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MOTHER VS. FATHER: THE RIGHT TO THE NAMING OF CHILDREN IN THE UNITED STATES AND AUSTRALIA

DEBORAH ANTHONY*

ABSTRACT

In England, surname use was at one time quite variable and individualized. This was particularly true for women, who historically held individualized surnames reflecting their specific traits, occupations, statuses, or family relations. Women sometimes retained their birth names at marriage and passed those names on to their husbands and children. But these diverse surname practices eventually disappeared from practice and from collective social memory in England. The new restrictive inherited practice then became highly entrenched in both Australia and the United States, with the latter seeing not only social but legal forces arising to enforce it. Legal battles eventually arose concerning the scope of women's right to surname autonomy, particularly in the United States. These conflicts extended to the naming of children in the latter half of the twentieth century.

Women in both Australia and the United States now have a recognized right to retain their birth names after marriage. However, when it comes to the naming of children in the event of disagreement between the parents, analysis of statutes and court cases involving child surname disputes reveals that women's rights are still legally secondary to those of men in the United States, often in effect and sometimes even directly by law. The same is much less true of Australia, where women regularly prevail in such cases.

While each nation ostensibly applied the same English common law in the application of surname requirements, both judicial interpretation of the legal requirements and empirical results of those interpretations are strikingly at odds with each other. This reveals the volatility and subjectivity of what is ostensibly a consistent and reasonably objective common law system.

INTRODUCTION

- I. BACKGROUND/HISTORY OF SURNAMES
- II. CURRENT LEGAL BATTLES

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INTRODUCTION

Surname use in England's history was at one time quite variable and individualized.¹ This was particularly true for women, who often held individualized surnames reflecting their specific traits, occupations, status, or family relations.² Women sometimes retained their birth names at marriage and passed them on to family members.³ These diverse surname practices eventually disappeared from collective social memory in England, and by extension, the nations that were once its colonies.⁴ The new restrictive inherited surname practice then became highly entrenched in both Australia and the United States, with the latter seeing not only social but legal forces arising to enforce it.⁵ Legal battles eventually arose concerning the scope of women's right to surname autonomy, particularly in the United States, as applied to both themselves and their children.⁶ "[American] courts justified restrictive decisions about women's [lack of surname rights] by reference to a 'tradition' so fundamental and absolute that it merited legal coercion despite nearly a millennium of common law and empirical evidence to the contrary."⁷ The common law was overtly warped to support the desired outcomes. Curiously, while the surname custom was just as prevalent in Australia, attempts to enforce it legally were both rare and unsuccessful.

1. Deborah Anthony, *Eradicating Women's Surnames: Law, Tradition, and the Politics of Memory*, 37 COLUMBIA J. OF GENDER AND LAW 1, 1–2 (2018).

2. *See id.* at 2.

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.* at 11–14.

7. Anthony, *supra* note 1, at 2.

Today, women in the United States possess formal legal surname equality with respect to their own surnames, although older sex-based naming conventions not only persist but are also still informally enforced in certain ways via public policy.⁸ In Australia, however, the marital naming custom was more consistently recognized as merely a cultural practice that remained a matter of choice rather than a legal mandate.⁹ There, the issue was the subject of significantly fewer legal and policy battles involving the sorts of coercion and punishment of women that were seen in the United States through the 1980s.

The conflicts surrounding the right of surname determination extended to the naming of children in the latter half of the twentieth century in both the United States and Australia. The vast majority of children are given the surname of the father in both countries, even when the mother does not share that name.¹⁰ But when the parents cannot agree on the question initially, or when one parent wishes to change a child's surname sometime later against the wishes of the other, courts have been tasked with determining which parent should prevail and why. Questions about tradition, common law, family and individual identity, and the gendered nature of custom come to the forefront in these decisions.

Analysis of statutes and court cases involving children's surname disputes between parents in the United States reveals a variety of approaches and legal standards, inconsistency in the application of those standards, and an apparent *de facto* preference for the father making the rights of women legally secondary to those of men in the United States.

The same is not true of Australia, where women regularly prevail in disputes over the surnames of their children. This is true even when judges apply identical legal standards as those used in the United States. While each nation ostensibly applied the same English common law in the application of surname requirements, judicial

8. *See id.*

9. Nina Evason, *Naming*, CULTURAL ATLAS (2021), <https://culturalatlas.sbs.com.au/australian-culture/australian-culture-naming> [<https://perma.cc/V932-UY7A>].

10. Colleen Nugent, *Children's Surnames, Moral Dilemmas: Accounting for the Prevalence of Fathers' Surnames for Children*, 24 GENDER & SOCIETY 499, 500 (2010) (noting that as of 2002, approximately 97% of married couples gave their first child only the father's name); *see also* Charlotte J. Patterson & Rachel H. Farr, *What Shall We Call Ourselves? Last Names Among Lesbian, Gay, and Heterosexual Couples and Their Adopted Children*, 13 J. OF GLBT FAMILY STUDIES 97, 106 (2017) (finding that 96% of children were given the surname of the father); *see also* Shivani Gopal, *Whose Name Should You Give Your Children—Father's or Mother's?*, REMARKABLE WOMAN (Mar. 1, 2024), <https://elladex.com/insights/whose-name-should-you-give-your-children-fathers-or-mothers> [<https://perma.cc/GR54-UD54>] (stating that in Australia, 90% of children are given the father's surname, while that number drops to 75% if the parents are unmarried).

interpretation of the legal requirements and the empirical results of those interpretations are strikingly at odds with each other. Despite that shared historical legal background, the judicial development that is supposedly based on the same common law can, in the face of social and political pressures, not only lead to divergent results, but also to a manipulated presentation of cultural and legal history to support them. While the effects of such jurisprudential differences are fairly clear, the reasons underlying them are less so.

I. BACKGROUND/HISTORY OF SURNAMES

Cultural surname practices worldwide are quite variable, and surnames in the United States and Australia have been influenced by diverse cultural practices and traditions.¹¹ This Article focuses exclusively on English history, primarily because the English common law was incorporated into U.S. and Australian law and, as will be seen below, has had formal and concrete effects on the development of both custom and law regarding surnames.

“Surnames entered the scene in England with the Norman Conquest of 1066; the previous Saxon culture utilized only given names.”¹² The use of surnames gradually spread throughout the region, becoming more commonly adopted and used by the population over the ensuing centuries.¹³ Multiple factors contributed to this trend, including the limited number of first names in use and the resulting difficulty in distinguishing individuals, the increase in government record-keeping and taxation and its attendant need to accurately identify and catalog individuals, and the desire to more easily align and designate family estates and the inheritance systems that would perpetuate them.¹⁴

Yet surnames at that time bore little resemblance to their modern forms. “English surname usage prior to [around] the seventeenth century was not only variable, but the [custom] for women bore little resemblance to the typical ‘traditional’ practices seen in modern-day England.”¹⁵ Nearly entirely forgotten are the once-common ways in which surnames were applied to and used by women, reflecting characteristics of their individual lives including personal traits, occupations, or family relations.¹⁶ A great many historical records reveal that surnames relating specifically to women existed in various dynamic

11. Anthony, *supra* note 1, at 4.

12. *See id.*

13. WILLIAM DODGSON BOWMAN, *THE STORY OF SURNAMES* 8 (1932).

14. L. G. PINE, *THE STORY OF SURNAMES* 11 (3d ed. 1970).

15. Anthony, *supra* note 1.

16. *See id.* at 5–6.

forms. Some names referenced a woman's father (Stevendoghter,¹⁷ Tomdoutter,¹⁸ Rogerdaughter¹⁹); her mother (Ibbotdoghter,²⁰ Anotdoghter²¹); her occupation (Selkwimman (female dealer in silk),²² Bredsellestere (female seller of bread),²³ Vikerwoman (female servant of the vicar)²⁴); or her familial status (Wedewe (widow),²⁵ Moder (mother),²⁶ Tomwyf²⁷). Surnames of men often identified their mothers (Margretson,²⁸ Elynoreson,²⁹ Wideweson,³⁰ Dyson,³¹ Allison³²); other female relatives (Marekyn,³³ Maggekin,³⁴ Lovekin³⁵); or their status with respect to a woman (Moderles (motherless),³⁶ Mariman (servant of Mary)³⁷). Oftentimes a woman's given name would become the surname of her children or other relatives (Agnes,³⁸ Marie,³⁹ Edith,⁴⁰ Helene⁴¹).

Even when surnames became more commonly inherited from parents around the fifteenth century, women were often the parent to pass down the surname to their children. There are many historical examples of married women with surnames that differ from their husbands, whose children bear surnames matching the mother rather than the father.⁴² Some records indicate that children were as likely

17. P.H. REANEY & R.M. WILSON, A DICTIONARY OF ENGLISH SURNAMES li (3d ed. 1997) (found in 1379).

18. "Daughters." *Id.* at 127.

19. *Id.* at xviii.

20. *Id.*; Ibb-ot is a diminutive Ibb, a pet form of Isabel. "Ibbott." *Id.* at 247.

21. "Daughters." *Id.* at 127; Annot is a diminutive of Ann. "Annatt." *Id.* at 12.

22. "Silk." *Id.* at 409.

