.010 (1964).

38. *In re* Falucci, 355 Pa. 588, 50 A.2d 200 (1947); *In re* Bitle, 54 Pa. D. & C. 329 (C.P. Phila. 1945).

39. *See* note 37 *supra*.

40. "In granting . . . the petition after due hearing and notice the court has wide discretion. . . . If there is no such lawful objection the petition *may* be granted. Under certain circumstances a court even in the absence of a lawful objection should deny such a petition." *In re* Falucci, 355 Pa. 588, 591, 50 A.2d 200, 202 (1947).

41. "[Discretion] should be exercised with due restraint if the pitfalls of prejudice, taste, or whim would be avoided." *In re* Bitle, 54 Pa. D. & C. 329, 332 (C.P. Phila. 1945). The Supreme Judicial Court of Maine ruled that it was an abuse of discretion not to grant a married woman's requested change of name to her maiden name. *In re* Reben, 342 A.2d 688 (Me. 1975).

It has been suggested that the federal ERA could be used as a basis for appeal when acts by administrative agencies and decisions by the judiciary reveal abuse of discretion because of sex discrimination. *See* Comment, *The Equal Rights Amendment: Constraint on Discretion in Family Law*, 22 BUFFALO L. REV. 917 (1973). It follows, then, that the Pennsylvania ERA could be used as a basis of appeal when a name change was apparently denied because of the trial court's prejudice in favor of the past custom that led to the adoption of the husband's surname.

42. *See, e.g.*, *In re* Romm, 77 Pa. D. & C. 481, 486 (C.P. Dauph. 1951):

> There was great liberality under the English common law in permitting a person to change his surname. . . .
>
> There did not carry over into the body of our common law any limitation upon the change of a given name or a surname. Liberality in the matter of change of name in this State has always been allowed.

43. PA. STAT. ANN. tit. 23, § 98 (Purdon 1955).

name can do so simply by giving written notice to the prothonotary of the court in which the divorce was granted. The notice simply recites the intention and records "the caption and number and term of the proceeding in divorce."[44] Although the procedure is set forth in mandatory language,[45] it has been interpreted as providing a convenient, but not exclusive, way for a divorced woman to resume her maiden name.[46] It has also been determined that this procedure applies only to women who were divorced in Pennsylvania; a woman divorced in another jurisdiction who desires to resume her maiden name must utilize the Title 54 Name Change Act.[47]

*2. Common Law Name Change.*—The possibility also exists that a person wishing to avoid the disadvantages of the Name Change Act could utilize instead the common law method of name change, the essence of which is proper notification and reputation. The attorney general has ruled that a married woman who has been using her husband's name may revert to her maiden name merely by notifying the appropriate government agencies, creditors, and other affiliations, such as a college alumnae organization.[48] The attorney general rejected the idea that this procedure might impose an onerous administrative burden on the Pennsylvania Department of Transportation and other agencies.[49] Although

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44. *Id.*

45. "Every such woman . . . *shall* file a notice . . . ." *Id.* (emphasis added). The word "shall" is generally regarded as being imperative and mandatory, although the interpretation ultimately depends upon legislative intent. Kamien v. Kamien, 139 Pa. Super. Ct. 538, 12 A.2d 471 (1940).

46. Appeal of Egerter, 32 Pa. D. & C. 164 (C.P. Allegh. 1938).

47. *In re* Kramer, 61 Pa. D. & C. 349 (C.P. Phila. 1948).

48. *See* 62 OP. ATT'Y. GEN. 172, 176 (1973). The attorney general also suggested that the Pennsylvania Department of Transportation promulgate regulations to ease the change of name from that of a married name to a maiden name. To date no such regulations exist.

49. Administrative convenience arguments have played a central role in sex discrimination cases. The United States Supreme Court held in two leading cases that administrative convenience to the state will not justify statutes that discriminate on the basis of sex. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Nonetheless, the Court reversed itself insofar as names are concerned and has held that to permit women to keep their maiden names would result in administrative inconvenience and added expense to the state. Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam* 405, U.S. 907 (1972); Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, 975 S. Ct. 654 (1976).

A New York court in *In re* Halligan, 46 App. Div. 170, 361 N.Y.S.2d 458 (1974), acknowledged that confusion may result when a woman uses a name different from her husband's, but concluded that this was insufficient to forbid a woman to use her own name. It noted that consistent use of the maiden name would minimize the confusion. It is only when women change their names that identification becomes more difficult and results in added cost to the state. *See also* Lamber, *supra* note 6, at 798-99.

It is interesting that the attorney general addresses the administrative convenience argument in the context of the burden imposed upon the State by individuals using the common law method of name change. The argument should be addressed in this context since paperwork will, in fact, be generated by women changing their names from married to maiden. To distinguish Pennsylvania law from the *Forbush* holding, the attorney general noted that (1) Pennsylvania has an ERA, and (2) the common law in Alabama holds that a married woman's legal name is her husband's. Thus, in spite of any genuine inconvenience that might result from the name changes it would not be sufficient to prevent women from resuming use of their former names. 62 OP. ATT'Y. GEN. 172, 176 (1973).

this opinion dealt only with married women who wish to retain or to resume using their maiden names, the ERA may extend the availability of this method of name change to others as well, including couples who wish to adopt a hyphenated name or an entirely new name.

