

# University of Michigan Journal of Law Reform

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Volume 8

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1974

## The Right of Married Women to Assert Their Own Surnames

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### Recommended Citation

Roslyn G. Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 U. MICH. J. L. REFORM 63 (1974).

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# THE RIGHT OF MARRIED WOMEN TO ASSERT THEIR OWN SURNAMES

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## THE RIGHT OF MARRIED WOMEN TO ASSERT THEIR OWN SURNAMES

Roslyn Goodman Daum\*

Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls.  
Who steals my purse steals trash – tis something, nothing,

'Twas mine, 'tis his, and has been slave to thousands –

But he that filches from me my good name  
Robs me of that which not enriches him  
And makes me poor indeed.

*Othello*<sup>1</sup>

In 1879, Lucy Stone was denied the right to vote in her maiden name despite the fact that she had used it exclusively since her marriage in 1855.<sup>2</sup> Nearly a century later, Gail Dunfey, an incumbent councilwoman of Lowell, Massachusetts, lost her bid for reelection ostensibly because of her insistence on using her birth-given name after marriage.<sup>3</sup> The controversy over a married woman's right to use her own surname is one of long standing, and one which portends increasingly significant societal consequences.

The focus of the problem has shifted to the totality of a woman's societal role. The difficulties that women have faced in their name choices have traditionally stemmed from the dual role of the

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The author wishes to acknowledge the valuable advice and assistance provided by Assistant Professor Diane T. Lund of the Harvard Law School.

<sup>1</sup> W. SHAKESPEARE, *OTHELLO*, Act III, Scene 3.

<sup>2</sup> See MacDougall, *Married Women's Common Law Right to Their Own Surnames*, 1 *WOMEN'S RIGHTS L. REP.* 2 (Fall/Winter, 1972/1973), for a concise analysis of the maiden name controversy and a good summary of its history.

<sup>3</sup> Negri, *How an Election was Lost in Lowell*, *Boston Evening Globe*, November 9, 1973, at 3, col. 1.

female professional.<sup>4</sup> Today, the problem of the professional/social dichotomy remains far from meaningful resolution.<sup>5</sup>

The flowering of the women's movement, however, has raised a different question. The movement has focused not on the identity problem of the woman who uses more than one name, but on the right of married women to retain their birth-given names for all purposes. Three arguments support the recognition of such a right: first, a woman has the right to use her maiden name after marriage without court interference; second, a woman's name does not change at marriage by operation of law, but rather by custom; and, third, the right to retain a surname should not be impeded by administrative or bureaucratic procedures.

Choice of name may, at first glance, appear to be little more

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<sup>4</sup> For example, etiquette books have counseled that while professional women can use their maiden names for career purposes, it would be socially unacceptable to use anything but their husbands' surnames in nonprofessional circumstances. See A. VANDERBILT, *AMY VANDERBILT'S ETIQUETTE*, 324-25, 544-45 (rev. ed. 1972).

Of more consequence were the situations where women were effectively precluded from asserting their surnames by the imposition of indirect administrative pressures. A typical case is that of *In Re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934), in which a musician well-known in performing circles by her birth-given name was denied the right to receive her naturalization certificate in that name. The right was denied in the face of an inevitable pecuniary loss, and despite Ms. Kayaloff's use of her husband's name privately. See Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552, 557 (1971).

<sup>5</sup> See, e.g., Letter to the Editor, N.Y. Times, Jan. 20, 1974, § 6 (Magazine), at 63: To the Editor:

Lois Gould's etiquette query as to how to introduce Dr. Joyce Brothers in the evening fails to convey the reality of the hazards for professional women in having a series of different names. I know. I trained and published using my first husband's name, received a Ph.D. and practiced and published after resuming my maiden name, married again, retained my maiden name professionally, and finally gave up and took my present husband's name. The experience has been chaotic, funny, maddening, and occasionally insulting.

For instance, when I was Dr. Linda Weingarten and also Mrs. Philip Scheffler, I received a Christmas greeting from the president of the college at which I worked. It was addressed to "Dr. and Mrs. Philip Weingarten." After all, etiquette could not have permitted "Dr. and Mrs. Linda Weingarten", nor would it have been correct.

When the confusion of the two names got too much I capitulated partially and informed the personnel office I would be known as Dr. Linda Weingarten-Scheffler. After two weeks in which introducing myself seemed to take longer than subsequent conversations, I wasn't even insulted when personnel admitted the name change had never been processed. When I told her my married name was now "it," the lady replied "Oh, we knew you'd come around."

A more serious hazard lurks in summarizing one's publications in resumés or in later publications. Unfortunately, several of my own works seem to have been written by two other people.

Oh, the confusion of it all! It tempts one to give in to the computer age and be known exclusively by one's Social Security number.

Miss/Mrs./Miss/Dr./  
Mrs./Ms.

Linda Lee Weingarten  
Shure Weingarten Scheffler  
New York City

than a symbolic issue that concerns only a few vocal women. But a name is a symbol of status. For many women, a requirement to use their husbands' names is a shackle which symbolizes ownership and dependence.

Furthermore, a state which requires wives but not husbands to adopt a surname other than that given at birth may be violating the Equal Protection Clause of the fourteenth amendment,<sup>6</sup> and the spirit of the proposed Equal Rights Amendment.<sup>7</sup> In addition, the legal justification for a mandatory surname change procedure can not withstand close scrutiny or comparison with widespread contrary practice.<sup>8</sup>

This article, then, will attempt to frame the issues involved in the name change controversy and to suggest not only ways to implement reforms, but also the consequences attending these measures. Massachusetts has been chosen as the setting for an in-depth analysis of each problem, and examples of legislative, judicial, and administrative action in that state will be interspersed throughout. The results of the efforts in Massachusetts may be politically and legally instructive for people with similar interests in other jurisdictions.

## I. THE LAW OF NAME CHANGE

### A. *Evolution of the Common Law Right*

Surnames were virtually unknown in England before the tenth century, and at least a hundred years passed before such names were commonly employed.<sup>9</sup> The existence of a last name signified little more than an identifying characteristic of a particular person; it could be assumed or rejected by his or her descendants at will.<sup>10</sup> The adoption of any surname was legally permissible, provided the name was not used fraudulently or to deceive or inflict pecuniary loss on another person.<sup>11</sup> Well into the nineteenth century the endowment of the patronymic on a newly born child was recognized "only as a general rule from which the individual may depart if he chooses."<sup>12</sup> The common law asserted only a casual supervision over the use of surnames.

The use of surnames by married women was similarly unpre-

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<sup>6</sup> See part I *B infra*.

<sup>7</sup> See part III *D infra*.

<sup>8</sup> See part V *infra*.

<sup>9</sup> C. EWEN, *A HISTORY OF SURNAMES OF THE BRITISH ISLES* (1931).

<sup>10</sup> *Petition of Snook*, N.Y. (2 Hilton) 566, 571 (C. P. 1859).

<sup>11</sup> *DuBoulay v. DuBoulay*, [1869] L.R. 2 P.C. 430.

<sup>12</sup> *Laffin and Rand Co. v. Steyler*, 146 Pa. 434, 442 (1892).

dictable. In the thirteenth and fourteenth centuries, it was not unusual for a married heiress to retain her father's family name.<sup>13</sup> One commentator suggests that it was more common for a man to take his wife's surname than for the wife to drop hers.<sup>14</sup> Today, English common law still does not require a woman to take her husband's surname after marriage.<sup>15</sup>

### B. *The Status of the Right Today*

Legal impediments to the retention or reacquisition of a woman's birth-given name derive primarily from judicial misinterpretation or misapplications of the common law of name change. Only Hawaii statutorily requires the use of the husband's name<sup>16</sup> and only Kentucky refuses by statute<sup>17</sup> to permit women to reassume their maiden names after marriage.<sup>18</sup> This section will therefore focus on the primary area of confrontation—recent judicial treatment of the common law right, with particular emphasis on decisions of the courts of Massachusetts.

The common law clearly permits individuals and business entities to acquire names by repute.

It is well settled that a person or corporation may assume or be known by different names, and contract accordingly, and that contracts so entered into will be valid and binding if unaffected by fraud. The validity, so far as third parties are concerned, of contracts entered into by a person or corporation under a name other than his or its proper name does

<sup>13</sup> C. EWEN, *supra* note 9, at 389.

<sup>14</sup> L. PINE, *THE STORY OF SURNAMES* 23 (1966), cited in MacDougall, *supra* note 2, at 4, n.18.

<sup>15</sup> 19 HALSBURY'S LAWS OF ENGLAND 391 (3d ed. 1970). See also part 1 C *infra*.

<sup>16</sup> HAWAII REV. STAT. tit. 31, §§ 574-1 *et seq.* (1968).

<sup>17</sup> KY. REV. STAT. ANN. § 401.010 (1971). For a comprehensive listing of all state statutes bearing any relevance to name changes, see Lamber, *A Married Woman's Surname: Is Custom Law?* 1973 WASH. U. L. Q. 779, 809-19. This has since been repealed.—Ed.

<sup>18</sup> There are some indications that both states will soon be relinquishing their dubious unique status. See CENTER FOR A WOMAN'S OWN NAME, BOOKLET FOR WOMEN WHO WISH TO DETERMINE THEIR OWN NAME AFTER MARRIAGE 32 (1974) [hereinafter cited as BOOKLET]:

Litigation has recently resulted in allowing married women to vote in their own names in Kentucky, and it is likely that the constitutionality of the Kentucky name change statute will be challenged.

See also *id.* at 7: "A recent Hawaiian Attorney General opinion states that 'there is no prohibition against a married woman changing her name subsequent to the marriage.'"; Bysiewicz & MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 603 n.14 (1973), assert that the Hawaiian law may soon be found unconstitutional under a recently passed equal rights amendment to the Hawaiian Constitution [1972] Hawaii Laws 650).

not depend on whether he or it is as well known by that name as by his or its true name, but upon whether quoad the particular transaction, the name is used in good faith by the party adopting it as descriptio personae.<sup>19</sup>

Hence, if a woman can assume a name by using it and developing a reputation under the common law standard, it seems clear that she can use her maiden name under that same standard, whether she "reacquires" that name after marriage or retains it upon marriage.