23. P.H. REANEY, THE ORIGIN OF ENGLISH SURNAMES 84 (1967).

24. REANEY & WILSON, *supra* note 17, at li.

25. PETER FRANKLIN, THE TAXPAYERS OF MEDIEVAL GLOUCESTERSHIRE: AN ANALYSIS OF THE 1327 LAY SUBSIDY ROLL WITH A NEW EDITION OF ITS TEXT 62 (1993).

26. "Mothers." REANEY & WILSON, *supra* note 17, at 315.

27. (Wife of Tom). REANEY, *supra* note 23, at 83.

28. "Margretson." REANEY & WILSON, *supra* note 17, at 298.

29. "Ellenor." *Id.* at 153.

30. FRANKLIN, *supra* note 25, at 107.

31. Son of Dye, short for Dionisia. REANEY & WILSON, *supra* note 17, at 147.

32. Son of Alice. REANEY & WILSON, *supra* note 17, at 7.

33. REANEY & WILSON, *supra* note 17, at xxxix (kinsman of Mary).

34. "Maggott." *Id.* at 293 (Magge is a pet form of Margaret).

35. "Lovekin." *Id.* at 285 (Love is a female given name).

36. "Motherless." *Id.* at 315.

37. "Mariman." *Id.* at 298.

38. "Agnes." *Id.* at 3.

39. P.H. REANEY & R.M. WILSON, A DICTIONARY OF ENGLISH SURNAMES xx (3d ed. 1997).

40. FRANKLIN, *supra* note 25, at 63.

41. "Ellen." REANEY & WILSON, *supra* note 17, at 153.

42. See Deborah Anthony, *To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames*, 5 BR. J. AM. LEG. STUDIES 217, 232–33 (2016) (alternatively, at times the child's given name would match the mother's surname).

to inherit their surnames from their mother as from their father.⁴³ Other times children would be given a surname matching that of their grandmother, rather than either their mother or father.⁴⁴ In addition to retaining their own surnames after marriage, women also at times passed their surnames onto their husbands.⁴⁵

While the frequency of these practices varied by period, region, and circumstance, these surname practices can be found in England as early as surnames first appeared; they were in widespread use, and continued in the record for hundreds of years.⁴⁶ This surname fluidity, when considered with other historical evidence, suggests that women possessed a social visibility and status, as well as a nuanced, independent, and autonomous legal identity, in stark contrast with later developments. Indeed, what we consider to be traditional when it comes to naming practices (women assuming the name of the husband and children that of the father) is in fact a relatively recent phenomenon rather than a product of ancient English practice.⁴⁷ “For roughly 800 years, English women underwent an extended period of decline in rights and status, with the most pronounced and abrupt shifts taking place in the early modern period beginning about the middle of the seventeenth century.”⁴⁸

New notions of citizen and non-citizen, self and other, emerged with the advent of the Enlightenment, as well as with the political creation of the nation-state and the advancement of colonialism and imperialism in the early modern period.⁴⁹ These concepts were employed to reinforce a patriarchal regime which deceptively claimed that the natural order, common sense, long history, and divine right supported the male-oriented surname system in its creation of new systems of rights and identity.⁵⁰ Strikingly, however, the collective social consciousness fails to acknowledge these developments. “Instead, the older, [more fluid] norms were wiped clean from collective memory and the new [patriarchal] practices, being [essential] to maintaining the new dominant social status quo, were made ‘traditional.’”⁵¹ That state of affairs became foundational at the establishment of the American and Australian colonies. Yet a comparative investigation of surname practices in the United States and Australia reveals

43. Anthony, *supra* note 1, at 6–7.

44. See Anthony, *supra* note 42, at 235.

45. See *id.* at 233.

46. See Anthony, *supra* note 1, at 7.

47. See *id.* at 10.

48. See *id.* at 2.

49. See *id.*

50. See *id.*

51. See *id.*

that the ways in which each nation has engaged with that cultural and legal history have varied in the years since.

II. CURRENT LEGAL BATTLES

Recent scholarship investigating marital surname practices has found that about 80% of Australian women take their husband's surname upon marriage,⁵² with up to 94% of American women doing so.⁵³ Most children are given the surname of the father,⁵⁴ though in an increasing number of cases, some other alternative is pursued. Children may be given the surname of their mother, especially when the mother is unmarried at the time of the birth. This may result in the father later requesting that the child's surname be changed to his—sometimes many years later. In some cases, the child is given the father's surname at birth, and it is the mother who later requests that it be changed. In all such cases, the courts must determine how to address the issue, and both the United States and Australia have regularly dealt with these questions. While the process and standards applied in these cases are ostensibly similar, the application and results have been significantly divergent.

Since the latter part of the 20th century, courts in both Australia and the United States tasked with deciding issues relating to children have adopted the “best interests of the child” as the controlling standard informing those decisions.⁵⁵ Although there is no single, universal definition of the term, the concept refers to the focus on the short- and long-term well-being of the child as a guiding principle in judicial actions and orders superseding the desires or best interests of the parents or others.⁵⁶ Where parental rights are also considered fundamental, the best interests of the child and the rights of the parents (as determined by the court) may not always be coextensive, creating an inherent tension in the law. Furthermore, what actions serve the child's best interests is at times rather

52. Ella Sangster, *Why Do Women Traditionally Take Their Husbands' Surnames?*, HARPERS BAZAAR, <https://harpersbazaar.com.au/why-women-take-husbands-surname/> [<https://perma.cc/L5FJ-NQYS>] (last visited June 12, 2024).

53. Lucy Pasha-Robinson, *Poorly-Educated Men Judge Women Based on Whether They Take Their Husband's Surname, Report Finds*, INDEPENDENT (Jan. 27, 2017), <https://www.independent.co.uk/news/world/americas/poorly-educated-men-judge-women-husband-surname-report-finds-a7548571.html> [<https://perma.cc/B6KM-ZK74>]; Gretchen E. Gooding & Rose M. Kreider, *Women's Marital Naming Choices in a Nationally Representative Sample*, 31 J. FAMILY ISSUES, 681–701 (2010).

54. Nugent, *supra* note 10, at 499.

55. 40 A.L.R.5th 697 (1996).

56. *Id.*

subjective, informed by the decision maker's own predilections and normative viewpoints, as the cases reveal.⁵⁷

A. *United States*

1. *Case Law*

In the latter decades of the twentieth century, after women in the United States won the right to their own surname autonomy and the logic of natural male rights to the naming of the wife fell away as constitutionally indefensible, the underlying principles of paternal privilege forged on in cases related to children.⁵⁸ The judges in these cases often continued to defer—quite overtly at times—to rights of the man to the naming of his progeny.⁵⁹ American courts and other administrative entities have espoused the notion that a father—by virtue of being the father—has a “protectible interest in having his child bear his surname”⁶⁰ and that it is “well known” that “a surname provides a means of identifying the child with the father’s family.”⁶¹ These courts frequently not only referenced tradition, but also placed it at the foundation of legal decision making and made it the singular standard on which male rights must be upheld.⁶² The (perceived) tradition was therefore the weapon used to defeat all other rights or interests claimed. That purported tradition that was “well-known” was often not cited or documented in these cases.⁶³

A multitude of cases thus prioritized the paternal surname. It is a “natural right,”⁶⁴ a “fundamental right,”⁶⁵ a “protectable”⁶⁶ right

57. *Id.*

58. Anthony, *supra* note 1, at 17–18.

59. *Id.* at 14.

60. Newman v. King, 433 S.W.2d 420, 423 (Tex. 1968).

61. Bennett v. Northcutt, 544 S.W.2d 703, 707 (Civ. App. Tex. 1976).

62. See *In re Trower*, 260 Cal. App. 2d 75, 77 (1968); *In re Worms*, 252 Cal. App. 2d 130, 134–35 (1967); *Montandon v. Montandon*, 242 Cal. App. 2d 886, 889–92 (1966); *In re Larson*, 183 P.2d 688, 690 (Cal. App. Dep’t Super. Ct. 1947).

63. See, e.g., *Matter of Morehead*, 706 P.2d 480, 482 (Kan. App. 1985) (claiming without citation that “[i]t is longstanding tradition in this country that a child carry the surname of his father.”).

64. *West v. Wright*, 283 A.2d 401 (Md. 1971) (“[T]he father has a natural right to have his son bear his name and . . . the court should not endeavor to interfere with the usual custom of succession of paternal surname nor foster any unnatural barrier between father and son.”).

65. *Young v. Board of Education of City of N.Y.*, 114 N.Y.S.2d 693 (1952).