This common law method of name change, however, may conflict with the Name Change Act, which specifically provides that changes of name are to be effected only in court.

> It shall be unlawful for any person to assume a name different from the name by which said person is and has been known, unless such change in name is made pursuant to proceedings in the court and approved by the court.[50]

Several cases have interpreted this mandatory language to mean that an individual cannot change his name without the permission of the court,[51] and at least one individual has been indicted for making such a change.[52] Although the attorney general has stated that the purpose of the statute is to augment the common law method of name change rather than to abrogate it, his opinion is suspect because it fails to discuss the section of the Name Change Act that prohibits extra-judicial methods of name change.[53] Instead, the opinion merely cites the general rule that the purpose of statutory name change procedures "is simply to secure an official or legal record."[54]

While the attorney general's reasons do not withstand thorough analysis, other arguments can be advanced to support his conclusion that the common law method of name change is still viable in Pennsylvania, despite the mandatory language of section 5 of the Name Change Act. A legislative enactment adopted subsequent to the Name Change Act provides that the Bureau of Vital Statistics must issue a birth certificate "in the name the applicant is actually using upon adequate proof demonstrating use of the name for fifteen (15) years or more."[55] When statutes relate to the same subject or class of persons, they are *in pari materia* and must be construed together, if possible, as one statute.[56] It is impossible in this case to give effect to both statutes: the Commonwealth cannot on one hand forbid a person to adopt a new name without judicial consent, but on

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50. PA. STAT. ANN. tit. 54, § 5 (Purdon 1964). Although this act declares extra-judicial name changes unlawful, it provides no penalties for its enforcement. Oklahoma is the only other state with legislation that provides that no name change is permitted except as provided by statute. OKLA. STAT. ANN. tit. 12, § 1637 (1961).

51. *In re* Falucci, 355 Pa. 588, 50 A.2d 200 (1947); *In re* Bitle, 54 Pa. D. & C. 329 (C.P. Phila. 1945).

52. The charges were subsequently *nolle prossed*; however, when the individual did petition for a name change, the court considered his previous unlawful name change and decided it could exercise its discretion to deny his petition. *In re* Weinstein, 35 Pa. D. & C. 227 (C.P. Phila. 1939).

53. 62 OP. ATT'Y. GEN. 172, 174 n.2 (1973).

54. *Id.* The authority cited as support for this conclusion is 65 C.J.S. *Names* § 11(2) at 27 (1966).

55. PA. STAT. ANN. tit. 35, § 450.806a(b) (Purdon Supp. 1976).

56. 1 PA. CONS. STAT. ANN. § 1932 (Purdon Supp. 1976).

the other hand give formal approval to the change if it remains unchecked for fifteen years. Section 1936 of the Statutory Construction Act provides that "[w]henever the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail."[57] Rules of statutory construction, therefore, nullify the mandatory language of the Name Change Act.

Dictates of policy also favor continued legality of the common law method of name change. This method of name change enables a married woman to change her name to her husband's without having to undergo a formal court proceeding.[58] To impart force to section 5 of the Name Change Act would accomplish the absurd result of making every married woman in the Commonwealth who has adopted her husband's name without judicial approval a law-breaker. The purpose of the mandatory language of section 5 was not to inhibit all names changes but only fraudulent ones, which are unlawful under section 6 of the Act.[59] Forcing everyone to go to court for a name change seems an overreaction to the problem of fraud and not even an effective deterrent. Those truly intent on committing fraud will have the foresight to avoid a courtroom proceeding altogether. It is, then, the continued viability of section 5 of the Name Change Act that is doubtful, rather than the common law method of name change.

### C. *Use of More Than One Surname*

Although married women in Pennsylvania may now choose to use either their maiden or married name,[60] the attorney general declared that they must be consistent in using whichever name they choose.

> [A] woman in making the choice to use her birth name, must use that name consistently in the conduct of her affairs. In so doing she has chosen her birth name as her "actual name" not only for purposes of obtaining a driver's license or registering her automobile but for other activities as well, e.g. owning property, purchasing insurance, applying for social security benefits and entering into contracts . . . . In making the choice to use the name she is known by . . . she is eliminating the possibility of confusion to the public and to administrative agencies . . . .[61]

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57. 1 PA. CONS. STAT. ANN. § 1936 (Purdon Supp. 1976). Case law also addresses this problem of inconsistent legislative enactments. When the legislature enacts a statute, it is presumed to do so with full knowledge of existing statutes relating to the same subject. In case a conflict exists between an earlier and later statute, it is presumed that the later act repeals the former, even though the later act contains no express repeal. *In re* Ulrich, 267 Pa. 233, 109 A. 922 (1920). It should, however, appear that such was the intent of the legislature. *Id.* Moreover, when there is no express repeal it is presumed that there was no legislative intent to repeal an earlier statute "unless there is such an inconsistency or repugnancy as to preclude the presumption." Borough of Kingston v. Kalanosky, 155 Pa. Super. Ct. 424, 426, 38 A.2d 393, 394 (1944).

58. *See* M. TURNER-SAMUELS, THE LAW OF MARRIED WOMEN, 345-46 (1957). *See also* note 7 and accompanying text *supra*.

59. PA. STAT. ANN. tit. 54, § 6 (Purdon 1964).

60. "Actual name shall mean . . . in the case of a married woman, the surname of her husband, if she so elects . . . ." 62 OP. ATT'Y. GEN. 172, 177 (1973).