If the situation of a married woman who has adopted her husband's surname is equivalent to that of anyone adopting a name other than that given at birth, then she should be allowed to change her name in accordance with the law; she may either petition the probate court or acquire her maiden name by reputation. Alternatively, if Jane Doe automatically becomes Jane Doe Roe upon marriage, though she has no intention of using that name, then the common law right to use a "different" name should still be hers. In short, by informing people that she will continue to be known as Jane Doe, and by maintaining or acquiring identification in her maiden name, Jane Doe Roe should become Jane Doe again. In effect, the common law right to change of name by reputation can therefore be construed to allow a woman to retain her maiden name.<sup>20</sup>

In addition to the right to change one's surname by reputation, many states allow probate courts to change surnames:

A petition for change of name of a person may be heard by the probate court in the county where the petitioner resides. No change of the name of a person, except upon the adoption of a child or upon the marriage or divorce of a woman, shall

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<sup>19</sup> *William Gilligan Co. v. Casey*, 205 Mass. 26, 91 N.E.124 (1910). *Cf. Young v. Jewell*, 201 Mass. 385, 386, 87 N.E. 604 (1909): "Where a person is in fact known by two names, either one can be used." *See also* *Petition of Buyarsky*, 322 Mass. 335, 338, 77 N.E.2d 216, 218 (1948):

A man, if acting honestly, may assume any name he desires and by which he wishes to be known in the community in which he lives or in the trade circles in which he does his business. The law does not require a man to retain and to perpetuate the surname of his ancestors. The common law recognizes his freedom of choice to assume a name which he deems more appropriate and advantageous to him than his family name in his present circumstances, if the change is not motivated by fraudulent intent.

*Cf. Lord v. Cummings*, 303 Mass. 457, 22 N.E.2d 26 (1939).

<sup>20</sup> For a good discussion of the existence of a woman's common law right to retain her surname after marriage, *see* *Lamber*, *supra* note 17. *See also* BOOKLET, *supra* note 18, at 29-36; Brief for Amicus Curiae Center for a Woman's Own Name on Behalf of Plaintiff-Appellant, *Whitlow v. Hodges*, No. 74-1726 (6th Cir. August, 1974) [hereinafter cited as *Whitlow* Brief].

be lawful unless made by said court for a sufficient reason consistent with the public interest.<sup>21</sup>

Despite the seemingly exclusive language of the statute, Massachusetts courts have held that one may change one's name without resort to the statutory procedure.<sup>22</sup> In *Mark v. Kahn*,<sup>23</sup> for example, the court stated:

At common law a person may change his name at will, . . . by merely adopting another name, provided that this was done for an honest purpose. . . . G.L. (Ter. Ed.) c.210 § 12 does not restrict a person's choice of name but aids him in securing an official record which definitely and specifically establishes his change of name.

An elaboration of this theme was made in *Petition of Merolevitz*:<sup>24</sup>

We assume, in view of the wording of our statute, (G.L. [Ter. Ed.] c.210, § 12), that it provides the only method by which one can change his name with legal effect. But it does not follow that one may not assume or use another name without resort to the statute if such use is for an honest purpose. In numerous cases<sup>25</sup> decided after the passage of the statute it has been recognized that without compliance with it one may use another name for contracting business, making contracts, instituting or defending lawsuits, and acquiring and transferring title to property, where such use is not tainted by fraud. . . . Section 12, construed in the light of these decisions, does not in our opinion require compliance with its provisions in order that one may use another name, if such use is for an honest purpose.

The statute says that no *change* of name shall be effective without compliance with the statutory procedure. If a woman retains her birth-given name for all purposes after marriage, therefore, one can argue that the law of name *change* is inapposite. If

<sup>21</sup> MASS. GEN. LAWS ANN. ch. 210, § 212 (1931).

<sup>22</sup> See also BOOKLET, *supra* note 18, at 29-36.

<sup>23</sup> 333 Mass. 517, 520, 131 N.E.2d 758, 761 (1956). Cf. *Petition of Buyarsky*, 322 Mass. 335, 77 N.E.2d 216 (1948).

<sup>24</sup> 320 Mass. 448, 450, 70 N.E.2d 249, 250 (1946).

<sup>25</sup> See, e.g., *Bridges v. Hart*, 302 Mass. 239, 18 N.E.2d 1020 (1939); *Young v. Jewell*, 201 Mass. 385, 87 N.E. 604 (1909); *Kendrick v. Kendrick*, 188 Mass. 550, 75 N.E. 151 (1905); *Lancy v. Snow*, 180 Mass. 411, 62 N.E. 735 (1902); *Commonwealth v. Seeley*, 167 Mass. 163 (1896); *Gillespie v. Rogers*, 146 Mass. 610, 16 N.E. 711 (1888); *Commonwealth v. Trainor*, 123 Mass. 414 (1877); *Gifford v. Rockett*, 121 Mass. 431 (1877); *Commonwealth v. Gale*, 77 Mass.(11 Gray) 320 (1858); *Sowle v. Sowle*, 27 Mass. (10 Pickering) 376 (1830).



one's name does not change at marriage, the qualifying word does not apply; the statute is irrelevant where a woman's name has never been that of her husband. Similarly, there is no need to develop a new reputation at common law if one's name has never been different.

Inimical to such a statutory construction are a limited number of cases which may indicate that a woman's surname automatically becomes that of her husband upon marriage. Whether other courts or state administrators will follow these decisions or not, at least some limitations have effectively been imposed upon the women's surname retention right.

According to a number of writers involved in the women's name change controversy,<sup>26</sup> only three cases have directly ruled on the woman's common law right to retain her surname after marriage: *People ex rel Rago v. Lipsky*;<sup>27</sup> *State ex rel Krupa v. Green*;<sup>28</sup> and *Stuart v. Board of Supervisors of Elections*.<sup>29</sup> *Lipsky* is the only decision holding against the right; and a combination of illogical statutory construction<sup>30</sup> and a later Illinois Attorney General's opinion<sup>31</sup> weakens the decision's precedential value.<sup>32</sup>

Although not directly dealing with the issue of the common law right of surname retention, the Supreme Court's memorandum affirmance in *Forbush v. Wallace*<sup>33</sup> has fueled much of the recent legal opposition to the recognition of such a right. In that case, a married woman who used her maiden name for all purposes attempted to get a driver's license bearing her maiden name. An unwritten regulation of the Alabama Department of Public Safety required a married woman to apply for and receive her license only in her husband's name. The regulation was apparently based upon an interpretation of Alabama common law that a woman's "legal" name is that of her husband.<sup>34</sup> The District Court for the

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<sup>26</sup> See, e.g., Lamber, *supra* note 17, at 783; *Whitlow Brief*, *supra* note 20, at 27.

<sup>27</sup> 327 Ill. App. 63, 63 N.E.2d 642 (1945).

<sup>28</sup> 114 Ohio App. 497, 177 N.E.2d 616 (1961).

<sup>29</sup> 266 Md. 440, 295 A.2d 223 (1972).

<sup>30</sup> Lamber, *supra* note 17, at 791-92.

<sup>31</sup> *Whitlow Brief*, *supra* note 20, at 28-29:

I do not believe that this appellate decision should control. The other Illinois decisions and cases elsewhere establish that a woman may in fact retain her own name upon marriage with or without court proceedings. (Ill. Op. Att'y Gen., February 13, 1974).

<sup>32</sup> The Ohio Court of Appeals held directly contrary to the *Lipsky* decision. *Stuart* is discussed in notes 43-47 and accompanying text *infra*.

<sup>33</sup> 341 F. Supp. 217 (M.D. Ala. 1971), *affd mem.* 405 U.S. 970 (1972).

<sup>34</sup> 341 F. Supp. 217 at 221. See also Brief for Respondent, *Forbush v. Wallace*, 405 U.S. 970 (1972).

Middle District of Alabama upheld the state's right to require the husband's surname on driver's licenses,<sup>35</sup> and the Supreme Court affirmed on that issue.

Ms. Forbush conceded that the Alabama common law was that a woman's legal name after marriage included her husband's surname.<sup>36</sup> This concession was at least sufficient to undermine the precedential value of the case with respect to the assertion of a common law right of surname retention.<sup>37</sup> At worst, the concession may be viewed as a tactical error that has resulted in the development of a precedent employed by other courts to deny a woman's right to retain her surname after marriage.<sup>38</sup>

Forbush argued that the regulation and the common law rule operated as denials of equal protection for two reasons: first, they were based upon a suspect classification (sex);<sup>39</sup> and second, they established a classification pursuant to an arbitrary and unreasonable policy which bore no rational relationship to a legitimate state purpose. Ms. Forbush did not win on either ground.

The district court declined to decide whether or not sex was a suspect classification.<sup>40</sup> The court held that it was not unreasonable for the state to require each individual to receive his license in his legal name and that Alabama's common law rule was not a violation of equal protection. The Alabama law defining a woman's legal name as that of her husband was held to be rational not only because of long standing custom and the need for uniformity but also for reasons of administrative convenience.<sup>41</sup> The Supreme Court of the United States affirmed without opinion.<sup>42</sup>

Shortly after the *Forbush* decision, the Maryland Court of Appeals decided *Stuart v. Board of Supervisors of Elections for Howard County*.<sup>43</sup> The case concerned opposition to Md. Ann. Code art. 33, § 3-18(c), which required that a woman re-register to vote in her married name in order to avoid cancellation of her

<sup>35</sup> 341 F. Supp. 217.

<sup>36</sup> Brief for Petitioner at 3. *Forbush v. Wallace*, 405 U.S. 970 (1972).

<sup>37</sup> See *Whitlow* Brief, *supra* note 20, at 12-14.

<sup>38</sup> See BOOKLET, *supra* note 18, at 29-36, for a summary of recent cases.

<sup>39</sup> See Lamber, *supra* note 17, at 801-03, arguing that the suspect classification questions bear careful re-examination after the Supreme Court opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>40</sup> 341 F. Supp. 217 at 221.

<sup>41</sup> See Lamber, *supra* note 17, at 798-99, 804-07. Prof. Lamber argues that "custom" does not constitute a rational basis for classification; that uniformity does not exist at present and therefore would not truly be disrupted; and that it was factually untrue that administrative convenience would be sacrificed.

<sup>42</sup> 405 U.S. 970 (1972).

<sup>43</sup> 266 Md. 440, 295 A.2d 223 (1972).

registration. Ms. Stuart, who had always used her maiden name and was therefore permitted to register in that name, was nonetheless informed that her registration would be cancelled. She argued that the common law permits a woman to retain her surname after marriage. The *Forbush* omission was avoided.

The Board contended that, although Maryland common law permitted a person to assume any name for a nonfraudulent purpose, such rights were not extended to married women because of § 3-18(a)(3) of the Maryland Code.<sup>44</sup> The Maryland court rejected the Board's argument. The court held that the common law rule was effective in Maryland, even with respect to married women, and that changes of name by married women were changes by custom and in fact, rather than by operation of law:

[A] married woman's surname does not become that of her husband where, as here, she evidences a clear intent to consistently and non-fraudently use her birth given name subsequent to marriage. Thus, while under *Romans*, a married woman may choose to adopt the surname of her husband—this being the long standing custom and tradition which has resulted in the vast majority of women adopting their husbands surnames as their own—the mere fact of the marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding on all.<sup>45</sup>

Noting that it was not bound by the Alabama common law as interpreted by *Forbush*,<sup>46</sup> the court, citing abundant English authority on the issue,

... expressly followed the 1961 American case of *State ex rel Krupa v. Green*, [citation omitted] which had held that a voting registration statute referring to persons who had changed their names by "marriage or otherwise" did not apply to women who did not change their names at marriage.  
...<sup>47</sup>

The trend toward increasing recognition of the surname retention right far from signifies an outright acceptance of such a policy, especially by low-level bureaucrats.<sup>48</sup> In Massachusetts,

<sup>44</sup> MD. ANN. CODE art. 33, § 3-18(a)(3)(1973). See MacDougall, *supra* note 2, at 2, 3. The statute requires county officials to file with voting boards the present and former names of females over twenty-one years of age whose names have been changed by marriage.