66. *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. App. 1979); *In re Application of Tubbs*, 620 P.2d 384 (Okla. 1980); *Ex Parte Stull*, 280 S.E.2d 209 (S.C. 1981); *In Interest of Baird*, 610 S.W.2d 252 (Tex. Civ. App. Fort Worth 1980).

that is “primary” and “time-honored,”⁶⁷ and both a legal right⁶⁸ and a common law right⁶⁹ that brings with it federal and state due process protections,⁷⁰ which should hold in the absence of “extreme circumstances.”⁷¹ The right is so crucial that a mother can be prohibited from using any other surname for her child even on an informal basis.⁷² Disruption of the right is “not commensurate with genealogy, history, justice and fairness in the United States.”⁷³ An Arizona appeals court noted in upholding the father’s rights that the mother “cannot point to tradition and custom as can the father.”⁷⁴ The Arkansas Supreme Court expressed a judicial deference to “the usual custom of succession of the parental surname.”⁷⁵ The Ohio Court of Appeals went so far as to claim that “[i]t has been the custom in our country since the time ‘when the memory of man runneth not to the contrary; to give to a child the surname of its father.’”⁷⁶ California courts have referred to the father’s “primary right”⁷⁷ and “protectible interest”⁷⁸ in having his children bear his surname. Courts in New York upheld a father’s “right to have his children use his name”⁷⁹ and determined that action to the contrary would “deprive a son of his father’s surname,” which would be a “serious and far-reaching action.”⁸⁰ The Nebraska Supreme Court in 2001 determined that the trial court had jurisdiction in a paternity action to change a child’s name from the mother’s to the father’s—but could not, as a matter of law, change the name from the father’s to anything else (in that case, the mother had requested a hyphenated surname to include hers with his).⁸¹

Many of these twentieth century cases seem to waver between purporting to be concerned only with the child’s best interests and

67. Application of Shipley, 205 N.Y.S.2d 581 (Sup. Ct. 1960).

68. Steinbach v. Steinbach, 119 N.Y.S.2d 708 (Sup. Ct. 1953).

69. Application of Trower, 260 Cal. App. 2d 75.

70. Carroll v. Johnson, 565 S.W.2d 10, 17 (Ark. 1978).

71. *In re Harris*, 236 S.E.2d 426, 427 (W. Va. 1977).

72. Brown v. Carroll, 683 S.W.2d 61 (Tex. App. 1984).

73. Montandon v. Montandon, 242 Cal. App. 2d 886 (1966).

74. Laks v. Laks, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975).

75. Carroll v. Johnson, 565 S.W.2d at 14.

76. Kay v. Bell, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) (citing 29 Ohio Jurisprudence, Names, Section 3; 38 American Jurisprudence, Name, Section 3, at page 596; 65 C.J.S., Names, § 3a).

77. *In re Larson*, 183 P.2d at 690.

78. Application of Trower, 260 Cal. App. 2d at 77.

79. Galenter v. Galenter, 133 N.Y.S.2d 266, 268 (Sup. Ct. 1954).

80. Application of Zipper, 153 N.Y.S.2d 282, 283 (App. Div. 2d Dept. 1956); *In re Application of Tubbs*, 620 P.2d at 384.

81. Jones v. Paulson, 622 N.W.2d 857, 860 (Neb. 2001) (“However, § 71-40.03 does not grant the district court the power, in a paternity action, to change the child’s surname to something other than the father’s surname.”).

deferring to the paternal naming custom. A Florida Appeals Court likewise held that not bestowing the father's name on a minor child is "[such] a serious matter [that it is justified only when it is shown] that such change is required for the welfare of the minor."⁸² Yet the circumstances in which courts determined that the change was in fact required for the child's welfare were narrow and limited, and also infused with notions of the father's rights. When the child themselves requested the name change away from the father's, this too was often insufficient. The Supreme Court of Nebraska dismissed the child's preferences in a 2002 case and found it significant in ruling for the father that his parental rights had not been terminated; he wrote to the child, talked with them on the telephone, and sent the child presents.⁸³ Such a focus on the existence of the most basic parental involvement on the part of the father was a common refrain. Courts have questioned whether the father has willfully abandoned or surrendered the natural ties between himself and his children in determining whether his surname should be preferred⁸⁴—a very minimal standard that was not applied to mothers when the question is whether their surname should be removed. Even where the father had already agreed to give the child the mother's name, and later changed his mind, he prevailed in his request to change the child's name to his, with the court noting that the father had paid his required child support and exercised visitation.⁸⁵ The standards required for fathers to maintain surname rights of their children are minimal, according to these decisions, and involve only the most basic parental involvement. When the parents of a child are no longer together, the general (rebuttable) presumption is that the parent who has been given custody is acting in the best interests of the child, including decisions about the child's education, health, residence, etc.⁸⁶ It is implicit in the decision to grant the parent custody that they will act in the child's interests. Yet when it comes to surname decisions, the courts have taken the opposite approach: that the custodial parent not only deserves no such presumption, but that they may in fact be acting *against* the child's interests.⁸⁷

As late as 2006, the West Virginia Supreme Court held that a father who exercises his parental rights has a "protectable interest in his children bearing his surname, and this interest is one *quid*

82. *Lazow v. Lazow*, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962).

83. *Davenport v. Davenport (In re Davenport)*, 641 N.W.2d 379, 381–83 (Neb. 2002).

84. *West v. Wright*, 283 A.2d at 403.

85. *Moon v. Marquez*, 999 S.W.2d 678 (Ark. 1999).

86. *Petersen v. Burton*, 871 N.E.2d 1025 (Ind. Ct. App. 2007).

87. *In re H.S.B.*, 401 S.W.3d 77 (Tex. App. 2011).

pro quo of his reciprocal obligation of support and maintenance.”⁸⁸ In other words, providing support to the child automatically grants him surname privileges. Such privileges only inhere in the father; mothers who support their children are given no such default presumption.⁸⁹ The Indiana Court of Appeals took the same approach a year later, holding that the statutory surname presumption in favor of a parent who has been making support payments applied only to the father and not the custodial parent mother.⁹⁰ An Oklahoma father was similarly granted his request to change his child’s name to his because he was fulfilling his basic parental responsibilities.⁹¹ The support of the custodial parent is legally irrelevant.⁹² Such an approach sidesteps actual consideration of the child’s best interests and provides a non-custodial parent a presumption in their favor in exchange for behavior that they are already required to do. The non-custodial parent is thus legally favored in surname rights, and that is typically the father. This is inconsistent with the best interests of the child standard, yet the courts typically contended that was the standard being applied.⁹³

In addition to arguments surrounding tradition, courts have also presumed that bearing the father’s surname is necessary to maintain the father-child relationship.⁹⁴ Not only would there be a “burden”⁹⁵ and an “estrangement”⁹⁶ if the father’s name is not primary, the total destruction of the relationship itself could hinge on the child’s surname.⁹⁷ The Arkansas Supreme Court discussed the “unnatural barrier between father and child” that would result from

88. *In re* Petition of Carter, 640 S.E.2d 96 (W. Va. 2006).

89. *Petersen v. Burton*, 871 N.E.2d at 1025.

90. *Id.*

91. *Golden v. Thompson (In re M.J.T.)*, 189 P.3d 745 (Okla. Civ. App. 2008) (reversing trial court order, which granted father’s request based on incorrect presumption that father’s fulfilling of parental responsibilities justified the name change); *see also In re H.S.B.*, 401 S.W.3d at 77 (rejecting parent’s financial support of child as appropriate factor to consider in child’s name change).

92. 40 A.L.R.5th 697 (1996).

93. *See id.*

94. *See, e.g., Likins v. Logsdon*, 793 S.W.2d 118 (Ky. 1990) (maintaining a relationship with the father is in the child’s best interest, which will be fostered by bearing his surname); *S. v. H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980) (giving the child the father’s surname will strengthen the father-child relationship, which is particularly important when the parents were not married).

95. *Carroll v. Johnson*, 565 S.W.2d at 10.

96. *Rounick’s Petition*, 47 Pa. D. & C. 71, 75 (C.P. 1942); *Application of Shipley*, 205 N.Y.S. 2d at 581.

97. *Rounick’s Petition*, 47 Pa. D. & C. at 71 (“To decree a change of name would simply be another step in the direction . . . of complete severance of the father-child relationship.”); *Application of Shipley*, 205 N.Y.S. 2d at 581.

the child bearing a surname other than the father's, which would "erode" the relationship.⁹⁸ Society itself has an interest in the preservation of the father-child relationship, so say the courts, and a change of surname could weaken or sever that critical bond.⁹⁹ A non-paternal surname could result in the father-child bond being "weakened if not destroyed."¹⁰⁰ Courts have supposed without evidence that failure to maintain the paternal surname "could represent to [the child] a rejection by his father; or evidence that his father is deserving of rejection or contempt; or an attempt by his mother to deceive him as to his true identity."¹⁰¹ Courts do not consider the impact of a surname on the mother-child relationship.¹⁰² The impact of the child's surname on the relationship between a child and a parent appears to occur, in the courts' view, exclusively with the child and the father.¹⁰³ One California court noted this phenomenon: "[i]n recognizing a father's right to have his child bear his surname, courts largely have ignored the impact a name may have on the mother-child relationship. . . ."¹⁰⁴ However, "the maternal surname might play a significant role in supporting the mother-child relationship"¹⁰⁵

The Court of Appeals of Maryland asserted that denying the paternal surname succession would constitute an "unnatural barrier" between the father and child.¹⁰⁶ The Kentucky Supreme Court employed the same presumption, but also explicitly acknowledged that it was not only the child's interests that were important but also the *father's* when it held in 1990 that "[t]he best interest of the child *as well as that of the father* is involved in maintaining the relationship with the divorced father fostered by bearing his name"¹⁰⁷ Such judicial assertions are typically not referenced or cited, but are

98. Carroll v. Johnson, 565 S.W.2d at 14–15.

99. Cohee v. Cohee, 317 N.W.2d 381, 383 (Neb. 1982).

100. Carroll v. Johnson, 565 S.W.2d at 14–15; *see also* Flowers v. Cain, 237 S.E.2d 111 (Va. 1977) (expressing concern that changing child's surname would damage the father-child relationship); *In re* Application of Tubbs, 620 P.2d at 384 (removing the father's surname may foster an unnatural barrier between him and the child and damage the relationship); Likins v. Logsdon, 793 S.W.2d at 118 (reversing trial court's granting of child's name change where trial court had deferred to child's request).