61. 62 OP. ATT'Y. GEN. 172, 176 (1973).

This requirement of consistency, if it means exclusive use, could present problems for a married woman who wishes to conduct her business affairs in her maiden name while using her husband's name on social occasions.[62] The consistency requirement, however, need not be interpreted in such a strict fashion. It is a well-known tradition, for instance, for women to practice their professions in their maiden names while choosing to be known socially by their husbands' names.[63] The theory could be adopted that such women would be practicing under an assumed name;[64] in this case, statutory requirements regarding the use of assumed names in business would have to be followed.[65] It is unclear, however, whether a married woman could use two surnames under the alternative theory that she is using her "actual" name for business purposes and conducting her social affairs under a married, or "assumed," name.

The Pennsylvania ERA poses a potential barrier to this theory of two-name use.[66] Since the state ERA has been interpreted as requiring the

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62. The question of two name use was considered by the dissent in a recent Wisconsin case, Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458 (1975). The main issue raised in *Kruzel* was whether a married woman could legally retain her maiden name without having to petition the court for a name change. The court concluded that since the common law of Wisconsin did not require a married woman to adopt her husband's name, there was no need to petition for a "change." Moreover, the court explained that by habitual use, a married woman could establish her name as either her birthgiven name or her married name. The dissent questioned the validity of the strictures imposed by an "habitual use" test. Justice Hansen argued that before *Kruzel* the common law in Wisconsin permitted a woman to use her married name or her maiden name or *both*. He also expressed the fear that, under the "habitual use" test, a choice of name, once made, was final and irrevocable. Arguing for the flexibility of name choice accorded by the common law, he posited the following hypothetical:

> If the bride, after the wedding, elects to retain her maiden name by not getting into the habit of using her husband's surname, she has made her decision. If, after the babies arrive, she would like to go to the PTA meeting as Mrs. So-and-So, that right has long ago been abandoned by her under the new test. For the free and continuing 'either-or' alternatives . . . , there has been substituted a 'one-or-the-other' election, apparently irrevocable once exercised. Who gains by that?

*Id.* at — , 226 N.W.2d at 469. Judge Hanson's interpretation of "habitual use" is criticized in *Women's Name Rights, supra* note 1, at 881. The author notes that the majority did not use the term "exclusively" and that there is no reason to equate habitual use of a name with exclusive use.

63. Susan Brandeis Gilbert, daughter of the late Louis Brandeis of the Supreme Court, used her birth name in her law practice and her husband's name socially. N.Y. Times, Oct. 9, 1975, at 44, col. 8. *See also* Smith v. Casualty, 197 N.Y. 420, 423, 90 N.E. 947, 949 (1910); L. GREENE, HOW TO CHANGE YOUR NAME AND THE LAW OF NAMES 56 (1954).

64. *See* People v. Darcy, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); MASS. GEN. LAWS ANN. ch. 209, § 10 (West 1958), provide that whenever a woman does business in a name other than that of her husband, she must file a certificate to do business under an assumed name.

65. "No individual . . . shall hereafter carry on or conduct any business . . . under any assumed . . . name . . . unless the persons . . . shall have first filed in the office of the prothonotary in the county, wherein the principal place of business is located . . . ." PA. STAT. ANN. tit. 54, § 28.1 (Purdon 1964). No case in Pennsylvania has held that a woman who does business in her maiden name is actually using an assumed name. *Compare* note 109 *supra*.

66. The proposed equal rights amendment to the United States Constitution has been the subject of much comment, from which have emerged two principal views on how any such amendment would affect the law of surnames. One viewpoint holds that classification by sex would be permissible only if a state could show a compelling state interest in that

laws to be neutral with respect to sex,[67] it can be argued that it would be unequal treatment of the sexes to permit women the special privilege of using two names.[68] This argument, however, is unpersuasive; if both sexes are permitted to use two names, the ERA should not bar the practice, although as a practical matter women may be more likely than men to avail themselves of the opportunity to use two names. Furthermore, preserving the privilege to use two names may not actually favor women for long; since surname customs are in a state of flux, we may not be far from the time when men, as well as women, have "married" names that they wish to use on social occasions.

The common-law method of name change may raise a greater barrier to two-name use than does the ERA. If a person continues to use a married name with regularity, he or she might effect a change of name by becoming known in the community by that name.[69] The married woman who wishes to retain her maiden name runs a particular risk in using her married name on social occasions. Because society will expect her to adopt her husband's name, it will be easy for her to become known by that name, thereby establishing her married name as her "actual" name. One solution to this dilemma would be for her to accept her husband's name as her actual surname while doing business in her maiden name and complying with the statutory requirements for conducting business under an assumed name. Another solution might be for her to make the community aware of her intention to use two surnames.

It cannot be said with certainty that the law in Pennsylvania permits the use of more than one surname. In particular, the married woman who uses her husband's name socially must take care lest she become "known

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classification. Karst, *"A Discrimination So Trivial:" A Note on the Law and the Symbols of Women's Dependency*, 35 OHIO S.L.J. 546, 556 (1974). Therefore, a woman might have to adopt her husband's name if the state could justify this requirement. Sex, then, would be a suspect classification. A second view is that the ERA would forbid any classification by sex. An individual could not enjoy a privilege or bear a duty solely on the basis of sex. Accordingly, a legal presumption that a married woman takes her husband's surname at marriage would be a nullity. Brown, Emerson, Falk & Friedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 940 (1941).