<sup>45</sup> 266 Md. 440, 447, 295 A.2d 223, 226-27, (1972).

<sup>46</sup> 266 Md. 440 at 446 n.2, 295 A.2d 223 at 226 (1972).

<sup>47</sup> *Whillow* Brief, *supra* note 20, at 23.

<sup>48</sup> See part II *infra*.

for example, there is no statute that either requires a married woman to use her husband's surname or that permits her to employ her maiden name. The sole cases which discuss the legality of a married woman's name, though easily distinguishable on the facts from the situations in which a married woman uses her maiden name for all purposes after marriage, do state that a married woman's legal name is that of her husband. The law, then, is ostensibly inconclusive; therefore, it is inconsistently applied.

*Bacon v. Boston Elevated Ry.*<sup>49</sup> is often cited for the proposition that in Massachusetts a woman's legal surname upon marriage is that of her husband.<sup>50</sup> In that case, Alice W. Bacon, a married woman, sought to recover for personal injuries and for damage to her automobile suffered in an accident with defendant's vehicle. The plaintiff was exercising due care and the defendant was negligent. Nevertheless, the court held that the plaintiff was not entitled to recovery because her automobile was registered in her maiden name. Under the then current law, an automobile that was not legally registered<sup>51</sup> was considered a "nuisance on the highway" and the owner thereof could not recover for damages because invalid registration was considered to be negligence *per se*. Citing ch. 208, § 23 of the General Laws,<sup>52</sup> which enabled a woman to assume her maiden name after divorce, the court held that the plaintiff's legal name was Alice W. Bacon. However, in that case, Mrs. Bacon used her husband's surname for all purposes (including income taxation and driver's license) except automobile registration.

The *Bacon* court thus did not have before it a situation in which a woman used her maiden name in all cases. Few would gainsay the fact that since Mrs. Bacon used her husband's surname the common law rendered that her legal name. The case is therefore inapposite.

*In Korsun v. McManus*,<sup>53</sup> an invalidly married woman had used her maiden name for employment and her "married" name (Korsun) for her automobile registration. Since the plaintiff was generally known by her "married" name, the court stated that to register the automobile under Korsun was not an invalid or negligent act. It was thus clearly established that a woman (as well as a man) could change her name by repute.

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<sup>49</sup> 256 Mass. 30, 152 N.E. 351 (1926).

<sup>50</sup> See, e.g., *Koley v. Williams*, 265 Mass. 601, 164 N.E. 444 (1929).

<sup>51</sup> MASS. GEN. LAWS ANN. ch. 90 (1946).

<sup>52</sup> MASS. GEN. LAWS ANN. ch. 208, § 23 (1931).

<sup>53</sup> 318 Mass. 642, 63 N.E.2d 457 (1945).

The Massachusetts courts have continued to enforce the name change statute,<sup>54</sup> claiming that it merely expands and makes official one's common law right to assume any nonfraudulent name.<sup>55</sup> The only cases in which it has been held that a woman's legal name is that of her husband on marriage have been automobile registration cases.<sup>56</sup> However, the absence of a clearly defined legal mandate has forced some women to use their married names on car registrations, presumably because their husbands' surnames are their "legal" names. The courts continue to overlook the legal/nonlegal name distinction in cases of male registrants.<sup>57</sup>

### *C. Other Legal Systems*

The alleged administrative inconvenience resulting from women's use of surnames different from those of their husbands does not appear to have necessitated a curtailment of this right in other countries. It is customary in civil law countries for women to retain their birth-given names, and Louisiana's succession to French law has meant that women in that state may legally use their maiden names after marriage.<sup>58</sup>

The trend in western countries has been to permit women greater rights in the use of their maiden names. For example, the German cabinet drafted legislation which would enable couples to adopt the wife's surname or a combination of both names if either alternative were preferred to use of the husband's surname alone.<sup>59</sup> In Italy, the Chamber of Deputies approved a reform which would no longer require a wife to replace her surname with

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<sup>54</sup> MASS. GEN. LAWS ANN. ch. 210, § 12 (1931).

<sup>55</sup> See note 23 *supra*.

<sup>56</sup> *Korsun v. McManus*, 318 Mass. 642, 63 N.E.2d 457 (1945); *Koley v. Williams*, 265 Mass. 601, 164 N.E. 444 (1929); *Bacon v. Boston Elevated Ry.*, 256 Mass. 30, 152 N.E. 35 (1926).

<sup>57</sup> In *Bridges v. Hart*, 302 Mass. 239, 18 N.E.2d 1020 (1939), Theophilus Doucette was permitted to recover damages for an accident though his automobile was registered under the name of Thomas Douey. He had never effected a "legal" change of name in probate court. Since the purpose of the automobile registration statute was found to be to "afford identification of the owner and of the motor vehicle," *id.* at 243, 18 N.E.2d at 1022, the court decided that the car was legally registered since Doucette was generally known as Douey. Since the courts have permitted automobile registrations under "non-legal" names, were the Massachusetts registrar to require a woman to use her "legal" name when she was not commonly known by that name, a compelling equal protection argument could be established.

<sup>58</sup> L. KANOWITZ, *WOMEN AND THE LAW* 43 (1969). *Cf.* *Succession of Kneipp*, 172 La. 411, 134 So. 376 (1931); *Willy v. Jefferson Parish Democratic Executive Comm.*, 245 La. 145, 157 So.2d 718 (1963).

<sup>59</sup> N.Y. TIMES, March 29, 1973, at 4, col. 3; N.Y. TIMES, May 20, 1971, at 2, col. 4.

that of her husband, and which would give all married women a hyphenated name consisting of their own surname plus that of their husband.<sup>60</sup>

There have similarly been few barriers to a wife retaining her birth-given name in common law countries. In Wales, Scotland, and Ireland, married women commonly retain their maiden names, particularly if they are of higher birth.<sup>61</sup> English common law, as noted above,<sup>62</sup> expressly permits married women to retain their own surnames:<sup>63</sup>

But although it is an almost universal custom for a married woman to be known by her husband's surname, it is quite open to her to retain her maiden name if she wishes. There is, so far as I know, nothing to compel a married woman to use her husband's surname. (*In re Fry*, [1945] Ch. 348 (per Vase-ly, J.)).<sup>64</sup>

## II. THE PROBLEM ILLUSTRATED: ELECTIONS, VOTING RIGHTS, AND PASSPORTS

The unresolved state of the law has often led to obstinance on the part of low-level bureaucrats charged with the duty to receive and process forms and applications. Under a mistaken impression of what the law demands, a clerk may thwart the will of a woman who is seeking only to exercise her lawful rights. As a result, permission for a married woman to use her maiden name on forms is frequently denied because the clerk believes that the "legal" married name is the required one.

This bureaucratic opposition and inconsistency can be seen as creating the following unnecessary consequences: (a) women who are timid about putting up a fight must acquiesce and use their husbands' names in order to accomplish their goal (such as the receipt of a driver's license); (b) women who are less intimidated must suffer harassment<sup>65</sup> or go to considerable trouble to protect

<sup>60</sup> N.Y. TIMES, December 5, 1971, at 125, col. 4.

<sup>61</sup> C. EWEN, *supra* note 9, at 391.

<sup>62</sup> See note 15 and accompanying text *supra*.

<sup>63</sup> See especially J. JOSLING, CHANGE OF NAME 24 (8th ed. 1964).

<sup>64</sup> *Id.*

<sup>65</sup> Similar harassment, engendered by marital status, not marital name, is evidenced by the following story related in 1 WOMEN'S RIGHTS L.R. 27 (Spring 1972):

When Dr. Donna Brogan tried to register to vote in De Kalb County recently, she was refused because she declined to say whether she was married or single. [She then asked to see the Registrar.]

"He (Thomas) [the registrar] told me I was a stupid woman and asked me why I was causing all this trouble."

....

Thomas replied: ... "When a woman marries, the Bible says the two become one flesh." ...

their rights; and (c) women who wish to reacquire their maiden names by repute are not able easily to procure identification necessary to prove their names, despite the fact that they may be known to others by their maiden names.

The dimensions of the problem can be more fully appreciated in light of some specific instances of official inflexibility. The gravity of the consequences may vary with each encounter, but the frustration and inequity do not.

An instructive case is that of Gail Dunfey, a city councilwoman in Lowell, Massachusetts, who married Ronald Sinicki.<sup>66</sup> Prior to her marriage, Ms. Dunfey had announced that she wished to retain her maiden name. Yet, at the next city council meeting following her wedding, the city clerk insisted on calling out "Councillor Sinicki" on roll call votes. The clerk claimed that Dunfey's legal name was Sinicki unless the court ordered otherwise. Dunfey refused to answer to her husband's surname.

Ms. Dunfey then won a temporary restraining order barring the clerk from using her married name on roll calls. In addition, the city solicitor ruled that Dunfey was the councilwoman's name since she was known by that name. Nevertheless, the ultimate outcome of this controversy was that Dunfey lost her seat in the next election. She attributed her defeat to "the unpopularity of her decision among female voters,"<sup>67</sup> and claimed that her refusal to change her name

was blown up all out of proportion in the Lowell press. There was a cartoon about it, it was editorialized against and there were letters to the Editor.<sup>68</sup>

What would probably have gone unnoticed, had the clerk cooperated with Ms. Dunfey, became a public issue which ostensibly resulted in an election loss wholly unrelated to Dunfey's performance of her duties.

A second example concerns Diana Altman and Gladys Waldman, both of whom were married but had never used their married names.<sup>69</sup> After their marriages, the women attempted to register to vote in their maiden names, but the election registrar in

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<sup>66</sup> The following sources were utilized for this example: Negri, *supra* note 3 at 3, col. 1; Boston Globe, June 4, 1973, at 6, col. 4; Boston Globe, June 16, 1973, at 7, col. 2; Boston Globe, November 8, 1973, at 8, col. 1.

<sup>67</sup> Boston Globe, November 8, 1973, at 8, col. 1.

<sup>68</sup> Negri, *supra* note 3, at 3, col. 1.

<sup>69</sup> The sources for this example were: Goodman, *2 Women Battle, Win Right to Vote under Maiden Name*, Boston Globe, April 9, 1972, at 27, col. 1; N.Y. Times, April 9, 1972, at 54, col. 8; personal interview with Diana Altman.