101. *In re* Lone, 338 A.2d 883, 887–88 (N.J. Cnty. Ct. 1975).

102. Kyle Hording, *Determining a Child's Surname: Common Law v. "Best Interests" Test*, 7 J. JUV. L. 117, 118 (1983).

103. Frederica K. Lombard, *The Law on Naming Children: Past, Present and Occasionally Future*, 32 J. ONOMASTICS 129, 134 (1984).

104. *In re* Marriage of Schiffman, 169 Cal. Rptr. 918, 620 P.2d 579, 584 (1980).

105. *Id.* (quoting Note, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303, 330).

106. Lassiter-Geers v. Reichenbach, 492 A.2d 303, 306 (Md. 1985).

107. Likins v. Logsdon, 793 S.W.2d at 122 (emphasis added).

evidently considered so obvious as to require no support.¹⁰⁸ Courts would simply assume estrangement and then determine that those presumed results would not be in the child's best interests.¹⁰⁹

Even when the father himself was not asserting his own interest, courts have stepped in to do it for him.¹¹⁰ In 1976, for instance, a Washington county registrar refused to issue a standard birth certificate for a child born to an unmarried mother because the child carried the mother's surname—even *with* the consent of the father.¹¹¹ In a 1985 case in Kansas, the parents divorced and the father subsequently died, and the mother had remarried.¹¹² The mother's petition to change the surname of the minor child was denied in part because the trial court prioritized the rights of the father who had died over the child or the mother: "A deceased father . . . is . . . entitled to have his child bear his name in accordance with the usual custom of succession to the paternal surname."¹¹³ The appellate court agreed, noting the "longstanding tradition in this country that a child carry the surname of his father" and concluding that "there is a protectable parental, generally paternal, interest in seeing that a child's name remains unchanged."¹¹⁴

Yet that preference for consistency in a surname applied only when the original name was the father's—in such cases, "courts are . . . most reluctant to allow such a change except under extreme circumstances,"¹¹⁵ should be exercised with "great caution,"¹¹⁶ and only where the "substantial welfare of the child necessitates" the change.¹¹⁷ The father's objection to a name change should prevail if he has an ongoing relationship with the child, because he has an important interest in having his child use his surname; the father's interest is presumed relevant to the child's best interest.¹¹⁸ The Kentucky Supreme Court reversed a name change that had been requested by the children (12 and 14) and granted at trial, even though the children's

108. *See, e.g.*, 40 A.L.R.5th 697 (1996) (stating without citation that "[i]t is widely accepted that a parent will feel closer to a child bearing the same surname as himself or herself.").

109. *See, e.g.*, Application of Shipley, 205 N.Y.S.2d at 586; Kay v. Kay, 112 N.E.2d 562, 567 (Ohio Ct. Com. Pl. 1953).

110. *See, e.g.*, Doe v. Dunning, 549 P.2d 1, 2–3 (Wash. 1976).

111. *See id.*

112. *See* Matter of Morehead, 706 P.2d at 481.

113. *Id.*

114. *Id.* at 482.

115. West v. Wright, 283 A.2d at 402; *see also* Brown v. Carroll, 683 S.W.2d 61 (Tex. App. 1984) (courts will change a child's surname reluctantly and only where the substantial welfare of the child requires it).

116. Robinson v. Hansel, 223 N.W.2d 138, 140 (Minn. 1974).

117. *Id.*

118. Beyah v. Shelton, 344 S.E.2d 909, 911 (Va. 1986).

wishes were “strongly expressed,” they had already been using the name for five years, and there was evidence as to confusion and embarrassment in not formalizing the name change.¹¹⁹ The court held that “clearly the father has a right and a protectable interest in having his children bear his name which is not forfeited on insubstantial grounds.”¹²⁰ Those “insubstantial grounds” appear to have been many of the typical facts brought out in a “best interest” consideration that would suggest the name change was proper. Relevant factors to be considered include misconduct and abandonment.¹²¹ Yet even in a case where the father was an incarcerated sex offender and evidence was submitted that the children wanted no association with his name, a Florida appeals court nevertheless determined that this was insufficient to establish that removing the father’s surname was in the children’s best interests.¹²²

At the same time, these standards that appeared to discourage the change of a child’s surname did not apply when it was the *father* requesting the change away from the mother’s name.¹²³ In those cases, the presumption that “a child’s name remains unchanged” appears to run the other direction.¹²⁴ A 1980 Indiana appeals court upheld a trial court ruling changing the surname of a child from the mother’s to the father’s, reasoning that significant consideration should be given to the father’s interest in passing on his surname, according to tradition.¹²⁵ No evidence was presented of the custodial mother’s misconduct or abandonment.¹²⁶ A 1994 trial judge approved a father’s request to change his child’s name to his, holding that “the public policy has always be [sic] that the child upon it [sic] marriage takes the patron name.¹²⁷ That’s the way we are in Anglo-Saxon society and our Anglo-Saxon tradition.”¹²⁸ In a 2011 Kansas case, the parents were divorced at the time of the birth, the father was not listed on the birth certificate, and the child was given the mother’s surname.¹²⁹ The father later petitioned to change the child’s surname to his.¹³⁰ The trial court judge noted that “tradition says the

119. *Likins v. Logsdon*, 793 S.W.2d at 122.

120. *Id.*

121. *See Beyah v. Shelton*, 344 S.E.2d at 911.

122. *See Cothron v. Hadley*, 769 So. 2d 1148, 1148 (Fla. Dist. Ct. App. 2000).

123. *See, e.g., S. v. H.*, 412 N.E.2d at 1263.

124. *See id.* at 1259.

125. *Id.* at 1263.

126. *Id.*

127. *Keegan v. Gudahl*, 525 N.W.2d 695, 696 (S.D. 1994) (rejecting the paternal surname presumption and remanding for consideration of child’s best interests).

128. *Id.*

129. *In re Denning*, 198 P.3d 212, 2009 WL 77972 at *1 (Kan. Ct. App. 2009).

130. *Id.*

child has the father's last name,"¹³¹ and held that it would serve the child's best interests to carry her father's surname even though the mother would raise the child, and ordered that the name be changed.¹³² Courts were inclined to presume that the tradition and the father's desires are coextensive and synonymous with the child's best interest, without significant evidence to support it.¹³³ In *Huffman v. Fisher*, for example, where the father had paid almost no support and had ridiculed the mother for getting pregnant and encouraged her to have an abortion, despite finding "no compelling reason" to change the child's name to his father's, the judge nevertheless, "in spite of the above," found that "it would be in Jacob's best interest" to replace his mother's name with his father's.¹³⁴

There has also been inconsistency in regards to the extent to which embarrassment to the child or inconvenience are considered relevant to their best interests.¹³⁵ Often courts will weigh it as significant when the father argues that the child may be embarrassed by not sharing his surname.¹³⁶ The father in *Fisher* made such an argument, which the trial judge took up: "[The child] will be faced with the task of explaining to his friends why he does not have his father's name."¹³⁷ Acknowledging that this was speculation, the court nevertheless determined that "it should be given weight."¹³⁸ I still believe that it would be less confusing and embarrassing for Jacob if he took his father's name.¹³⁹ A 2022 Utah court similarly held that the possible existence of bias societally provides reason to rule against the mother: the child might suffer embarrassment in not having the father's name because it suggests the child might be "illegitimate."¹⁴⁰ Yet when the mother argues that the child will suffer embarrassment by having a surname different from everyone else in the household, courts seem inclined to dismiss the relevance of "mere" embarrassment altogether.¹⁴¹ A California appeals court

131. *Id.* at *2.

132. *Id.* at *7 (affirming trial court's decision to change the child's surname to that of the father). *But see* *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (Sup. Ct. 1986); *Jenkins v. Austin*, 255 S.W.3d 24, 27 (Mo. Ct. App. 2008) ("Neither parent has the absolute right to confer his or her name upon the child."); *Tominack v. Curtis (In re H.M.C.)*, 876 N.E.2d 805, 808 n.5 (Ind. Ct. App. 2007) ("A father and mother enjoy equal rights with regard to naming their child.")

133. *See Huffman v. Fisher*, 987 S.W.2d 269, 271 (Ark. 1999).

134. *Id.* at 270.

135. *See, e.g., Huffman v. Fisher*, 987 S.W.2d at 271.

136. *See id.* at 270.

137. *Id.* at 271.

138. *Id.*

139. *Id.*

140. *Bowers v. Burkhart*, 522 P.3d 931, 935 (Utah Ct. App. 2022).

141. *See, e.g., Application of Trower*, 260 Cal. App. 2d at 77.

held that “a change of name will not be authorized against the father’s objection, merely to save the mother and child minor inconvenience and embarrassment.”¹⁴² A Kentucky court similarly dismissed “mere inconvenience” and the child’s own desires in a request to change the child’s surname from the father’s.¹⁴³ The Maryland Supreme Court likewise held—even while purportedly utilizing the best interests of the child standard—that the embarrassment and teasing of classmates is not enough to justify removing the father’s surname.¹⁴⁴

Although many states formally rejected the paternal surname preference decades ago,¹⁴⁵ the results of individual cases subsequently remained much the same for many years. As demonstrated by many of the above cases, decided after the law ostensibly equalized the rights of mothers and fathers, even the formal removal of the paternal preference and a shift to gender-neutral legal standards did little to alter the case results and the reinforcing of paternal rights to the surnames of their children.¹⁴⁶ U.S. cases gradually began to shift after the turn of the century. Appeals courts explicitly asserted that neither parent enjoys a default preference in children’s surnames, that the parents’ preferences are not relevant in the child’s best interests, and that tradition is not a factor in the determination.¹⁴⁷ Courts have established more concrete considerations, including the motivation of the parties, the effect of the request on estrangement between child and parents, the possibility of lack of identity or insecurity, and the length of use of surname,¹⁴⁸ in guiding these decisions.