67. *See* Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974); Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Wiegand v. Wiegand, 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973). *See also* Beck, *Equal Rights Amendment: The Pennsylvania Experience*, 81 DICK. L. REV. 395 (1977).

68. It was indicated in the course of congressional hearings that the mandate for equal treatment under the equal rights amendment to the United States Constitution would prohibit the use of more than one name, unless the option were available to men as well as women. *S. Rep. No.* 92-689, 92d Cong., 2d Sess. 2 (1972). *See also* K. DAVIDSON, R. GINSBURG & H. KAY, SEX - BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 108-09, 114-15 (1974).

69. Prior to enactment of section 5 of the Name Change Statute, the Supreme Court of Pennsylvania explained the common law method of name change as follows: "[A] man may change his name or names, first or last, and, when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name." Laflin & Rand Powder Co. v. Steytler, 146 Pa. 434, 438, 23 A. 215, 217 (1892). In keeping with the principle of change of name by reputation, the attorney general said that a woman must use the name "she is known by" on her driver's license. 62 OP. ATT'Y. GEN. 172, 176 (1973).

in the community'' by that name. It can be argued, however, that there should be no bar to using more than one surname as long as this option is available to both sexes and does not result in confusion to the public. The state's only interest in a person's name is identification.[70] As long as the state can identify individuals, there should be no restrictions on the practice of men and women doing business in their ''actual'' names while using their married names on social occasions.[71]

## III. Surname Alternatives for Legitimate Children

### *A. Parental Agreement*

According to regulations issued by the Bureau of Vital Statistics, the parents of a child born in wedlock have the right to give their child any name they choose.

> Thus, a child's surname as recorded on its birth certificate may be the surname of either or both of the child's parents, a surname formed by combining the surname of the parents in hyphenated or other form, or a name which bears no relationship to the surname of either parent.[72]

These regulations recognize that new surname customs are evolving. Since women no longer uniformly adopt their husbands' names, it can no longer be automatically assumed that legitimate children bear the father's name.[73]

### *B. Parental Disagreement*

No Pennsylvania courts have considered what name a legitimate child would take if its parents disagreed at the time of birth. It is likely that a court confronted with such a situation would attempt to determine what name would be in the best interest of the child, using the same rules as those followed in cases in which the parents disagree about a child's

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70. The attorney general noted, ''What is a person's actual name? The sole function of a 'name' is to identify the person whom it is intended to designate.'' 62 OP. ATT'Y. GEN. 172, 173 (1973).

71. It has been suggested that to forbid an adult the right to use any name he or she chooses may violate the United States Constitution. First amendment arguments are presented in Carlsson, *supra* note 11, at 560-62; *A Woman's Right to Her Name, supra* note 1, at 683-85. The latter also suggests a right-to-privacy argument. *Id.* at 680-82.

72. PA. CODE tit. 28, § 1.7 (1975). This regulation was issued under the authority of PA. STAT. ANN. tit. 71, § 532 (Purdon 1962).

73. While this regulation was inspired by the ERA, it appears that parents could agree to give their children a surname different from the father's even in the absence of such an amendment. This right may be protected by the equal protection clause of the fourteenth amendment. *See* Laks v. Laks, 25 Ariz. App. 58, 540 P.2d 1277 (1975). Moreover, there is authority for the view that the common law does not require a child to bear its father's name. The attorney general of Massachusetts studied the question of a child's surname and concluded that a child bears its father's name only by custom, not because the law requires it. 29 OP. ATT'Y GEN. 105 (1974). *See also* Laflin & Rand Powder Co. v. Steytler, 146 Pa. 434, 438, 23 A. 215, 217 (1892) which states, ''*Custom* gives [a person] the family name of his father . . . .'' (emphasis added). Finally, the name used on the birth certificate is not controlling; using the common law method of name change, the parents could agree, for example, to register their child in school by a name different from that appearing on the birth certificate.

surname after a divorce.[74] Determining a child's best interest is a highly discretionary matter for the court that entails following subjective criteria that cannot be easily enumerated. Although in such cases the court frequently fails to explain how it reached its decision,[75] it is possible to identify several aspects of a child's welfare that the courts will consider, such as pecuniary advantage[76] and the effect on the parent-child relationship.[77] Most importantly, the courts have given great deference to the custom that a child bears his father's name, apparently in the belief that conformity with tradition is in the child's best interest.[78] Although the