Newton, Massachusetts, refused to allow them to do so. After a great deal of frustration, the women appealed the registrar's decision. The city solicitor said that no law compelled a woman to register in her husband's name if she were generally known by another name. The common law requirement of repute was sufficient for voting purposes.

In response to the decision, the city election commission finally voted to permit married women who use their birth-given names to register in those names. Several other Massachusetts communities followed suit, while others such as Arlington have still refused to permit women to register in their birth-given names.<sup>70</sup>

Finally, encounters with the passport office have produced similarly annoying and unnecessary obstacles to surname retention.<sup>71</sup> In order for a woman to receive a passport in her maiden name, she must submit affidavits and documents which attest to the fact that she is known by her own name in her community.<sup>72</sup> This is true even though she may never have used any other name and all her identification is in her own surname. As one author aptly notes, although there are no official regulations dealing with married women who want to use their birth-given names:

The Passport Office requires proof of a married woman's identity only when she uses her own name, a name she has generally used all her life.<sup>73</sup>

<sup>70</sup> See also BOOKLET, *supra* note 18, at 29-36.

<sup>71</sup> See, e.g., MS. MAGAZINE, March, 1974, at 7:

I had the only tantrum of my life last year when I went down to get my first passport, all excited about my first trip to Europe, and found that they wouldn't give me one. My maiden name (Stoll) was not my legal name. Well, I said in desperation, put Schneidhorst then. They couldn't do that either, because I had no identification with that name on it. (I had been using Stoll exclusively for the five years since my divorce.) So, for one horrible moment, I had no name at all, and they would'nt give me a passport.

It isn't really the fault of the people at the passport office, my lawyer friend tells me. They have to be sure that nobody gets more than one passport. And the passport office has a solution. They have a special form which must be filled out by a close relative (your mother or father, if they are living) and *notarized*, attesting to the fact that your name is really your name. I'm 34 years old, and I have to have a paper signed by my mother to prove that I am who I have always been. . . .

Patricia Stoll  
Chicago, Ill.

<sup>72</sup> See BOOKLET, *supra* note 18, at 9.

<sup>73</sup> U. STANNARD, MARRIED WOMEN V. HUSBANDS' NAMES 47 (1973). See also part V B *infra*.



### III. LEGAL AVENUES TOWARD SOLUTIONS OF THE PROBLEM

As the previous section demonstrates, by far the greatest difficulty encountered by women who wish to retain their maiden names is that of surmounting administrative barriers. On appeal, many agencies and city solicitors recognize a woman's right to her own name. However, it is at the lowest bureaucratic level that women would like to be able to assert their rights, thereby avoiding the necessity for an appeal. Therefore, an official, conclusive statement of the right of married women to use their own surnames is needed. It must be unambiguous and must clearly exclude bureaucratic discretion. Such a statement, presumably, would convince clerks that a married woman may use her birth-given name on official documents.

There appear to be four possible sources<sup>74</sup> of an appropriate statement: (a) a state supreme court decision; (b) an opinion of the Attorney General; (c) a statute; and (d) the Equal Rights Amendment.

#### *A. State Supreme Court Decision*

A court decision would not only bind the parties before the court but would influence agencies and other instrumentalities which ordinarily require people to submit names for some purpose. However, several problems arise when one attempts to procure a judicial pronouncement that the name of a married woman is that by which she is generally known in her community. First, it may prove difficult to get a case before the highest court. Lower courts are likely to hold that a woman who is commonly known by a name may use it; unfortunately, such decisions are binding only upon the court which renders the opinion. Having received a favorable decision, a woman cannot appeal, and the agency may not wish to spend time appealing a seemingly trivial issue with little chance of reversal. In effect, the great possibility of a woman's success in a lower court proceeding may ironically subvert the ultimate goal of a supreme court pronouncement.

The second major difficulty with seeking a state supreme court decision is that the effort is often time-consuming and costly. The derivable benefits may not appear to merit the battle. Finally, there remains the unavoidable risk that a supreme court decision would be unfavorable.

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<sup>74</sup> The use of antenuptial contracts is another alternative, although their enforceability is contingent upon the state's recognition of a surname retention right.

### *B. Opinion of the Attorney General*

Statutes often provide that the Attorney General must give opinions when requested to do so by agency heads.<sup>75</sup> If a test case arises, a request could be made of one or two agencies to seek an opinion from the Attorney General on the question of a married woman's right to use her maiden name. In Massachusetts, the request could be made either to the chairperson of the Massachusetts Commission Against Discrimination or to the Governor's Commission on the Status of Women.

This route has significant advantages. The elapsed time between a request and an opinion is likely to be less than six months, obviating the problem of protracted judicial appeals or statutory lobbying efforts. Secondly, an opinion of the Attorney General in many states is likely to be favorable.<sup>76</sup> In a recent opinion the Massachusetts Attorney General wrote:

[A] woman who has retained the use of her maiden name after her marriage is not compelled by Massachusetts law to assume her husband's surname for any purpose.<sup>77</sup>

The primary disadvantage of getting an attorney general's opinion is that it is not binding on anyone. Nevertheless, any "official" document may be sufficient to convince bureaucrats that it is possible for a woman to keep her maiden name.

### *C. Statute*

A statute can serve one very significant function that no other method of securing a conclusive statement of law does: it can provide a means for the recordation of a name. So long as married women are conventionally expected to use their husbands' names, women who choose to do otherwise may be encouraged to assert their own names by having available to them an official record which establishes their "true" names. In addition, since a recordation of name choice may be kept at a central location, governmental agencies and others can easily refer to a woman's name usage within the state.

Furthermore, a statute that codifies the right of married women to use their maiden names might bind people who deal with

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<sup>75</sup> *E.g.*, MASS. GEN. LAWS ANN. ch. 12, § 3 (1931).

<sup>76</sup> See *Whitlow* Brief, *supra* note 20, at 6, 25-29, for favorable opinions from the following states: California, Illinois, Maine, Maryland, Pennsylvania, and Virginia.

<sup>77</sup> 74/75-5 MASS. OP. ATT'Y GEN. 3 (1974).

married women. Additionally, a bill may be made almost immediately effective. Such an enactment would avoid both the risk and the delay of a court action. If the bill does not pass, women will still be entitled to their common law rights.<sup>78</sup> At worst, the bill's defeat might cause bureaucrats to take less flexible stands on name use. Passage of the bill, on the other hand, would provide low-level bureaucrats with an explicit statement that would permit no discretionary avoidance.

However, this method of obtaining a conclusive statement of the law presents problems. First, many feminists object to any statute because it may end up limiting common law rights already in existence. If a bill were enacted, it might require a statement of intent to use one's own surname after marriage or the payment of a fee; some women object that such a system would entail positive action where none has been or should be required.<sup>79</sup> Secondly, professional politicians may not wish to risk supporting name rights as a campaign issue, particularly since women already have a common law right. As the Gail Dunfey controversy demonstrated,<sup>80</sup> the right of married women to use their birth-given surnames is not always a popular cause, even among women; nor is it considered by many to be a significant issue in light of other problems facing women in American society.<sup>81</sup>

#### *D. The Equal Rights Amendment*

Awaiting ratification of the Equal Rights Amendment as a solution to the surname retention controversy may involve a considerable delay before the significance of the amendment is felt in the bureaucracy. Once passed, however, the effect of the amendment will be clear:

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. . . . Thus, common law and statutory rules requiring name change for the married woman would become legal nullities. . . . [T]he legal barriers would have been removed for a woman who wanted to use a name that was not her husband's.

Some state legislatures might decide there was a governmental interest, such as identification, in requiring spouses to

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<sup>78</sup> See part I B *supra*.

<sup>79</sup> See, e.g., Lamber, *supra* note 17, at 807.

<sup>80</sup> See notes 67-69 and accompanying text *supra*.

<sup>81</sup> See, e.g., notes 91-92 and accompanying text *infra*.

have the same last name. These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both.<sup>82</sup>

Consequently, the adoption of the Equal Rights Amendment could obviate the necessity for resorting to any of the previously discussed legal strategies. On the other hand, the amendment's future is uncertain; even if it is ratified, a significant amount of time would remain before the amendment became effective.<sup>83</sup> Other courses of action may yield more timely results.

#### IV. AN EFFORT TO SOLVE THE PROBLEM: THE QUEST FOR STATUTORY REFORM IN MASSACHUSETTS

The recent history of proposed name change legislation in the Massachusetts legislature<sup>84</sup> demonstrates that, in an ostensibly sympathetic community and a ripe political setting, such efforts may yet meet with substantial opposition and defeat. The example is, nevertheless, instructive from the standpoint of tactics drafting.

In 1972 a bill<sup>85</sup> was filed which would have enabled a woman who wished to use her maiden name to do so after filing a notice of intent with the "officer authorized by law to receive the certificate of marriage" and after paying the Commonwealth one dollar. The bill was sent to the Judicial Council,<sup>86</sup> which returned an unfavorable report the next year.<sup>87</sup> The Judiciary Committee also

<sup>82</sup> Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 940 (1971).

<sup>83</sup> *Id.* at 909.

<sup>84</sup> Bills dealing with women's name change rights introduced in the 1974 session of the Massachusetts legislature include: S. 1098 (filing notice of intent to retain maiden name after marriage); S. 1072 (same); S. 909 (allowing divorced woman to use maiden or married name); S. 197 (filing notice of intent for both spouses to use either name or hyphenated combination); H. 3716 (same as S. 909); H. 3527 (allowing filing to retain surname and to use same name for children); H. 3490 (voting right in maiden name); H. 2729 (same); H. 1004 (prohibiting discrimination in all identification activities); and H. 275 (same as S. 1098).

<sup>85</sup> H. 3367 (1972).

<sup>86</sup> The Judicial Council is an independent study group hired by the legislature to consider social legislation.

<sup>87</sup> The following is the text of the report:

In the class action brought by Ms. *Wendy Forbush* (and others similarly situated) against Governor George *Wallace* of Alabama, 92 S.Ct. 1197 (1972), it was held that an Alabama law requiring a woman to assume her husband's surname upon marriage had a rational basis and was enacted to control an area where the state had a legitimate interest. The Alabama case involved a driver's license.

We are mindful that a person may call himself or herself by any name at all, unless there is an illegal aspect to the matter.

reported the bill unfavorably. When the Committee report came to the floor of the Senate for approval, Senator Saltonstall unexpectedly moved to substitute a new bill which had been hastily drafted by Kathy Brock, an aide to Senator Parker. Although the bill was poorly written, it passed its first reading. A move for reconsideration was then defeated. The bill also passed its second reading in the Senate and a subsequent move to kill the bill was unsuccessful. It was finally returned to the Judiciary Committee where it died in the rush of prorogation.