Yet even today, despite the formal updating of legal standards, the cases suggest that fathers are more likely to prevail—perhaps significantly so—in child surname disputes, whether they are the ones requesting the change or opposing it. This is especially true at the trial court level.¹⁴⁹ In many cases, the evidence presented at trial simply

142. *Id.*

143. *Likins v. Logsdon*, 793 S.W.2d at 122.

144. *West v. Wright*, 283 A.2d at 404; *see also In re Spatz*, 258 N.W.2d 814, 815 (Neb. 1977) (minor embarrassment or emotional upset is not sufficient to require a change from father’s surname).

145. *See, e.g., In re Schiffman*, 620 P.2d at 583 (rejecting the “common law and custom, which have given the father a ‘primary right’ to have his child bear his surname . . .”); *Keegan v. Gudahl*, 525 N.W.2d at 698–99 (rejecting the paternal surname presumption applied by the trial court and remanding for consideration of child’s best interests); *In re Marriage of Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993) (rejecting the presumption of paternal surname preference); *Hamby v. Jacobson*, 769 P.2d 273, 277 (Utah Ct. App. 1989).

146. *See, e.g., Application of Trower*, 260 Cal. App. 2d at 77; *Likins v. Logsdon*, 793 S.W.2d at 122.

147. *See Keegan v. Gudahl*, 525 N.W.2d at 698–99.

148. *State on behalf of Lalley v. Whitt*, 2003 WL 21212122, at *6 (Neb. Ct. App. 2003).

149. *See, e.g., Bowers v. Burkhart*, 522 P.3d at 941 (reversing trial court order

amounts to a statement of the father's desires and assumptions, with no evidence supporting them, and are often nevertheless successful.¹⁵⁰ A number of recent cases supporting the father's preferences have been reversed on appeal,¹⁵¹ indicating that fathers are still enjoying a de facto presumption in their favor in courts across the country, and raising questions about what is taking place in all the cases that are not appealed.¹⁵² The requests of mothers are often denied despite clear and convincing evidence that the request would serve the child's best interests.¹⁵³ Mothers continue to lose even requests that their surnames be added in hyphenation,¹⁵⁴ yet when the father's name is being added in hyphenation, this is more likely to be seen as a reasonable compromise that serves the child's interests.¹⁵⁵

For instance, in 2021 an unmarried, non-custodial father brought an action requesting that his child's surname be changed from the mother's to his.¹⁵⁶ He won at trial and on appeal, with the court emphasizing the father-child bond that would likely result from the new name.¹⁵⁷ Similarly, a New York court in 2020 granted an unmarried father's request to change not only his child's surname, but also the first name.¹⁵⁸ There, however, the appellate court remanded

changing child's name from mother to father, holding that father's stated desire that his child should have his last name for "religious, genealogy, and family ties" were insufficient, and other assertions were "based on speculation and not evidence.").

150. *Id.*

151. *See, e.g.,* Gangi v. Edmonds, 218 S.W.3d 339, 342 (Ark. Ct. App. 2005) (trial court did not discuss any evidence in support of statements regarding assumptions about best interests of the child); Chamberlin v. Miller, 47 So. 3d 381, 382 (Fla. Dist. Ct. App. 2010) (assertions about teasing if the child did not have father's name were purely speculative); *In re* Name Change of L.M.G., 738 N.W.2d 71, 76 (S.D. 2007); Bowers v. Burkhart, 522 P.3d at 941; Daves v. Nastos, 711 P.2d 314, 316 (Wash. 1985) (reversing appellate court affirming of trial court order changing child's surname to father's, based on father's request alone with no findings as to child's best interests); Minnig v. Nelson, 613 N.W.2d 24, 26 (Neb. Ct. App. 2000) (reversing trial court order granting father's request to change child's surname from mother's to father's for lack of evidence demonstrating the change would be in the child's best interests.).

152. *See, e.g.,* Bowers v. Burkhart, 522 P.3d at 941.

153. *See, e.g., In re* M.E., 130 N.E.3d 66, 76–77 (Ill. App. 3d 2019) (reversing trial court denial of mother's request to change child's surname and holding that clear and convincing evidence established that change was necessary for daughter's best interests); Bobo v. Jewell, 528 N.E.2d 180, 183 (Ohio 1988) (reversing trial court order changing child's surname from mother's to father's for lack of showing of child's best interests).

154. *See, e.g.,* Volkmann v. Baratta, 2023 WL 2375693, at *7 (Neb. Ct. App. 2023); *In re* Crawford, 2010 WL 1910012, at *3 (Neb. Ct. App. 2010); Matter of Eberhardt, 920 N.Y.S.2d 216, 222 (App. Div. 2011) (reversing trial court rejection of mother's request to add her name to father's in hyphenation).

155. *See, e.g.,* Velasquez v. Chavez, 455 P.3d 95, 99 (Utah Ct. App. 2019); E.R.J. v. T.L.B., 990 N.W.2d 570, 578–79 (N.D. 2023) (upholding trial court decision to change child's name from that of the mother to a hyphenation of mother and father).

156. *In the Interest of* G.L.H., 630 S.W.3d 309, 316 (Tex. App. 2021).

157. *Id.*

158. Matter of Noah ZZ., 186 A.D.3d 1806, 1806 (N.Y. App. Div. 2020).

the case due to insufficient showing of the child's best interests.¹⁵⁹ A 2022 Arkansas case likewise affirmed a trial court's changing of a child's name from the mother's to the father's when the child was nine years old.¹⁶⁰ It is evident that some trial courts are still today requiring very little actual showing of the best interest of the child in granting the surname requests of fathers.¹⁶¹

It does seem apparent that U.S. fathers are less likely to prevail today in their surname cases than in earlier times. Courts are more inclined to expect concrete evidence of the child's best interests with respect to the surname, rather than to defer to the father's desires and give deference to various assumptions, traditions, and speculations.¹⁶² Yet the imbalance in results based on gender is difficult to deny.

2. Statutes

Most U.S. states do not prescribe a preference for a child's surname as between the mother and the father. However, there are some notable exceptions to this.

a. Mississippi

Mississippi, for example, contains an explicit surname presumption in favor of the father: when paternity is determined by the court, "the surname of the child shall be that of the father, unless the judgment specifies otherwise."¹⁶³ While the "unless" clause allows for courts to diverge from the otherwise problematic language, the intent and the result both seem calculated to tip the scales in favor of the father. Even more extreme, the statute also provides that when paternity is established via an acknowledgment when the parents are unmarried (as opposed to by the court), "the surname of the child *shall be changed* on the [birth] certificate to that of the father."¹⁶⁴ This clear directive for the paternal surname—even when the parents are unmarried and regardless of the father's involvement in the

159. *Id.*

160. *Edmonds v. Miller*, 655 S.W.3d 908, 910, 917 (Ark. Ct. App. 2022).

161. *See, e.g., Klundt v. Benjamin*, 930 N.W.2d 116 (N.D. 2019) (trial court abused its discretion in changing minor child's last name to that of father).

162. *See, e.g., Westerhold v. Dutton*, 938 N.W.2d 876 (Neb. Ct. App. 2020) (father's request to change child's surname denied at trial and on appeal due to insufficient evidence that it was in the child's best interests); *Marini v. Kellett*, 279 So. 3d 248 (Fla. Dist. Ct. App. 2019) (changing child's surname from mother's surname to father's surname was not in child's best interests).

163. MISS. CODE ANN. § 93-9-9 (1).

164. MISS. CODE ANN. § 93-9-9 (3) (emphasis added).

child's life—appears to allow for no exceptions, raising obvious questions as to its constitutionality.

This clear statutory presumption for the father resulted in a father prevailing in a request to change the name of his nine-year-old child to his, when the child lived with the mother and the father was not “in the picture.”¹⁶⁵ The father's stated reasons—judged sufficient by the trial court—amounted to nothing more than the father's desires: “I want him to carry . . . his family name My father passed my name down to me, and I want to pass it down to my children.”¹⁶⁶ The mother's family name and its importance were not mentioned. The trial court determined that the father must have the surname, even in the face of “embarrassment or confusion for the child . . . that may result from the name being changed.”¹⁶⁷ In reversing the trial court, the appellate court focused on the best interest standard, which it judged the mother had met.¹⁶⁸ In effect, then, the appellate court distanced itself from the actual language of the statute in applying the best interest standard in substitution for the male preference explicitly provided by the law. It is indeterminate how many cases follow the same initial path but are not appealed.