74. Generally, Pennsylvania cases dealing with a child's surname have arisen when the mother, with custody of the child, seeks to change the child's name unilaterally either to her maiden name or to the name she adopted upon remarriage. The mother petitions the court for a name change in two ways. First, the mother might petition to change her own surname, which automatically changes her child's surname. PA. STAT. ANN. tit. 54, § 4 (Purdon 1964). *E.g. In re* Romm, 77 Pa. D. & C. 481 (C.P. Dauph. 1951). Second, if the mother has changed her name by a subsequent marriage or by using the Divorce Act, which in no way affects the name of her children, she will petition the court to change her child's name using the Title 54 Name Change Act. At either proceeding, the father may appear at the hearing and object to the change of name sought for his child. *E.g., In re* Bennetch, 13 Pa. D. & C.2d (C.P. Berks 1958); *In re* Bilske, 75 Pa. D. & C. 288 (C.P. Wash. 1950); *In re* Rounick, 47 Pa. D. & C. 71 (C.P. Dauph. 1942). Only the father has standing to object. The sisters of a deceased father objected to the mother's petition to change her name, which automatically included her son, but the court concluded that they had no interest that could be recognized by the court. *In re* Romm, 77 Pa. D. & C. 481 (C.P. Dauph. 1951). Consistently courts have resolved these disputes by considering what will be in the best interest of the child. *In re* Lotman, 87 Montg. 348 (1966); *In re* Di Bacco, 32 Pa. D. & C.2d 90 (C.P. Erie 1963); *In re* Rothstein, 28 Pa. D. & C.2d 665 (C.P. Montg. 1962); *In re* Bennetch, 13 Pa. D. & C.2d 308 (C.P. Berks 1958); *In re* Romm, 77 Pa. D. & C. 481 (C.P. Dauph. 1951); *In re* Rounick, 47 Pa. D. & C. 71 (C.P. Daugh. 1942).

All the Pennsylvania cases deal with petitions for name change. If the mother attempted a unilateral name change using the common law method, the father could seek an injunction prohibiting a name change. *See* Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956); Sobel v. Sobel, 46 N.J. Super. 284, 134 A.2d 598 (1957). The father must object promptly to the mother's change of name or he may lose his right of injunction. Bilenkin v. Bilenkin, 78 Ohio App. 481, 64 N.E.2d 84 (1945).

75. Often the court simply decides the case without detailing the considerations that prompted the conclusion. Typically, the court will simply state that "[w]hen dealing with the happiness and welfare of a little child, its elders, as well as the court should objectively consider the child. And so, exercising our discretion consonant with this important public policy, we enter the following [decree]." *In re* Rothstein, 28 Pa. D. & C.2d 665, 669-70 (C.P. Montg. 1962).

76. In one case, both sides argued on the question of what surname would yield a greater pecuniary advantage.

> Objectors maintain that there would be a pecuniary advantage to the child if the name Romm is retained, since his grandmother made a bequest under her will that was contingent upon his retaining the Romm surname. . . .
>
> Petitioner, on the other hand, testified that in her opinion it would be beneficial to the child from an economic standpoint to have his name changed. This opinion perhaps must be viewed in the light of the long established name of Abrams in the business with which the mother and her brothers are now identied [sic]. Objectors do not . . . show that it would be economically to the disadvantage of this child to have his name changed.

*In re* Romm, 77 Pa. D. & C. 481, 491-92 (C.P. Dauph. 1951).

77. We are convinced that, were we to grant [the petition], we would be lending our aid to the "estrangement of father and child." To decree a change of name would simply be another step in the direction . . . of complete severance of the father-child relationship.

*In re* Rounick, 47 Pa. D. & C. 71, 75-76 (C.P. Dauph. 1942).

78. Thus, one court stated that,

> In exercising our discretion we have kept in mind the universal custom and the public policy of succession to paternal surname, and that the courts should not,

custom of the patronymic surname has never reached the status of a legal right in Pennsylvania,[79] state courts have generally granted name change petitions over the father's objection only in cases involving serious misconduct by the father, such as criminal activity[80] or abandonment.[81]

This traditional deference to the custom of patronymic surnames, however, cannot withstand the mandate of the Pennsylvania ERA. The theoretical basis of patronymic surnames is that the father is the head of the household[82] and has an absolute duty to support his children.[83] The ERA has destroyed that basis in Pennsylvania.[84] Recent cases have specifically held that the father is no longer the head of the household[85] and does not have the exclusive duty of support.[86] Since the reason for the custom of the patronymic surname has disappeared, the custom should be irrelevant to a determination of a child's best interest. Trial courts may still consider the father-child relationship, but the ERA requires them to give equal consideration to the mother-child relationship.

There are also other equitable approaches to resolving parental disagreement over a child's name. One approach would be for the courts to permit the custodial parent to determine a child's surname. Since the court awards custody on the basis of the child's best interest, it can be

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except for sound and compelling reasons [change the child's patronymic surname].

Rothstein Petition, 28 Pa. D. & C.2d 655, 669 (C.P. Montg. 1962).

79. In other jurisdictions, the legal right of a father to name his children has been considered such that "it shall be unadulterated by hyphens or combinations." Trower v. Trower, 260 Cal. App. 2d 75, 78, 66 Cal. Rptr. 873, 875 (1968). The father was said to have a "natural right" to name his children in DeVorkin v. Foster, 66 N.Y.S.2d 54 (Sup. Ct. 1940). The father's right to have his children bear his name was found to be "protectible," but not a property right within the meaning of the fourteenth amendment. Fulgham v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1976).

80. In one case, for example, the petition for name change was granted over the father's objection because he had "made a career of lawbreaking." *In re* Brestoransky, 4 Leb. 47, 48 (Pa. C.P. 1952). Continued identification of the petitioner and her child with the father was a "source of continuing embarrassment and mortification." *Id.* at 49.

81. In *In re* Rocuskie. 41 Northumb. 80, 82 (Pa. C.P. 1969), the court concluded, "It does not appear that the father did anything to establish a relationship with his son . . ., and we are satisfied that his conduct amounts to an abandonment of the child."

82. *See* note 11 and accompanying text *supra*.