Meanwhile, the Women's Lobby Task Force on Name Change was working on its own name change bill.<sup>88</sup> While they hoped that the Saltonstall bill would not be defeated, the group nonetheless felt that a better bill could be written.<sup>89</sup> The Saltonstall bill's fate during prorogation was therefore greeted with some relief. In the 1974 session of the Massachusetts legislature, the Women's Lobby bill was officially filed as S. 197.<sup>90</sup> At least eight other bills

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The Commonwealth and its subdivisions must keep many public records which have been based on the assumption by a married woman of her husband's name.

If a married woman continued to carry on her legal affairs under her maiden name, a great amount of confusion and uncertainty would result. There is a rational basis to the present system. Some married women might have problems conducting business under their maiden name if they sought to pledge the credit of their husband.

For those married women who wish to use their maiden name on social occasions, and where serious legal affairs are not involved, we see no problem nor the necessity for any legislation.

We believe that the Commonwealth has a legitimate interest in maintaining usable public records, and this interest will suffer if some women should, although married, use their "maiden" name while most probably would continue to use the name of their husband.

We do not recommend this bill.

<sup>88</sup> Information concerning the strategy of the Task Force was gathered by the author at the Task Force meetings.

<sup>89</sup> *Id.*

<sup>90</sup> The bill included the following provisions:

*An Act Providing for a Procedure for the Recording of the Choice of Name at Marriage.*

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: . . .

Section 2. Chapter 26 of the General Law is hereby further amended by inserting after section 1C the following section:—

*Section 1D.* The parties to the marriage shall have the right to jointly adopt the present or birth-given surname of either party, to each retain or resume use of his or her present or birth-given surname, or to adopt any hyphenated combination thereof. A person's name does not change at marriage by operation of law except as recorded on the record of marriage.

Section 3. Chapter 210 of the General Laws is hereby amended by striking out section 12, as appearing in the Tercentenary Edition, and inserting in place thereof the following section:

Section 12. A petition for the change of name of a person may be heard by the probate court in the county where the petitioner resides. The change of name of a person shall be granted unless such change is inconsistent with public interests.

relating to name choice had also been filed.<sup>91</sup> Because of the unexpected success of the Saltonstall bill in the last session, there was some hope that a maiden name bill would be enacted in the 1974 session. But the bill was eventually defeated in the lower chamber.<sup>92</sup>

An examination of the language of the Women's Lobby bill sheds further light on the lobbying strategy. The bill would have amended ch. 46, § 1 of the General Laws,<sup>93</sup> which provided for the recordation of vital statistics by the town clerk. Initially the bill had been written to amend ch. 207 of the General Laws<sup>94</sup> which required couples to file a notice of intention to marry. However, ch. 207 stated only that the certificate was to include such "information required at law," whereas ch. 46, § 1 spelled out the details of this information. Section 17 of chapter 46<sup>95</sup> required that town clerks submit annually to the Secretary of the Commonwealth all information appearing on marriage certificates. Thus, the bill served the centralized recordkeeping function so crucial to an enjoyment of a name change right. The marriage license itself would have served as official documentation of a married woman's name. "Birth-given" name was used rather than "maiden" name, because it was possible under the bill for males to adopt names other than those given to them at birth.

The parties to the marriage were given a choice of using the surname of either partner, adopting a hyphenated combination of their names, or retaining (or resuming in the case of previously married parties) their own birth-given names. As originally written the bill enabled marriage partners to adopt any new name, but some politicians felt that the bill would be too revolutionary to pass in that form.<sup>96</sup> The drafters of the bill believed that the development of names at common law by reputation or by petition in probate court were sufficient available alternatives for persons desiring to assume an entirely new name.

Perhaps the most important provision of the bill was in the last sentence of Section 1D: "A person's name does not change at marriage by operation of law except as recorded on the certificate of marriage." This statement eliminated the presumption that Jane Doe becomes Jane Doe Roe automatically on her marriage to

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<sup>91</sup> See note 84 *supra*.

<sup>92</sup> S. 197 passed the Senate three times, and was subsequently defeated by a vote of 95-103 in the House.

<sup>93</sup> MASS. GEN. LAWS ANN. ch. 46, § 1 (1960).

<sup>94</sup> MASS. GEN. LAWS ANN. ch. 207, § 19 (1969).

<sup>95</sup> MASS. GEN. LAWS ANN. ch. 46, § 17 (1960).

<sup>96</sup> See note 89 *supra*.

John Roe. Her name could change as a matter of fact; that is, if she were to change her records on marriage, and tell people that she is Mrs. Roe, the common law would establish her new name. However, the important distinction is that Jane Doe, who wishes to remain Jane Doe, would not necessarily have become Jane Roe by virtue of the decision of a bureaucrat.

Section 3 of the bill eliminated the following sentence from the current Massachusetts name change statute:

No change of the name of a person, except upon the adoption of a child or upon the marriage or divorce of a woman, shall be lawful unless made by said court for a sufficient reason consistent with the public interest.<sup>97</sup>

Since a change of name could have been effected by either sex simply by recording the name at marriage by both spouses, the provision quoted above would have been meaningless. One of the bill's basic purposes was to reaffirm the common law right to change one's name.

Finally, the new bill would have created a presumption in favor of the legality of a person's changing his or her name. An affirmative right would exist that could be countered only if the change were *inconsistent with the public interest*. This section codified the rule of *Petition of Rusconi*,<sup>98</sup> in which the Supreme Judicial Court of Massachusetts limited a judge's discretion in the granting of a petition for a name change. The lower court had denied a petitioner's request to change his name from Rusconi to Bryan on grounds that the change was "un-American" and an insult to Italians. The court reversed, holding:

It is not open to the Court to inquire into the motives that prompt one to change one's name, provided, of course, they are not for dishonest or unlawful ends.<sup>99</sup>

Nor did the bill require a petitioner to pay a filing fee. Since the notice of intention to use a certain name after marriage would be recorded on the marriage certificate and on the marriage records in the town clerk's office, there should exist no additional administrative burden which could justify a special fee. Should a bill be passed permitting couples to register a name change other than at the time of marriage, a small fee could be charged to cover the expense.

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<sup>97</sup> S. 197 (1974).

<sup>98</sup> 341 Mass. 167, 167 N.E.2d 847 (1960).

<sup>99</sup> 341 Mass. 167 at 170, 167 N.E.2d 847 at 850 (1960).

Those who objected to the necessity to file or to pay a fee could, of course, have continued to assert their common law right to any name they choose.<sup>100</sup> Once again, however, there is a risk that if a bill such as S. 197 is passed, it may be interpreted to preempt a married person's common law right to change her or his name by repute.<sup>101</sup>

#### V. THE CONSEQUENCES OF PROVIDING WOMEN WITH A CHOICE OF NAME

In a society where written records play a major role, the name that one uses is significant. The state has a legitimate interest in preventing confusion in the identification of individuals and in preventing fraud on third parties. Furthermore, in the United States there is a strong expectation that married women will use the surnames of their husbands after marriage.<sup>102</sup> As long as this expectation exists, confusion may result if a woman continues to use her maiden name, at least with respect to strangers. Yet, the common law right to use any nonfraudulent name<sup>103</sup> also anticipates a certain possibility of misidentification until one has become well known by his or her new name.

The major purpose of name related statutes is to provide an easy means of identification. If a woman uses her maiden name for all purposes, the function of such statutes is frustrated if she is required to be identified by her husband's name.

Confusion about the requirement that a married woman must use her husband's surname inheres in the fact that this usage does not effectively identify the husband. From the case law<sup>104</sup> it is quite clear that even if a woman's legal name includes her husband's surname, her legal name consists of her first name and her husband's last name. That is, if Jane Doe married John Roe, her legal name would be Jane Roe, not Mrs. John Roe. While husband and wife usually live in the same household (and, therefore, the identification of Jane as "Roe" helps to identify John as her husband), it is similarly possible that Jane and John Roe are sister and brother, mother and son, or completely unrelated.

Arguments alleging administrative inconvenience to compel women to use their husbands' surnames are equally untenable. In fact, requiring all women to change their names at marriage im-

<sup>100</sup> See part I B *supra*.

<sup>101</sup> See part I B *supra*.

<sup>102</sup> See, e.g., Lamber, *supra* note 17, at 779.

<sup>103</sup> See part I B *supra*.

<sup>104</sup> See, e.g., Koley v. Williams, 265 Mass. 601, 164 N.E. 444 (1929).



poses an even greater burden on the state. If a woman's surname is changed at marriage, she must alter all of her records, including credit cards, voter registration, and automobile registration and license. It would appear more sensible to have simply a space on each document for the name of the spouse if his or her identification were essential; the task of destroying unnecessarily outdated records would be avoided.

This section will examine various areas that are affected by name change laws and will demonstrate that the use by a woman of her own surname will bring little change to existing procedures, and may actually ameliorate others.

### A. State Administrative Regulatory and Licensing Schemes

1. *Automobile Registration and Driver's Licenses*—It will be recalled that the court in *Bacon v. Boston Elevated Ry.* stated in *dicta* that a woman's legal name included her husband's surname when a woman used her husband's name for all purposes except her automobile registration.<sup>105</sup> *Forbush v. Wallace* later held that under Alabama common law it was not unreasonable to require a married woman to apply for her driver's license in her married name despite the fact that she normally used her maiden name.<sup>106</sup> Automobile registration and driver's licenses have thus provided a common source of litigation.

In Massachusetts, the automobile registration statute contains the following language:

. . . The application shall contain, in addition to such other particulars as may be required by the registrar, a statement of the name, place of residence and address of the applicant. . . . The certificate [of registration] shall contain the name, place of residence and address of the applicant and the register number or mark, and shall be in such form and contain such further information as the registrar may determine.<sup>107</sup>

The purpose of the statute has been variously found to be "to afford easy means for the identification of motor vehicles and their owners,"<sup>108</sup> and "that the owner may be readily found by police

<sup>105</sup> 256 Mass. 30, 152 N.E. 35 (1926).

<sup>106</sup> 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.* 405 U.S. 970 (1972).

<sup>107</sup> MASS. GEN. LAWS ANN. ch. 90, § 2 (1965, as amended 1969).

<sup>108</sup> *Matherson v. Dickson*, 310 Mass. 18, 36 N.E.2d 382 (1941). *Accord*, *Sanjean v. Hyman*, 302 Mass. 224, 19 N.E.2d 3 (1939); *Lappanasse v. Loomis*, 297 Mass. 290, 8 N.E.2d 766 (1937); *Doyle v. Goldberg*, 294 Mass. 105, 1 N.E.2d 1 (1936); *Brodmerkle v. Gorolsky*, 293 Mass. 517, 200 N.E. 275 (1936).

officers, injured persons and others interested, without uncertainty or need for search."<sup>109</sup>

Yet the courts have permitted persons to receive automobile registrations in a name other than that given at birth, even without an order of the probate court making the name change "official." The only condition imposed has been that the registrant be generally known by the name on the registration. As mentioned above,<sup>110</sup> Theophilus Doucette was permitted to register his automobile under the name of Thomas Douey.<sup>111</sup> Ethel M. Williams was similarly permitted to register her car under the name of Mrs. John P. Williams since she was "better known" by that name "and could easily be identified by such designation."<sup>112</sup>

If the purpose of the automobile registration is to enable third parties to find a registrant without search, then such registration should be in the name most commonly used by that registrant. This purpose is defeated if a married woman using her maiden name must register her automobile in her husband's name.