The Mississippi Supreme Court employed an approach in 2010 that appears to apply the best interests standard while also giving a default presumption to the father.¹⁶⁹ In *Rice v. Merkich*, the court found that the child's name should be changed from the mother's to the father's unless the mother can prove that it would *not* be in the child's best interest to do so.¹⁷⁰ In other words, the court shifted the burden from the parent requesting the change (the father) to the one opposing it (the mother), which the court instituted without citation to any authority on the point.¹⁷¹ This is contrary to other authority that places the burden generally on the moving party, as the dissent pointed out.¹⁷² In so doing, the court created a presumption that the father's name is in the best interests of the child, and requires the mother to prove otherwise if she objects. Despite testimony about embarrassment and confusion for the child,¹⁷³ the court noted that Merkich was “a good father,”¹⁷⁴ and unsurprisingly, found

165. *Olson v. Bennett*, 271 So. 3d 781, 784 (Miss. Ct. App. 2018).

166. *Id.*

167. *Id.*

168. *Id.*

169. *See Rice v. Merkich*, 34 So.3d 555 (Miss. 2010).

170. *Id.* at 557.

171. *Id.*

172. *Id.* at 562 (Lamar, J., dissenting).

173. *Id.* at 559.

174. *Id.*

that the mother had failed to prove that it was “in the child’s best interest that her surname not be Merkich.”¹⁷⁵ This approach is problematic because, as the *Olsen* court noted, “In most cases, it will be difficult, if not impossible, for a mother to produce objective evidence that a name change will cause a specific, certain harm to her child.”¹⁷⁶ The state Supreme Court therefore established a standard that purports to be neutral but is decidedly not.

b. Tennessee

As with Mississippi, Tennessee also mandates a paternal surname by statute when the parties are married.¹⁷⁷ There, the parents can select either “surname of the natural father” or “the surname of the natural father in combination with either the mother’s surname or the mother’s maiden surname.”¹⁷⁸ Any surname arrangement that does not include the father’s name requires a sworn application signed by both parents.¹⁷⁹ If the parents cannot agree on a surname within ten days of birth, the father’s name will be the surname by law.¹⁸⁰ What’s more, if the father was uninvolved, or simply didn’t get around to dealing with the issue, state law allows him to unilaterally change the child’s surname to his within a year of birth.¹⁸¹ The law provides no discretion on the matter or opportunity for the mother to object: “the father’s surname shall be entered on the amended birth certificate as the surname of the child.”¹⁸²

The cases in Tennessee are similar in nature to those found in other states. Few cases can be found where the parents were married at the time of birth—this is perhaps due in part to the fact that the statute so clearly dictates that the father’s name prevails that parties may be less likely to litigate their disagreements. Several cases appear where the parents were unmarried, however. In such circumstances, the statute gives the mother additional surname rights.¹⁸³ Most cases appear to largely ignore those rights and instead apply a best interests of the child standard, and then typically rule in favor of the father. In *Knipper v. Enfinger*, the trial court

175. *Rice v. Merkich*, 34 So.3d at 559.

176. *Olson v. Bennett*, 271 So.3d at 787.

177. See TENN. CODE ANN. § 68-3-305(a).

178. TENN. CODE ANN. § 68-3-305(a)(1) (2006).

179. TENN. CODE ANN. § 68-3-305(a)(3) (2006).

180. *Id.*

181. TENN. CODE ANN. § 68-3-305(a)(5) (2006).

182. *Id.*

183. TENN. CODE ANN. § 68-3-305(a)(5)(b) (2006).

accepted as sufficient the father's preference to "carry on his family lineage" and evidence about the respect in the community held by each surname.¹⁸⁴ The court asserted an unsupported assumption that the name change would encourage the mother to support the father-child relationship.¹⁸⁵ In *Sullivan v. Brooks*, the trial court used the mother's *hypothetical* future marriage against her in ruling for the father: "In all probability, Ms. Brooks—you're at a young age—you will marry. And if you marry, you will probably, tradition and custom, take on your husband's name,"¹⁸⁶ suggesting that eventually the mother would have a different surname than the child even if she prevailed in the instant case. The judge reiterated the importance of custom: "tradition and custom in this country, in this area, basically, is to take on the father's name."¹⁸⁷ The court then likewise used other people's experience against the mother as well:

I have had cases where children carry the maiden name and mom marries a couple of times, and then you have three children by three different names. And that raises the issue—certainly, there's an inconsistency there when they are in school, and kids can be rather cruel to other kids and hurt—you know, be made fun of when brothers and sisters have different names, none of them the father's name. Kids know who their fathers are. He will know soon. You know, and the father has been, the proof is, active from birth and very involved, he's supported, and therefore I find it in the best interest that [child's] last name be changed to Sullivan.¹⁸⁸

In response to a question about whether he would accept a hyphenated name, the father replied, ". . . why should I have to explain to my son why he has two last names? I shouldn't have to. He's my son."¹⁸⁹ The court ruled for the father.¹⁹⁰ The appellate court reversed that decision for failure to show the name change was in the child's best interest.¹⁹¹

184. *Knipper v. Enfinger*, 2020 WL 5204227, at *4 (Tenn. Ct. App. 2020) (reversing trial court decision for father).

185. *Id.* (reversing trial court decision for father); see also *In re Khrystchan D.*, 2020 WL 3494467 (Tenn. Ct. App. 2020) (finding that name change to the father's name would not harm the child; the father's name was respected in the community; and that child's age supported the name change).

186. *Sullivan v. Brooks*, 2011 WL 2015516, at *2 (Tenn. Ct. App. 2011).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at *1.

191. *Id.* at *4.

c. Louisiana

Louisiana contains perhaps the most restrictive gender-specific surname law of any state.

It mandates that if the mother was married at the time of the birth, the child's surname "shall be the surname of the current husband of the mother."¹⁹² The law even requires the mother to give her child the surname of her *former* husband, if she was married to him within 300 days of the child's birth.¹⁹³ If there are two men in the picture—a former husband and a subsequent partner—the state dictates which one receives priority; it is never the mother. Any other arrangement that does not give the child the father's surname requires the agreement of both parents.¹⁹⁴ Although the statute indicates that a child of an unmarried mother will have the mother's surname,¹⁹⁵ cases have nevertheless held otherwise when the father objected. In *Gold v. Liner*, for instance, the court interpreted the statute to require that because the father had been acknowledged and had agreed to support the child, "he could require that the illegitimate child bear his (the natural father's) surname."¹⁹⁶

3. State Statutes and Equal Protection

It would appear that a state statute that provides special rights to one group of people based on gender while denying them to another group may violate the Equal Protection Clause of the U.S. Constitution.¹⁹⁷ The Mississippi mother in *Olson*, in fact, made that very claim on appeal, arguing that the state statutory preference for the man violates the Equal Protection Clause of the U.S. Constitution.¹⁹⁸ The Supreme Court reversed the trial court on other grounds, thereby avoiding ruling on the constitutional claim altogether.¹⁹⁹ The statute was thus left intact.²⁰⁰ The dissent in *Rice* similarly suggested that a presumption in favor of the father would raise Equal

192. LA. REV. STAT. § 40:34.2(2)(a)(i).

193. LA. REV. STAT. § 40:34.2(2)(a)(ii)–(iii).

194. LA. REV. STAT. § 40:34.2(2)(a)(iv).

195. LA. REV. STAT. § 40:34.2(2)(b).

196. *Gold v. Liner*, 822 So. 2d 166, 167 (La. Ct. App. 2002).

197. *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (holding that intermediate scrutiny applies to governmental gender discrimination, whereby the discrimination must further an important government interest by means that are substantially related to that interest).

198. *Olson v. Bennett*, 271 So. 3d 781 (Miss. Ct. App. 2018).

199. *Id.* at 787.

200. *Id.* at 784 n.3.

Protection concerns,²⁰¹ but the majority did not take up that question in its opinion at all.²⁰² The constitutionality of the Mississippi statute was also raised in *Powers v. Tiebauer*,²⁰³ but the Court refused to address the issue due to procedural problems with the claim.²⁰⁴ Thus, the gender preference in the Mississippi law remains untested and in place.²⁰⁵

The Louisiana statute was challenged on Equal Protection grounds in *Sanders v. Silverthorn*.²⁰⁶ The appellate court summarily rejected that argument, holding that the preference for the father substantially fulfills an important government interest, specifically, “increasing the number of fathers who acknowledge and support their children,”²⁰⁷ which would be furthered by a “requirement that a father of a child born outside of marriage acknowledge the child and agree to a plan of support before being listed on the birth certificate and giving the child his last name”²⁰⁸ The Court did not discuss how such an interest was important or in what ways the gender-specific statute would substantially address that purported interest—both of which are requirements of an intermediate scrutiny equal protection analysis.²⁰⁹ Far from supporting the assertion that fathers receiving preferred legal status over mothers will increase the support fathers provide to their children, the court’s two-sentence discussion was simply a conclusory statement of the law itself: the state has an interest in father’s acknowledging their children, and giving fathers preference in surnames does that.²¹⁰ Missing is any actual evidence, data, or logic beyond implied assumptions and stereotypes.²¹¹ Surely this is an insufficient response to a gender-based claim of equal protection denial.

a. Australia

The legal development of surname usage has taken a different trajectory in Australia than in the United States.²¹² To be sure, the

201. *Rice v. Merkich*, 34 So.3d at 562 (Lamar, J., dissenting).

202. *Id.*

203. *Powers v. Tiebauer*, 939 So. 2d 749, 752–53 (Miss. 2005).

204. *Id.*

205. *Id.*

206. *Sanders v. Silverthorn*, 906 So. 2d 518, 526–27 (La. Ct. App. 2005).

207. *Id.*

208. *Id.* at 527.