83. *See* note 11 and accompanying text *supra*.

84. *See* Carlsson, *supra* note 11, at 568:

> The law will undoubtedly follow the changed status of women. . . . If a woman contracts a marriage on an equal standing with her husband, and she supports the children, she can name her children . . . and she can maintain equal control of the family. However, this equal status is incompatible with financial dependency by the wife.

85. The court noted that the "Roman Law conception that the father is sovereign of his family is gone" in *In re* Larue, — Pa. Super. Ct. — , —, 366 A.2d 1271, 1274 (1976).

86. Conway v. Dana, 456 Pa. 536, 539, 318 A.2d 324, 326 (1974), a landmark case interpreting the ERA held,

> . . . [A] presumption that the father, solely because of his sex and without regard to the actual circumstances of the parties, must accept the principal burden of financial support of minor children, . . . is clearly a vestige of the past and incompatible with the present recognition of equality of the sexes. . . . Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father.

*See also* Kaplan v. Kaplan, 236 Pa. Super. Ct. 26, 344 A.2d 578 (1975); Buonore v. Buonore, 235 Pa. Super. Ct. 66, 340 A.2d 579 (1975).

argued that the custodial parent is acting in the child's best interest when he or she changes its name.[87] Since the custodial parent's choice is determinative when disagreement occurs at birth,[88] it should also prevail at a later time. Moreover, the right of noncustodial parents to object to surname changes is frequently abused.[89] Nor would a rule favoring custodial parents discriminate against men, since under the ERA fathers must be given equal consideration in awarding custody of children.[90]

Another solution in cases of parental disagreement over a child's surname would be to allow the child to choose a name and petition the court if a change is desired. One problem with this approach is determining how old a minor must be to petition in his or her own name.[91] Another problem with a minor's petition is ensuring that the child actually desires to be known by a particular name and is not simply yielding to the pressure of the custodial parent.[92] As the scope of children's legal rights

87. In one case the court determined that the child's welfare was best served by bearing the name of the custodial parent. Over the father's objection, the court granted a petition to change the name of a seven-year-old girl to that of her mother, who had remarried, to strengthen the ties to her mother and to her new family. This case is the only example of a petition being granted over the father's objection when the father was found to be guilty of no misconduct, but was an exemplary parent. *In re* Rothstein, 28 Pa. D. & C.2d 665 (C.P. Montg. 1962). *See also* notes 80-81 and accompanying text *supra*.

88. PA. CODE tit. 28, § 1.7(b) (1975) promulgated under authority of PA. STAT. ANN. tit. 71, § 532 (Purdon Supp. 1977). These regulations provide that, "If the parents are divorced or separated at the time of the child's birth, the choice of surname rests with the parent who has custody of the newborn child."

89. In *In re* Gallagher, 193 Misc. 305, 85 N.Y.S.2d 719 (1948), for example, the father objected to a name change in an attempt to lower support payments; and in *In re* Almosnino, 204 Misc. 53, 122 N.Y.S.2d 277 (1952), the father objected simply as revenge against the mother. In response to these abuses, the New York Legislature altered its name change statute to require only one parent's consent to effect the change. N.Y. CIV. RIGHTS LAW §§ 60-63 (McKinney 1953).

90. No Pennsylvania cases have yet challenged the rebuttable presumption that a child's welfare is best served by being in the custody of its mother. *See, e.g.*, Rainford v. Cirillo, 222 Pa. Super. Ct. 591, 296 A.2d 838 (1972). Considering the result in Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974), it is probably only a matter of time until the ERA is used to challenge this presumption. *See also* Brown, Emerson, Falk & Friedman, *supra* note 66, at 953.

91. There have been cases in Pennsylvania in which a minor petitioned for a name change. *E.g.*, *In re* Falcucci, 355 Pa. 588, 50 A.2d 200 (1947); *In re* Rocuskie, 41 Northumb. 80 (Pa. C.P. 1969); *In re* Lotman, 87 Montg. 348 (Pa. C.P. 1966). In *In re* Lotman, for example, a thirteen-year-old girl petitioned, apparently on her own initiative, to change her name to that of her mother's second husband. The court applied the "tender years" doctrine and held that Michele Lotman was too immature to understand the nature and consequence of the proceeding. The petition was denied. While a minor of eighteen has been found old enough to petition in his own name, *see In re* Falcucci, *supra*, it is not clear at what age over thirteen a minor can petition. Other states have resolved this problem through statutes and case law. Arizona provides that a child can petition for a name change at age 16, ARIZ. REV. STAT. ANN. § 12-601 (1965) and New Mexico permits a child to petition at age 14, N.M. STAT. ANN. § 22-5-1 (1954). Courts in other jurisdictions have deemed children of high school age mature enough to petition for a change of name. Bruguier v. Bruguier, 12 N.J. Super. 350, 79 A.2d 497 (1951); *In re* Adoption of McCoy, 31 Ohio Misc. 195, 287 N.E.2d 833 (1972).