The driver's license statute in Massachusetts<sup>113</sup> provides, *inter alia*, that a license shall contain the photograph and name of the licensee, and that

. . . every person licensed to operate motor vehicles as aforesaid shall endorse his usual signature on the margin of the license, in the space provided for such purpose. . . .

Although there is no case law regarding the purpose of the name requirement on a license, presumably it is the same as that for registration—to provide easy identification of the driver. The requirement that a photograph be affixed to the license eliminates any confusion as to the recognition of the operator; furthermore, the command that the license be endorsed with one's "usual signature" enforces the idea that the license should be in the driver's most frequently used name.

2. *Voting*—Because voting may appear to be more official than other government regulated activities, it is not surprising that many women who use their own surnames have great difficulty in persuading registrars that they may register in those names.<sup>114</sup>

<sup>109</sup> Ricker v. Boston Elevated Ry., 290 Mass. 111, 194 N.E. 815 (1935).

<sup>110</sup> See note 53 *supra*.

<sup>111</sup> Bridges v. Hart, 302 Mass. 239, 18 N.E.2d 1020 (1939). See note 56 *supra*.

<sup>112</sup> Koley v. Williams, 265 Mass. 601, 164 N.E. 444 (1929). Cf. Fine v. Kahn, 270 Mass. 557, 170 N.E. 462 (1930); Korsun v. McManus, 318 Mass. 642, 63 N.E.2d 457 (1945).

<sup>113</sup> MASS. GEN. LAWS ANN. ch. 90 § 8 (1946).

<sup>114</sup> See, e.g., notes 69-70 and accompanying text *supra*.

Many election clerks believe that persons must register in their "legal" names, and that a woman's legal name is that of her husband, whether or not she uses it in her daily life.<sup>115</sup> The state clearly has an interest in preventing voter fraud and in assuring that a person votes only once. However, if a woman uses only one name and has records in only one name, fraud is no more likely than in other situations.

The voting scheme in Massachusetts is contained in Chapter 51 of the General Laws.<sup>116</sup> Every person who is eighteen or older, who complies with the voting law, and who is a resident of the town where he or she claims the right to vote, may have his or her name entered on the voting list.<sup>117</sup> Every January or February, "police lists" are prepared, which contain the name, age, occupation, nationality, and residence of all persons over age seventeen in each town.<sup>118</sup> In April, street lists are prepared from the police lists and are distributed to all organized political committees and candidates.<sup>119</sup> These lists include:

. . . the name, age or date of birth, occupation and nationality if not a citizen of the United States, of every person listed under § 4 [police lists], and his residence on January 1st of the preceding year and of the current year. Every person so listed, shall, if he is a registered voter, be so designated by an asterisk or other symbol.<sup>120</sup>

The election registrars record in the general register the list of all qualified voters.<sup>121</sup>

They shall enter therein the name of every such voter written in full, or instead thereof the surname and first Christian name *or that name by which he is generally known*, written in full and initial of every other name which he may have. . . [emphasis added].<sup>122</sup>

Thus, there is no requirement that a voter be recorded on the register in his or her "legal" name. Voter fraud can be prevented by requiring a person to register in the name by which he or she is generally known. Therefore, registrars are acting unjustifiably in

<sup>115</sup> Goodman, *supra* note 69.

<sup>116</sup> MASS. GEN. LAWS ANN. ch. 51 (1973).

<sup>117</sup> MASS. GEN. LAWS ANN. ch. 51, § 1 (1971).

<sup>118</sup> MASS. GEN. LAWS ANN. ch. 51, § 4 (1971).

<sup>119</sup> MASS. GEN. LAWS ANN. ch. 51, § 6 (1973).

<sup>120</sup> MASS. GEN. LAWS ANN. ch. 51, § 7 (1969).

<sup>121</sup> MASS. GEN. LAWS ANN. ch. 51, § 37 (1973).

<sup>122</sup> MASS. GEN. LAWS ANN. ch. 51, § 36 (1971).

refusing to permit a married woman to register in her maiden name if that is the name by which she is commonly known.

Furthermore, one could logically argue that many existing statutory provisions permit a woman to register in her maiden name unless her name is changed in fact by marriage. For example, Section 2 of Chapter 51 of The General Laws provides:

If the name of a person who is duly registered as a voter is changed by decree of court, or if a female, by marriage, his or her right to vote in his or her former name shall continue until January first next following. . . .<sup>123</sup>

If a woman retains her maiden name after marriage, her name has not changed by marriage; her right to vote in her maiden name should therefore be unimpaired.

3. *Licensing Boards*—One of the major reasons for having licensing boards is to protect the public from unskilled or untrustworthy practitioners. The board examines license applicants and permits only those with proper qualifications to practice their professions. To defend the public adequately, it is necessary that the licensee be properly identified; the board must thus assure that one does not receive a license in more than one name.

This standard, however, does not differ from the requirement of the common law that one could assume a name only for a non-fraudulent purpose.<sup>124</sup> The board's obligation is satisfied by ensuring that a person seeking a license receive it in the name that he or she uses for all other transactions. There is no doubt that the board should encourage or require licensees to use one name only, but in the case of married women there is no reason why that name should be their husbands'. The purpose of licensing is defeated if a female licensee must be registered in a name which she would not otherwise use professionally.

Most licensing boards have no regulations regarding name changes; they just require that licensees be registered in their "name." A few boards have, however, dealt specifically with the problem. Typical of the latter group is the regulation of the Massachusetts Board of Registered Dispensing Opticians:<sup>125</sup>

The Board shall issue a new registration certificate to any licensee whose name has been legally changed upon receipt

<sup>123</sup> MASS. GEN. LAWS ANN. ch. 51, § 2 (1971).

<sup>124</sup> See part I B *supra*.

<sup>125</sup> Mass. Board of Registered Dispensing Opticians, Regulation of November 31, 1971. See also Mass. Board of Registration of Dental Examiners, Regulation of October 25, 1944; Mass. Board of State Examiners of Electricians and Board of Electricians' Appeals, Regulation of September 8, 1969, § 6.9.

of satisfactory evidence of the legality of such change, the return of the original certificate with satisfactory evidence that he is the same person to whom the certificate was issued, together with such fee as is required by law.

The issuance of the new certificate is predicated on some action by the licensee; that is, the surrender of the old license, evidence of the change, and a request for a new license. If a female optician did not change her name at marriage, she would not request a new license. If her name did change, she would not get a new certificate unless she submitted to the Board a copy of her marriage certificate. Although it would benefit the licensee to have the certificate changed to the new name used by him or her, the regulation of the Board ostensibly does not require this. It is clear, therefore, that a requirement of name change after marriage would cause unwarranted disruptions in the licensing scheme.

The Massachusetts Board of Registration in Nursing registers more women than men. Their regulation also is relevant to a married nurse's choice of name:

*Name on original certificate.* All original certificates issued by the board shall bear the individual's legal name in full or the first initial of each name. Unless the individual's name has been changed legally, i.e., by marriage or decree, the board will consider the name or names appearing on the birth certificate or other certified record of birth as the legal name. . . .

*Name on renewal certificate.* Unless evidence of authorization by court, notification of marriage, etc. has been submitted to the board, the renewal certificate will be issued under the same name as the original certificate.<sup>126</sup>

If one accepts the holding of the *Bacon* case,<sup>127</sup> the regulation implies that married women must receive their original certificates in their married names. However, the rule relating to a renewal certificate would be meaningless if a female nurse could not get her original license in her maiden name. Fortunately, the Board has interpreted the regulation to allow a married woman using her maiden name to receive her original certificate in that name.<sup>128</sup> It would perhaps be advisable for similar boards to provide in their regulations that both the original and renewal certificates be issued in the name by which the nurse is known professionally. Once again, existing administrative operations would continue to

<sup>126</sup> Regulation of July 30, 1971.

<sup>127</sup> *Bacon v. Boston Elevated Ry.*, 256 Mass. 30, 152 N.E. 35 (1926).

<sup>128</sup> The author verified this by a telephone call to the Board on February 28, 1974.

function with at least equal efficiency were a name change or surname retention right to be recognized.

### *B. Federal Administrative Regulations*

Although the effectuation of women's name change rights must be a state legal matter,<sup>129</sup> there will be a necessary interrelationship with the federal bureaucracy. Four of the most frequent areas of confrontation will be in the procurement of savings bonds, social security cards, and passports, and in the collection of the income tax.<sup>130</sup> As with state administrative functions, the recognition of a woman's right to retain her surname after marriage, or to change back to her maiden name, can not significantly affect the efficiency of these operations.

The issuance of savings bonds is regulated by the Code of Federal Regulations<sup>131</sup>, which permits the bond to be in the "name by which [the purchaser] is ordinarily known or the one under which he does business." The regulation seems to accept the common law concept of a name;<sup>132</sup> a married woman may be the beneficiary of a bond issued in her maiden name if she has generally used that name.

The Social Security Administration will not change the name on a social security card unless the new name is formally reported to the Administration.<sup>133</sup> An employer must enter on withholding forms the employee's name and account number for tax and social security purposes.<sup>134</sup> Therefore, no change of name can be forced upon a married woman by her employer unless she chooses to make the change herself. Information regarding the name to be used in business and that which was given at birth are required on the application forms, enabling those who wish to use one name socially and one professionally to do so validly.

The same analysis applies to state and federal income tax systems, for which the identifying notation is the social security number.<sup>135</sup> The number does not change with a change of name, and no statute requires a woman to file returns in her married name.

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<sup>129</sup> U.S. Const. amend. X.

<sup>130</sup> Much of the information in this subsection is found in Bysiewicz & MacDonnell, *supra* note 18, at 613-15.

<sup>131</sup> 31 C.F.R. § 315.5 (1973).

<sup>132</sup> See part I *B supra*.

<sup>133</sup> See Bysiewicz and MacDonnell, *supra* note 18, at 614.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

The Code of Federal Regulations also governs the passport procurement process.<sup>136</sup> There do not appear to be any official rules preventing a married woman from obtaining a passport in her maiden name,<sup>137</sup> although the formal language of the regulation would imply that a change from maiden name to married name at marriage would also require verification:

. . . any applicant who has changed his name by the adoption of a new name without formal proceedings shall submit with his application evidence that he has publicly and exclusively used the adopted name over a long period of time.<sup>138</sup>

### C. *Fraud on Creditors*

Permitting a woman to use her maiden name after marriage may elicit fears that fraud will be more easily perpetrated. However, from a creditor's standpoint, the problem is no greater than that faced when any other individual changes his name at common law.