209. *Id.* at 526 (holding that the proponent of a law that classifies based on gender must “establish that the classification substantially furthers an important governmental interest”).

210. *Id.*

211. *Id.*

212. Angela Tufvesson, *Should Women Take Their Husband’s Name After Marriage?*,

social practice is similar, in that the majority of women still today take the husband's surname.²¹³ It appears that a smaller proportion of Australian women opt for the customary practice, at roughly 75% as compared with up to 95% of American women.²¹⁴ Both countries have seen a conservative shift in recent years, with an uptick in the numbers preferring the name change for the wife.²¹⁵ There can be found scattered in various places indications that the customary practice in Australia includes the wife taking the husband's name.²¹⁶ For example, in determining for Social Security purposes whether an unmarried couple is legally a couple, one factor to be considered is whether the woman uses the man's surname,²¹⁷ thereby suggesting that joining as a couple also often includes using a shared surname, which would be the man's (even, apparently, in the absence of a legal marriage). Some references can be found in Australia indicating an assumption that a wife will assume her husband's name, but none rise to the level of a requirement.²¹⁸ For example, the Victoria Government Gazette in 1952 listed as a requirement for a nursing application that married applicants provide their maiden name;²¹⁹ various regulations related to registration of births, deaths, and marriages reference the "maiden surname" of women.²²⁰ As such, there is an implicit acknowledgment in various processes and forms that Australian women often change their names at marriage.

4. Legislation

Very little Australian legislation or common law exists regarding the acquisition of names.²²¹ With respect to marital names,

NEW DAILY (Feb. 11, 2017), <https://thenewdaily.com.au/life/relationships/2017/02/11/should-you-take-your-husbands-last-name/> [<https://perma.cc/V8ZP-WLQ7>].

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Ronald Sackville, *Social Security and Family Law in Australia*, 27 INT'L & COMP. L.Q. 127 (1978) (noting that the principles were unpublished, contained instead in internal departmental memoranda and instructions).

218. *See, e.g.*, Victorian Government Gazette, No. 260, 12 March 1952, 1516 ("If married or widow give maiden name and furnish certificate of marriage. Not applicable to male applicants").

219. *Id.*

220. *See, e.g.*, Registration of Births, Deaths and Marriages Act 1962 (QLD), Subordinate Legislation 1995 No. 319, Sch. 1(7).

221. *See, e.g.*, *Right to a Name and Acquire a Nationality*, ATTORNEY-GENERAL'S DEPT. OF AUSTRALIA, <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-name-and-acquire-nationality> [<https://perma.cc/DUN5-QRHR>] (last visited June 12, 2024) (establishing the right to have a name).

investigation of various marriage acts from 1899 forward reveal no mention of maiden names or surnames after marriage.²²² Where American legal cases are abundant up until the 1980s involving women challenging the denial of their right to vote, drive, get a passport, hold a job, get a divorce, and bring a lawsuit in their birth names, no such cases can be found in Australia. There appears to have been very little if any legal dispute about the application of English common law on the issue. The common law principle—which holds that a person’s legal name is whatever name they are commonly known as and that they can choose for themselves any name they wish so long as it is not for fraudulent purposes²²³—seems to have been applied to women as consistently as to men. The courts did not appear to make attempts to modify or misstate the common law to construct a new requirement for the purpose of reinforcing the subordinate status of a woman within marriage, nor were there significant attempts on the part of government to mandate compliance with the status quo.²²⁴ One of the few cases to be found addressing the issue took place in 1883.²²⁵ A married woman signed a will in her birth name rather than her married name (and had used that name in some other contexts), and the court was asked to determine whether the will was properly executed.²²⁶ It answered in the affirmative.²²⁷ It was noted in the 1979 case of *D v. B* that taking the husband’s surname “is the normal convention in this country but it is no more than that . . .,”²²⁸ and the case was accepted as explicitly stating what was already evident in the common law and accepted in practice. The full court of the Family Court of Australia stated in *Chapman & Palmer*, “At common law an adult may assume any surname by using such name and becoming known by it.²²⁹ A surname is not a matter of law but a matter repute.”²³⁰ The courts have acknowledged that the ordinary custom involves the wife’s assumption of the husband’s surname, but that the common law

222. See, e.g., Marriage Act 1899 (NSW); Marriage Act 1958 (Vic); Registration of Births, Deaths and Marriages Ordinance (Northern Territory) 1941–1954; Marriage Act 1961 (Cth); Marriage Regulations 1963 (Cth); Marriage Regulations 2017 (Cth).

223. See *In re T. (Orse H.) (an Infant)* [1963] Ch. 238, 240 (“An adult can change his or her surname at any time by assuming a new name by any means as a result of which he or she becomes customarily addressed by the new name.”); *D v. B (Orse D)* [1979] Fam 38, 46 (“It is common ground that a surname in common law is simply the name by which a person is generally known . . .”).

224. See, e.g., *id.*

225. *In the Will of Hurd*, 9 VLR (IPR) 23 (10 May 1883).

226. *Id.*

227. *Id.*

228. *D v. B (Orse D)* [1979] Fam 38, 46.

229. *Chapman & Palmer* (1978) FLC ¶ 90-510.

230. *Id.*

regards this practice as no more than a convention.²³¹ The relative lack of conflict in Australia on the issue suggests an implicit acceptance of that principle. Multiple American institutions waged much more concerted battles to reject its application to married women.²³²

Instead, a more absolute application of the original English common law upholding individual choice in surnames²³³ has been maintained in Australian regulations.²³⁴ The historical regulations dealing with names make little or no mention of either maiden/birth names or married women's names.²³⁵ The 1923 Changes of Names Regulation (WA), for instance, contemplates that a married person may change their name at marriage (without specifying gender), but doing so is given as an option rather than a requirement.²³⁶ The regulation reads,

A person shall not assume, use, or purport to assume or use any name other than any name (a) by which such person was registered at birth; (b) which was assumed by marriage; (d) which he had assumed under any statute, deed poll or license before the commencement of this Act[.]²³⁷

A person was therefore permitted to assume a new name under certain circumstances, including marriage, but is equally permitted to maintain the name they had at birth.

With respect to the surnames of children, there can be found some historical legislation enforcing the paternal surname presumption.²³⁸ In Queensland, for instance, legislation required that when a father of the child was registered, the child be given his surname,²³⁹ although the legislation outlined multiple exceptions. It directed that the child be given the mother's surname when there was no father formally registered, and provided multiple circumstances where the

231. *See* D v. B (Orse D) [1979] Fam 38, 46.

232. *See, e.g.*, Powers v. Tiebauer, 939 So. 2d at 752.

233. Wakefield v Wakefield [1807] 1 Hagg. Con. 394; Cowley (Earl) v. Cowley (Countess) [1901] A.C. 450 (Lord Lindley at 460).

234. Report 61 (1988)—Names: Registration and Certification of Births and Deaths, http://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/NSWLRC/1988/61.html?context=1;query=surname%20at%20marriage;mask_path=#R61CHP2 [https://perma.cc/698F-ZMHF].

235. Change of Names Regulation (WA) (No. 40 of 1923).

236. *Id.*

237. *Id.* (The regulation was amended several times, and was ultimately repealed by the Acts Repeal and Amendment (Births, Death and Marriages Registration) Act 1998 § 3(1) (No. 40 of 1998). None of the amended versions were substantively different on this issue.)

238. Registration of Births, Deaths and Marriages Act 1962 (QLD), § 27A.

239. *Id.* § 22(1A).

mother's surname would be given even with the existence of a registered father.²⁴⁰ It also allowed for a surname combining that of the mother and the father.²⁴¹ When the mother's surname was given, the name could subsequently be changed to the father's only when the mother requested it herself, or when the mother was deceased or absent.²⁴² Western Australia had a similar provision in 1961;²⁴³ it had been removed by 1998, with the new Act stating that the child's name is "a matter of choice" and need not be "the same as that of a parent of the child."²⁴⁴ Even when the paternal presumption appears in some form, therefore, that presumption can be trumped by various considerations, and there is nevertheless extensive recognition of the mother's interest in passing her name to her children as well. Currently, all jurisdictions allow the parents a choice in the surname of their child.²⁴⁵

Currently, legislation in Australia recognizes the rights of mothers in the naming of their children.²⁴⁶ The Registration of Births, Deaths and Marriages Act 1962 (QLD), for example, includes a section providing for the change of a child's surname to that of the mother, and is particularly deferential to the mother's wishes when she was never married to the child's father.²⁴⁷

In contrast with American cases, any suggestion that the paternal custom had achieved the force of law was soundly rejected by the NSW Supreme Court in 1979:

There is, in my view, no rule of law that a child should have or must be given the same surname as his father. . . . The better view, in my opinion, is that the surname of a child is that by which he is known, and that there is a rebuttable presumption . . . that a child is known by the surname of his father, at least where his father and mother are married, and the mother has herself taken the surname of the father.²⁴⁸

240. *Id.* § 22(1A)(b)–(c).

241. *Id.* § 27C.

242. *Id.* § 27B.

243. Registration of Births, Deaths and Marriages Act of 1961, § 20(5) (WA) (No 34 of 1961).

244. Births, Deaths and Marriages Registration Act of 1998, § 22(3) (WA) (No 39 of 1998).

245. Margaret Hyland, *A Rose by Any Other Name*, 15 AUSTRL. J. L. & SOC'Y 184, 192 (2001).

246. *A Guide to Child Naming Laws in Australia*, JUSTICE FAMILY LAWYERS (Oct. 4, 2023), <https://justicefamilylawyers.com.au/family-law/child-naming-laws-australia/> [<https://perma.cc/WY6X-EVTL>].