92. *In re* Lotman, 87 Montg. 348 (Pa. C.P. 1966); *In re* Pollock, 31 Pa. D. & C.2d 514 (C.P. West. 1963). The court paid little attention to the child's declaration that he wished to have the same name as his mother in *In re* Rounick, 47 Pa. D. & C. 71 (C.P. 1943), on the basis that that expression revealed an anxious desire to please the parent with whom he lived.

expands, however, a minor may be able to change his name over a parent's objection without a formal legal proceeding.[93]

## IV. Surname Alternatives for Illegitimate Children

Regulations promulgated by the Bureau of Vital Statistics give the mother of an illegitimate child the exclusive right to name it.[94] The passage of the ERA, however, has left the validity of this regulation in serious doubt.[95] In a recent case, *Adoption of Walker*,[96] the Pennsylvania Supreme Court found that "[t]he only differences between unwed fathers and unwed mothers are those based on sex"[97] and held that the adoption of an illegitimate child requires the consent of the father in addition to that of the mother.[98] This reasoning indicates that the mother of an illegitimate child has no rights or privileges relating to her child that are not shared by its father, including the right to name the child. Thus, an unwed father should be able to enjoin the use of the name the mother has given the child if he disagrees with her choice.[99] Such parental disagreement should

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93. Case law offers no answers on the question of a minor's right to choose his own name, but one commentator concludes,

> While the common law method of changing one's name is apparently still available to minors, it is obvious that the courts will examine closely any change to which an objection has been voiced by the father, in order to ensure that it is a competent volitional determination and not just a product of maternal influence.

Note, *Domestic Relations: Change of a Minor's Surname: Parental Rights in a Surname*, 44 CORNELL L.Q. 144, 149 (1958).

94. PA. CODE tit. 28, § 1.6 (1975). The regulations were issued under authority of PA. STAT. ANN. tit. 71, § 532 (Purdon 1962). They provide,

> The child of an unmarried woman may be registered with any surname requested by the mother. If no other surname is requested, such child shall be registered with the mother's surname.

The foundation of a mother's exclusive right to name her illegitimate child probably rests on her exclusive right to custody. *In re* Hawthorne, 146 Pa. Super. Ct. 20, 21 A.2d 521 (1941).

95. The exact nature of parental, legitimate, and illegitimate rights and duties are in a state of transition. *See* notes 74-90 and accompanying text *supra*.

96. — Pa. —, 360 A.2d 603 (1976).

97. *Id.* at — , 360 A.2d at 606.

98. Until the *Walker* case Pennsylvania law considered the mother's rights in the illegitimate child superior, and, therefore, only the mother's consent was needed for adoption. *E.g.*, Commonwealth *ex rel.* Meta v. Cinello, 218 Pa. Super. Ct. 371, 280 A.2d 420 (1971). The common law rights and duties of the mother of an illegitimate child were identical to those of the father of a legitimate child: she had the absolute duty to support her child and the exclusive right to custody and control of the child. Commonwealth v. Fee, 6 S. & R. 255 (Pa. 1820); *In re* Hawthorne, 146 Pa. Super. Ct. 20, 21 A.2d 521 (1941). Statute altered this situation to the extent that the duty of support of an illegitimate child is shared by both parents. PA. STAT. ANN. tit. 62, § 2043.35 (Purdon 1953); 18 PA. CONS. STAT. ANN. § 4323 (Purdon 1973). Under *In re Walker*, distinctions of law based on sex that relate to legal rights and duties of a parent will be forbidden by the ERA whether the parents of a child are married or not. *See also* notes 82-86 and accompanying text *supra*.

99. There is only one Pennsylvania case in which the father of an illegitimate child attempted to assert a right to name his child. In that case the natural and acknowledged father sought to change his son's surname over the mother's objection. The petition was denied because the child was born while the mother was married to another man and was, therefore, presumptively the child of the previous husband. The petitioner failed to give the presumptive father, a necessary party, notice of the proceeding. This is the only case in which the father of any child, illegitimate or legitimate, has sought a name change for the child. *See In re* Change of Surname, 33 Beaver 43 (Pa. C.P. 1973). Because of its unusual facts, this case should be applied narrowly and should not be construed as authority for the proposition that the father of an illegitimate child has no right to name his child over the mother's objection. *See also* notes 101-02 and accompanying text *infra*.

be resolved in the same way as it would be if the parents were married.[100]

When a married woman gives birth to an illegitimate child, she may desire to register it with the surname of its natural father. Normally the mother would be denied this option under the rule that neither husband nor wife may deny the legitimacy of a child born to a married woman.[101] In some circumstances, however, the illegitimate child of a married woman can be given the name of the natural father on its birth certificate. This procedure is permissible only when (1) the mother acknowledges the natural father, (2) the natural father acknowledges the child, and (3) the mother's husband gives his permission.[102]

## V. Surname Alternatives for Adopted Children

The law of adoption in Pennsylvania is entirely statutory.[103] The propriety or necessity of changing the adopted child's name to that of the adoptive parents has never been raised, since the statute provides that "[i]f desired by the parents the decree may also provide that the person adopted shall assume the name of the adopting parent or parents and any given first or middle names that may be chosen."[104] This provision clearly assumes the use of one family name. While this name would traditionally be that of the father, there is no reason why the adoptive parents could not agree instead to give the child the surname of the mother.[105] If the adopting parents disagree on what surname to give the child, they may have difficulty convincing the court of the "desirability of the proposed adoption," in which case the problem of disagreement would become moot.[106]

In two cases[107] the questions of adoption and a child's legal surname have come together in an interesting way. In each case a stepfather sought to adopt his wife's children, but the petition was denied because the father refused to give his consent. As a compromise, however, the courts in both instances decreed that a change of name for the children to that of the stepfather was in the best interest of the children.