Under common law rules, one could assume for business purposes a name other than that given at birth, as long as the name were not used fraudulently.<sup>139</sup> As the court in *Petition of Merolevitz*<sup>140</sup> stated, one can use an acquired name to make contracts, to institute or defend law suits, and to take title to property.

Although no particular evidence suggests that married women using their maiden names will be more likely than others to perpetrate fraud, appropriate sanctions do remain in force. For example, a common law action for damages for false pretenses may be available to a creditor.<sup>141</sup> Statutory remedies exist as well.<sup>142</sup>

<sup>136</sup> 22 C.F.R. § 51.24 (1973).

<sup>137</sup> This appears contrary to the implications of the letter reprinted in note 67 *supra*.

<sup>138</sup> However, the author's call to the Boston branch of the Passport Office revealed the following applicable rules: 1. If a woman has never had a passport, has married, and uses her husband's surname, it is not necessary to submit a marriage license or proof of marriage since the passport application asks for the name of one's spouse. 2. If a woman has had a passport issued in her maiden name, married, and adopted her husband's surname, it is necessary to furnish proof of the marriage. 3. If a woman has never had a passport, married, and retains her maiden name, no proof other than the normal identification is required. 4. If a woman has had a passport in her married name and wishes to change back to her maiden name, she must submit proof that she has used her maiden name for at least a year. It is not necessary for her to submit affidavits to that effect; charge cards or similar identification are sufficient.

<sup>139</sup> See part I *A supra*.

<sup>140</sup> 320 Mass. 444, 448, 450, 70 N.E.2d 249, 250 (1946). See note 24 and accompanying text *supra*.

<sup>141</sup> *Commonwealth v. Warren*, 6 Mass. 72 (1809).

<sup>142</sup> MASS. GEN. LAWS ANN. ch. 266, § 37B (1955).

§ 37B. Misuse of credit cards. Whoever, with intent to defraud, (a) makes or causes to be made, either directly or indirectly, any false statement as to a material fact in writing, knowing it to be false and with intent that it be relied on, respecting his identity or that of any other person, or his financial condition or that of any other person, for the purpose of procuring the issuance of a credit card . . . shall be punished by a fine of not more than \$500 or by imprisonment in a jail or house of correction for not more than one year, or both.

One might need to know the identity of a husband only if the husband were responsible for debts incurred by his wife. However, contracts made by a married woman relating to her separate property (which includes her income) do not bind her husband.<sup>143</sup> Nor is a husband responsible for the tortious conduct of his wife.<sup>144</sup> The only debts of the wife for which the husband is responsible are "necessaries."<sup>145</sup> When a merchant extends credit to a married woman for such purchases, he need simply ask for the name of her spouse; the wife need not use the same surname as her husband if the latter's identity is made known to the creditor. Furthermore, most credit card applications already require all applicants to supply the name of their spouses.<sup>146</sup>

If a wife were liable for the debts of her husband, then it might be desirable to know the identity of each spouse. But under the General Laws,<sup>147</sup> a married woman is not liable for the debts of her husband except for necessities (up to a value of \$100) furnished with her consent, if she has property worth more than \$2,000. Where a wife might be liable for certain debts of her husband, a creditor need only require identification of the spouse. As noted earlier,<sup>148</sup> identical surnames are not as good an index of marital relationship as the positive identification of a spouse.

A further credit problem develops for a married woman if she cannot use her own name in business and credit transactions. If all credit is extended in her husband's name, it may be very difficult for her to establish credit in her own right, even based

<sup>143</sup> MASS. GEN. LAWS ANN. ch. 209, § 9 (1931).

<sup>144</sup> MASS. GEN. LAWS ANN. ch. 209, § 6 (1963). Cf. *McCarty v. DeBest*, 120 Mass. 89 (1876); *Austin v. Cox*, 118 Mass. 58 (1875).

<sup>145</sup> MASS. GEN. LAWS ANN. ch. 209, § 7 (1963). "Necessaries" includes food and clothing. *Id.*

<sup>146</sup> See generally Littlefield, *Sex-Based Discrimination and Credit Granting Practices*, 5 CONN. L. REV. 575 (1973).

<sup>147</sup> MASS. GEN. LAWS ANN. ch. 209, § 7 (1963).

<sup>148</sup> See notes 138 and 143 and accompanying text *supra*.



upon her separate property. In addition, if a husband and wife were to divorce and the wife to resume her maiden name, she might be left entirely without credit although she had worked all her life.<sup>149</sup>

Centralized records are kept by the Secretary of the Commonwealth of all the information listed on Massachusetts marriage certificates.<sup>150</sup> Since the record is filed under both the maiden name of the wife and the surname of the husband, creditors can discover the identity of the husband of any woman married in Massachusetts, regardless of the name she uses. Wherever joint liability of husband and wife is a potential problem, identification of the spouse prior to the extension of credit should give sufficient protection to a creditor.

#### *D. Property Transactions— Interspousal Rights*

It would be far easier to conduct a title search were married women to retain their maiden names.<sup>151</sup> In Massachusetts, real property records are kept by a system of grantor/grantee books. The grantor index lists transactions in alphabetical order by the name of the grantor, and the grantee index performs a like function according to the name of the grantee. If a single woman receives property, the deed will record her name as grantee in her maiden name; if she marries and uses her husband's name, it is likely that as grantor of the property, the deed will list her in her married name. As a result, title searches may disclose an apparent gap in the holding of a parcel of property. One commentator has suggested that all "honest" grantees will indicate on a deed the maiden name of a married female grantor.<sup>152</sup>

Problems may arise even if a woman retains her maiden name, because tax assessments and liens may still be indexed under her husband's name. Property in which the grantor is listed as Alice Smith may have all incumbrances indexed under John R. Jones.<sup>153</sup> Spousal recognition will be difficult unless John R. Jones is speci-

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<sup>149</sup> Material prepared by Steven Patt for the Women's Lobby concerning the negative Judicial Council Report on H. 3364.

<sup>150</sup> MASS. GEN. LAWS ANN.ch. 46, § 17 (1960).

<sup>151</sup> Author's discussion with Ms. Audrey Ingber, a professional title examiner in New York.

<sup>152</sup> Johnson, *Title Examination in Massachusetts*, in A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY, 886, 913 (2d ed. 1969).

<sup>153</sup> *Id.* at 889.

fically identified as the husband of Alice Smith, whether or not both share a common surname.

Another type of problem arises when husband and wife are presumed to take property as tenants by the entirety rather than as joint tenants when a conveyance is made to them jointly.<sup>154</sup>

In joint tenancy, each tenant takes an undivided share in the property; a right of survivorship vests in the surviving tenant(s). However, the survivorship feature can be defeated if any joint tenant conveys his or her interest to a third party.<sup>155</sup> Thus, if X and Y owned property as joint tenants, and no conveyance to a third party were made, at the death of X, Y would own the entire parcel outright. However, if X conveyed his interest to Z during the former's lifetime, on the death of X, Y would have only an undivided one-half interest in the property.

A tenancy by the entirety is limited to ownership of property by husband and wife. As with the joint tenancy, each partner takes an undivided share in the property. However, barring termination of the marriage by divorce or annulment, the right of survivorship here is indestructible.<sup>156</sup> Thus, if the foregoing transaction were conducted in regard to a tenancy by the entirety, the conveyance to Z would be void, and Y would still be entitled to the entire parcel on the death of X.

Consequently, if a conveyance to a husband and wife jointly were to create a tenancy by the entirety rather than a joint tenancy, serious problems could arise if a woman used her maiden name after marriage. Third parties would have no notice of a tenancy by the entirety unless the parties were identified as husband and wife in the deed. To prevent such confusion, some statutes create a presumption that husband and wife take property as joint tenants; in order to create a tenancy by the entirety, the words "tenancy by the entirety" must be used explicitly.<sup>157</sup> Of course, if the relevant words are used, this gives sufficient notice to third parties that a tenancy by the entirety has been created, regardless of the surnames of the spouses.

At the death of one of the spouses, it may be necessary to prove the marital relationship. On intestacy, the wife or husband will need to be positively identified to assert his or her rights; if a

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<sup>154</sup> For the analysis in this section see generally A. CASNER & W. LEACH, *supra* note 144, at 281-83.

<sup>155</sup> A. CASNER & W. LEACH, *supra* note 144, at 282.

<sup>156</sup> *Id.* at 283.

<sup>157</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 184, §7 (1954, as amended 1973).

will or trust instrument does not identify the spouse beneficiary by name, identification problems also may arise. However, there should be no difficulty in proving the identity of a spouse with a different surname than the decedent, since the marriage certificate will include the birth-given names of each spouse.

A different problem arises with respect to dower and curtesy rights. If the husband and wife have different surnames, it may be more difficult for potential or actual bona fide purchasers of property to ascertain whether a spouse exists. Yet, at least as to marriages performed in Massachusetts, records are available in the Secretary of the Commonwealth's office to determine whether a marital relationship exists. Further documentation is ensured by the fact that many banks will not accept mortgages unless the grantor's spouse joins in the deed.

In addition, many states have substantially limited dower and curtesy rights.<sup>158</sup> In Massachusetts, such rights are now limited to only a one-third life interest in property of which the decedent spouse was seised at the time of death.<sup>159</sup> Even intestacy gives a spouse a minimum of a one-third outright interest in the property.<sup>160</sup> Furthermore, a husband or wife cannot claim curtesy or dower unless the will is renounced or the will explicitly provides to the contrary.<sup>161</sup> Therefore, only in a very few cases will a spouse elect to take dower or curtesy.

Potential conflicts in community property states may similarly be resolved in favor of allowing a woman to use her maiden name. As the following analysis will demonstrate, a purchaser of property should not be prejudiced by such a practice if a woman properly records her ownership in her maiden name.

If property is held by a married couple sharing a common surname, a bona fide purchaser would be held to have notice that the property was community property. A purchaser should similarly be held to a duty of inquiry regarding the true state of ownership of property held by two persons who do not share a common surname. Furthermore, if property is recorded only in the name of one spouse, the difficulties encountered in a title search would be no greater than if the deed were recorded solely in the name of a married woman who uses her husband's surname.

The state of California has mitigated the problem somewhat by

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<sup>158</sup> See E. SCOLES & E. HALBACH, JR., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 75 (2d ed. 1973).

<sup>159</sup> MASS. GEN. LAWS ANN. ch. 189, § 1 (1965).

<sup>160</sup> MASS. GEN. LAWS ANN. ch. 190, § 1 (1931).