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100. *See* notes 74-93 and accompanying text *supra*.
101. 780 INFORMAL OP. ATT'Y GEN. (1936).
102. 75-8 OP. ATT'Y GEN., 5 PA. BULL. 423 (1975).
103. PA. STAT. ANN. tit. 1, §§ 1-7 (Purdon 1963).
104. *Id.* § 4.
105. An Hawaiian case interpreting a statute worded almost identically to Pennsylvania's held that "the name of the adoptive parent or parents" meant the "name . . . of the adoptive father" and that the change of the child's name to the father's name was mandatory. *In re* Watson's Adoption, 45 Hawaii 69, — , 361 P.2d 1054, 1058-59 (1961). If the General Assembly of Pennsylvania intended the same meaning in the Pennsylvania Adoption Act, the Act can no longer withstand challenge under the ERA. *See* notes 66-68, 84 and accompanying text *supra*.
106. PA. STAT. ANN. tit. 1, § 3 (Purdon 1963).
107. *In re* Thomas, 404 S.W.2d 199 (Mo. 1966); *In re* Adoption of McCoy, 31 Ohio Misc. 195, 287 N.E.2d 833 (1962).

## VI. Conclusion

The law of surnames in Pennsylvania presents few problems for adult citizens. The Pennsylvania ERA[108] requires that the common-law rule allowing a man to use any surname he wishes absent fraudulent purposes be extended to women as well.[109] Thus, anyone may retain his or her birth-given name through any number of marriages. Alternatively, a new name may be acquired in one of two ways. First, a person can petition for a statutory change of name, which should be granted if no fraudulent intent can be shown. Second, one may be able to acquire a new name by general usage. The statutory provision that purports to prohibit such common-law name changes is subject to attack; moreover, there is probably little interest in enforcing the statute, since it provides for no penalties. Similarly, an individual who consistently uses one name for business purposes in unlikely to be challenged if he or she uses a second name on social occasions.

Various surname alternatives are also available for children, whether legitimate, illegitimate, or adopted. Difficulties usually occur when a child's parents disagree about the choice of name. The case law that developed before the passage of the ERA offers imperfect guidelines, since the courts gave great weight to the father's right to name his child. This preference cannot be justified under the ERA. Since the child's best interest controls when its parents cannot agree on its name, a strong argument can be made that the question should not be litigated at all. The fact of the litigation itself is almost surely going to be to the child's detriment. Therefore, the custodial parent ought to determine the name of young children, and minors of high school age should be able to decide

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108. Almost identical in wording to the Pennsylvania ERA is the proposed ERA to the United States Constitution, found at H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). It is doubtful that a federal ERA could result in any change in Pennsylvania law, since the state courts have already followed a very strict interpretation of the state ERA. A federal ERA would have a great impact on surname law, particularly in those jurisdictions where a married woman's legal name is her husband's. In Forbush v. Wallace, 341 F. Supp. 217 (D.C. Ala. 1971), *aff'd per curiam*, 405 U.S. 970 (1972), the court upheld an unwritten regulation based on a view of the common law that required a married woman to use her husband's surname when applying for a driver's license. The court found that administrative convenience provided a rational basis for such a regulation. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Supreme Court rejected the administrative convenience argument to show a compelling state interest in classification by sex. It was thought that since *Frontiero*, a *Forbush* result would be impossible; however, in a case identical to *Forbush*, the Supreme Court denied certiorari. *See* Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, 97 S. Ct. 654 (1976). Administrative convenience and *Forbush* are considered in depth in *A Woman's Right to Her Name, supra* note 1, at 677-80. The attorney general distinguished Pennsylvania law from *Forbush* in 62 OP. ATT'Y. GEN. 172, 177 (1973).

While the fourteenth amendment has had only a limited impact on the law of surnames (see note 73 *supra*), it does seem clear that a federal ERA would render the *Forbush* holding void. Thus, no matter what the common law of a particular jurisdiction held a married woman's or child's legal surname to be, the right of free choice of a surname could not be based upon gender. Essentially, then, a federal ERA would bring other jurisdictions in line with Pennsylvania law.

109. Smith v. U.S. Casualty Co., 197 N.Y. 420, 90 N.E. 947, 950 (1910); Laflin & Rand Powder Co. v. Steytler, 146 Pa. 434, — , 23 A. 215, 217 (1892).

for themselves what name to adopt.[110] Remedial legislation or case law is needed to effect these rules.

The custom by which a woman adopted her husband's name and a child its father's name derived, most likely, from the common law (*i.e.* the doctrine of coverture). It appears now that we have come full circle to the starting point where surname customs developed free from any legal constraints, save the prohibition against using a name for a fraudulent purpose. It is possible, then, for the law to adapt itself to changing customs.[111] Our society is many times more complex than that of fourteenth century England, however, and there is a state need for identification of its citizens. That need can be met without putting restraints on the individual's preference for a surname.[112]

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110. *See* notes 91-93 and accompanying text *supra*.

111. "Theoretically incomplete, the law of names shows how most satisfactorily the common law and equity expand to meet all practical needs." Arnold, *supra* note 2, at 233.

112. To a certain extent, the social security number is the ultimate identifying symbol. It remains unchanged despite any number of name changes that might occur in a lifetime.