<sup>161</sup> MASS. GEN. LAWS ANN. ch. 191, § 17 (1931).

creating a statutory presumption designed to expedite the process of verifying joint title. A married woman taking property pursuant to a written instrument takes the property separately if the deed contains her name alone.<sup>162</sup>

Regardless of the nature of the property rights in any given state, the unrestricted use by married women of their maiden names would create no additional hardship. Once again, any assertion of administrative burden in opposition to granting such a right stands weakly before the realities of the situation.

### *E. Children*

One of the most difficult assertions to dispute is that the use by married women of names different from those of their spouses and children will inevitably hasten the deterioration of family life. However, with higher divorce rates<sup>163</sup> it is no longer unusual for remarried parents and their children to have different surnames. In addition, it is not uncommon for a child to use a different surname from his mother's when the latter has custody after divorce.<sup>164</sup> A remarriage by a parent does not automatically change the name of the child; even an adoption does not confer a new name on a child unless such change is requested and the court, in its discretion, grants the petition.<sup>165</sup> Furthermore, if an individual seeks to change his or her name by petition to the probate court,<sup>166</sup> it is unnecessary for the spouse and the children of the petitioner to be included in the petition. If a person changes his or her name by repute at common law, the names of his or her spouse and offspring do not change unless they, too, develop new reputations.

If there is an agreement between husband and wife, all children in the family may not legally be required to receive their father's name; it is possible also for children to share their mother's surname.<sup>167</sup> This may strengthen family ties by demonstrating to the children that their parents are equal partners in a marital relationship. One may conclude that because little empirical data

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<sup>162</sup> CAL. CIV. CODE § 5110 (West 1969).

<sup>163</sup> U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 38 (1973).

<sup>164</sup> Hughes, *And Then There Were Two*, in *Symposium—Women's Rights*, 23 HASTINGS L.J. 233, 244 (1971).

<sup>165</sup> MASS. GEN. LAWS ANN. ch. 210, § 6 (1971).

<sup>166</sup> Under MASS. GEN. LAWS ANN. ch. 210, § 6 (1971).

<sup>167</sup> 73/74-29 MASS. OP. ATT'Y GEN. (1974).

exists, the familial effects of having parents who use different surnames remain unclear.

It is also argued that differences between children's surnames and those of their fathers imply illegitimacy.<sup>168</sup> However, if it becomes difficult to ascertain whether a child is a bastard merely by comparing the surnames of father and child, the opposite effect may result: the stigma of illegitimacy may diminish.

As previously mentioned,<sup>169</sup> at least one attorney general has concluded that if a married woman has "changed" her name to her maiden name by petition to the probate court, she and her husband may give the child her surname.<sup>170</sup> The Massachusetts Attorney General reasoned that no statute required a legitimate child to take on its father's surname.<sup>171</sup> Since a married woman could use a name different from her husband's through the mechanism of the probate court petition, the state demonstrated no strong interest in requiring families to share a surname.<sup>172</sup> Courts have held that even a child may acquire a new name; the right to name a baby is relegated to its parents.<sup>173</sup> Although the Attorney General did not reach the question of whether the same analysis applied to a woman who simply retains her maiden name, there is no significant distinction.

A different problem is raised when parents who do not share a surname disagree about the surname of their legitimate child. Massachusetts courts have approached the problem only in cases of divorce, where the parents do not share a household. In *Mark v. Kahn*,<sup>174</sup> an equity proceeding was brought by the father to enjoin his former wife and her current husband from registering his children in school under the surname of the mother's current husband. While the court recognized that at common law one could change one's name at will,<sup>175</sup> it was unwilling to concede that a parent could force on a child a name different from that by which the child had always been known.<sup>176</sup> The court would determine whether a child should be obliged to change his surname according to the best interest of the child and the degree of estrangement of the child from the complaining father.<sup>177</sup> The

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<sup>168</sup> See, e.g., U. STANNARD, *supra* note 69, at 48.

<sup>169</sup> See note 17 *supra*.

<sup>170</sup> 73/74-29 MASS. OP. ATT'Y GEN. (1974).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See Lamber, *supra* note 17, at 805.

<sup>174</sup> 333 Mass. 517, 131 N.E.2d 758 (1956).

<sup>175</sup> 333 Mass. at 520, 131 N.E.2d at 761.

<sup>176</sup> 333 Mass. at 520-521, 131 N.E.2d at 761-62.

<sup>177</sup> 333 Mass. at 521-22, 131 N.E.2d at 760.

court implied that to allow the children to assume a name other than their father's would, in this instance, weaken an already tenuous relationship. Therefore, the injunction was granted.

Similarly, in *Margolis v. Margolis*,<sup>178</sup> the court enjoined the school registration of children of divorced parents under their mother's maiden name. The trial judge found that to use that name would adversely affect the father's relationship with his children.

It is not clear what courts would do where parents are not divorced and where the child has not already acquired his or her father's name by repute. One author has suggested that the courts have maintained the right of the father to name his children on the basis of a "head of household" test or because he has the duty to support his children.<sup>179</sup> Consequently, when courts realize that women may equally contribute to the economic support of the family, the father's exclusive right to name his children will vanish accordingly:

Where, then, does this leave the mother who wishes to give her children her own surname or a hyphenated surname composed of her name and her husband's name? The laws will undoubtedly follow the changed status of women. Gradually, the term 'Head of the Family' has meaning only in a divorce proceeding in which a wife is seeking support from the husband. If a woman contracts a marriage on an equal standing with her husband, and she supports her children, she can name her children anything she wishes on a mutual agreement and she can maintain equal control in the family. However, this equal status is incompatible with financial dependency of the wife.<sup>180</sup>

It should be noted that the above premise is predicated upon mutual agreement. Should a parent object to the use of someone else's surname for the child, it would be appropriate for the courts to use a *Mark v. Kahn*<sup>181</sup> test, and decide each case on its facts.

### *F. Conflict of Laws*<sup>182</sup>

The law of name change raises some interesting but as yet

<sup>178</sup> 338 Mass. 416, 155 N.E.2d 177 (1959).

<sup>179</sup> See Carlsson, *supra* note 4.

<sup>180</sup> *Id.* at 568.

<sup>181</sup> See note 175 and accompanying text *supra*.

<sup>182</sup> The author wishes to express her gratitude to Professor Donald Trautman of the Harvard Law School for his help with this section.

unresolved issues on conflict of laws. If a woman in Massachusetts has the right to change or to retain her maiden name, does that right remain intact when she moves to another state? The question arises in three name change situations: (a) where a woman changes her name by decree in probate court; (b) where a woman retains her maiden name at common law; and (c) where a woman asserts her own surname on the basis of a statute.<sup>183</sup>

If a woman has her name changed to her maiden name by decree of a probate court in one state, that decree should be honored in other states.<sup>184</sup> If other states claim an overwhelming interest in the use by married women of their husbands' surnames, they might prevail, but it would be difficult to establish a valid state interest in this field.<sup>185</sup> Rather, a probate court decree on name change should be treated like a probate court decree of adoption. Under normal conflict principles, the status of a person as an adopted child is decided under the law of the state rendering the adoption decree.<sup>186</sup> Analogously, if under the law of one state a probate court confers a name on a person, the legality of the name should be determined with reference to that state's law.

A woman who uses her maiden name under her common law right<sup>187</sup> and who then moves to a state which requires by statute or regulation that a woman use her husband's surname, would probably lose her right to use her own surname. This was the situation in *Forbush v. Wallace*,<sup>188</sup> which remains applicable to the conflicts issue.<sup>189</sup> Wendy Forbush retained her maiden name after marriage under Maryland common law, and she moved to Alabama. That state required her to receive her driver's license in her husband's name, and the Supreme Court upheld Alabama's right to do so.<sup>190</sup>

Surname retention pursuant to a statutory provision might be analogized to legitimization. Both are statutory procedures, and both involve the granting of a status in one state which must be

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<sup>183</sup> An example would be a statute patterned after S. 197. See note 90 and accompanying text *supra*.

<sup>184</sup> U.S. CONST. ART. IV, § 1.

<sup>185</sup> See parts V A and V B *supra*.

<sup>186</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 290 (1971).

<sup>187</sup> See part I B *supra*.

<sup>188</sup> It should be recalled that the *Forbush* decision is of questionable precedential value due to Ms. Forbush's concession of the common law rule. *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.* 405 U.S. 970 (1972).

<sup>189</sup> See notes 33-42 and accompanying text *supra*.

<sup>190</sup> However, a court applying the principles enunciated in *Stuart v. Board of Election* might reach a contrary result. 266 Md. 440, 295 A.2d 223 (1972).

given effect in another state.<sup>191</sup> Furthermore, in both cases the state in which the person is domiciled frequently has a greater interest in the status of the individual than the state where the initial act took place. Yet the Restatement of Conflict of Laws states that:

§ 287. (1) Whether a child is legitimate is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the child and the parent under the principles stated in § 6.

(2) The child will usually be held legitimate if this would be his status under the local law of the state where either (a) the parent was domiciled when the child's status of legitimacy is claimed to have been created or (b) the child was domiciled when the parent acknowledged the child as his own.<sup>192</sup>

The comment to this section explains that:

A status of legitimacy once created under the principles stated in the rule of this section will usually be recognized in another state even with respect to an issue, such as inheritance, in the determination of which the other state has the dominant interest.<sup>193</sup>

Presumably, even under these conflicts principles, a state could invalidate another state's legitimization if the former state's public policy against a particular legitimization were overwhelming. However, an interpretation of the conflicts principles of legitimization suggests that a statutory name change should be accepted in the new state.

## VI. CONCLUSION

While an increasing number of married women have begun to assert their own surnames, opposition to recognition of the right continues to cause unnecessary bureaucratic and social confrontations. Refusals to permit the use of maiden names are often justified by a misplaced reliance upon the notion that a woman's legal name includes her husband's surname. According to the common law, however, a legal name is simply the name by which a person is generally known. Thus, although it has been customary for married women to adopt their husbands' surnames, no legal

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<sup>191</sup> See note 182 *supra*.

<sup>192</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 287 (1971).

<sup>193</sup> *Id.*, Comments to subsection (2) at 257.



rule establishes a prohibition against women retaining or reasserting their maiden names.

The additional bureaucratic burdens that would allegedly accompany the right to retain or reacquire maiden names do not, in fact, exist. The problems encountered in processing the multitude of women who automatically change their surnames at marriage are perhaps even greater at present than they would be were women unquestionably permitted to retain their own surnames.

Furthermore, doubts concerning property transactions and possible creditor fraud can be resolved by requiring adequate spousal identification and by enforcing existing anti-fraud sanctions.

The potential avenues of legal recourse are varied, although the most preferable solution remains universal recognition of the common law right to retain one's own surname. In view of the obstinance of many low-level bureaucrats, however, a statutory route might also be effectively followed. Regardless of which path is chosen, it is imperative that existing discrimination – which constitutes a denial of equal protection to women – be eliminated.