247. Registration of Births, Deaths and Marriages Act 1962 (QLD), § 28A.

248. *C v. S* (1979) 2 NSWLR 598, at 603.

Thus, the case for the child is only clear when both parents already possess the father's surname; even then, the paternal surname presumption is rebuttable based on the particular facts of the case; there is no inherent father's right on the issue.

Where U.S. courts often presumed that the father-child relationship would be irreparably damaged if they did not share a surname—and automatically enhanced if they did—Australian courts have resoundingly rejected that notion and its implications.²⁴⁹ In a case denying the father's request to change the child's surname from the custodial mother's to his, the court observed:

One of the reasons the father advanced for bringing the application to change the child's name related to his own desire for the child to identify more closely with him. To my mind, that smacks of a parent seeking to advance some proprietorial interest in the child rather than having the welfare of the child as her or his uppermost and paramount consideration.²⁵⁰

The 2006 Amendments to the Family Law Act 1975 (Cth) regulate considerations in the changing of a child's surname, but they are not significantly dissimilar from those laid out in earlier court decisions on the issue to suggest different results.²⁵¹

Indeed, in the Sex Discrimination Act 1984 (Cth), the rights of both husband and wife to choose a family name are recognized.²⁵² This presents an implicit acknowledgment that eliminating sex discrimination also includes eliminating any male preference in surnames. No such law exists in the United States.²⁵³ The United Nations Convention on the Elimination of all Forms of Discrimination Against Women—upon which this provision of the Australian Sex Discrimination Act is based²⁵⁴—was never ratified by the United States.²⁵⁵

B. Cases

A number of Australian cases involve similar disputes concerning the surnames of children as those found in the United States.²⁵⁶

249. *A Guide to Child Naming Laws in Australia*, JUSTICE FAMILY LAWYERS, *supra* note 246; B.S.S., *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1303–07 (1984).

250. Muir & Newell [2016] FCCA 1690 at [44].

251. *Id.* at 27–28, 35.

252. *Sex Discrimination Act 1984* (Cth) § 16(1)(g).

253. Carlton F.W. Larson, *Naming Baby: The Constitutional Dimensions of Parental Naming Rights*, 80 GEO. WASH. L. REV. 159, 172 (2011).

254. *United Nations Convention on the Elimination of all Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 16(g).

255. Larson, *supra* note 253.

256. *De Facto Relationships, Same-Sex and Surrogate Parents: Exploring the Scope and Effects of the 2008 Federal Relationship Reforms*, 2009 AJFL LEXIS 33, 1–3.

The results are in stark contrast to the U.S. cases.²⁵⁷ Australian cases reveal a more widespread practice of shared naming of children.²⁵⁸

In court disputes, cases involving a non-custodial father demanding a surname change from the mother's to his are extremely rare. Much more common are requests from a custodial mother after separation or divorce to change the children's surname from the father's to hers. The legal standard in such determinations has for decades been established as the best interest of the child.²⁵⁹ The preeminent case on the issue is *Chapman & Palmer*, which held that the welfare of the child is the primary consideration in determining a surname change and that neither parent is entitled to a presumptive preference.²⁶⁰ While the court noted that the mother may not enter on the child's birth certificate a surname other than "the father to whom she was married at the time of conception,"²⁶¹ the court nevertheless explicitly rejected any principle that the father should determine the child's surname.²⁶² Instead, factors to consider include short and long-term effects of a surname change; confusion of identity that may arise for the child if the name is changed or not changed; the effect of a surname change on the relationship between the child and the parent whose name the child bore during the marriage; the effect of frequent or random surname changes; and any embarrassment likely to be experienced by the child, if its name is different from that of the parent with custody or care and control.²⁶³ The last factor is notable, because although it is one of several factors to be considered, it weighs in favor of the custodial parent, who is significantly more likely to be the mother.²⁶⁴ U.S. standards do not typically include this factor.²⁶⁵ In fact, the court noted that normally the child will carry the surname of the parent with whom the child lives.²⁶⁶ In *Beach v. Stemmler*, the Family Court of Western Australia held that a custodial parent is permitted to change the surname of a child without either reference to the other parent or to the court, but when the court is involved, it is reluctant to interfere with the decisions of the custodial parent.²⁶⁷ No similar standard appears in U.S. cases. Additional considerations applied in Australia include

257. *Id.*

258. *Id.* at 75.

259. *Chapman & Palmer* [1978] FLC 90-510.

260. *Id.* at 462.

261. *Id.* at n.22.

262. *Id.*

263. *Id.*

264. Hyland, *supra* note 245, at 186.

265. Larson, *supra* note 253.

266. *Chapman & Palmer* (1978) FLC ¶ 90-510, at n.24.

267. *Beach & Stemmler* [1979] FLC 90-692.

the short and long-term advantages of the name remaining the same, and the degree of identification of the child with each parent.²⁶⁸

Australian cases have consistently applied this standard in a way that does not confer deference to any paternal surname presumption.²⁶⁹ In some cases, the mother requested that the child's name be modified from the father's surname to one with a hyphenation that included her surname.²⁷⁰ In *Fitzroy & Clauson*, for example, the mother argued that so doing would enhance the children's sense of identity and family, and that her status as custodian means that her name will be important in their development and their identification with her.²⁷¹ Her request was granted.²⁷² The judge in *Mahony & McKenzie* granted a similar request of the mother, suggesting that it "offers a middle road in times of rapidly changing social attitudes."²⁷³ The judge in *Giessruf & Giessruf* allowed the custodial mother to change the names of the child to a hyphenated surname that combined the names of both parents, noting that it was "a very common procedure these days for some children to take the surname of both parents, perhaps as a symbol of equality between the genders, perhaps to give equal paramountcy to the role of each parent. I see no detriment to the children having that take place in these circumstances."²⁷⁴

In other cases, the mother requested to have the child's name changed from the father's to hers alone, and those requests are often granted as well, even over the father's objections.²⁷⁵ In at least one case, the mother requested that she and the child both be given an entirely new surname that was neither the father's nor the mother's birth name.²⁷⁶ In upholding that request, the judge stated that "where the mother, by consent, has sole parental responsibility of the child, and has pursuant to the . . . consent orders relocated to Queensland, it is also reasonable that the mother and child share the same surname."²⁷⁷

Many cases in Australia weigh heavily the custodial parent's role in surname disputes, as was the case in *Fitzroy & Clauson*.²⁷⁸

268. *Id.*

269. *See* *Fitzroy & Clauson* [2017] FCCA 46.

270. *See id.*

271. *Id.*

272. *Id.*

273. [1993] FLC 92-408.

274. *Giessruf & Giessruf* [2004] FAMCA 848 at 7. *See also* *Mainard & Holden* [2010] FMCA 1174.

275. *See, e.g.,* *Sakhagi & Brawn* [2017] FamCA 178.

276. *Somerville & Somerville (No.2)* [2018] FCCA 2665 at 78.

277. *Id.*

278. *Fitzroy & Clauson* [2017] FCCA 46.

The courts find that the custodial parent's choice of a surname is an important fact to consider in determining the child's best interest and is relevant to the child's relationship with the custodial family and their own identity, as well as the confusion, embarrassment, and inconvenience involved in having a different surname than the custodial parent.²⁷⁹ As discussed above, with few exceptions,²⁸⁰ U.S. cases took the opposite approach, presuming that the *non*-custodial parent should receive the primary consideration in order to enhance their bond with the child, and essentially deeming irrelevant or insufficient the benefits in sharing the same surname as the rest of the household.²⁸¹ Indeed, the Washington Supreme Court surmised that "the custodial mother's interest is potentially *adverse* to the best interests of the child. In this instance, care must be taken to assure that the mother's interests do not taint the determination of the child's best interests."²⁸² U.S. courts have not expressed the same concern about tainting the determination with the father's interests. A California court even derisively referred to the mother as "a mere custodian," and described her request as an attempt to "interrupt, arbitrarily," the "inheritance of a surname."²⁸³ Some U.S. courts have more explicitly suggested that having custody is a strike against a parent in surname disputes, because the "child's surname will not likely impact the development and preservation" of the custodial parent's relationship with the minor child, as the court assumes it would with the non-custodial parent.²⁸⁴

While some U.S. cases have included consideration of the child's identification with the custodial parent in a list of relevant best interest factors,²⁸⁵ they often tend to be de-emphasized in individual cases. One notable exception was in a case where the child lived

279. *Id.*

280. *See, e.g., State ex rel. Spence-Chapin Services v. Tenedo*, 421 N.Y.S.2d 297 (Sup. Ct. 1979) (it was in child's best interest to retain her mother's name on her birth certificate where the mother had custody); *Matter of Shawn Scott C.*, 520 N.Y.S.2d 821, 821 (1987) (sharing custodial mother's surname "minimizes [the child's] embarrassment, harassment, and confusion in school and social contacts").

281. *See Daves v. Nastos*, 711 P.2d at 319 (emphasis added); *Montandon v. Montandon*, 242 Cal. App. 2d at 892.

282. *Daves v. Nastos*, 711 P.2d at 319.

283. *Montandon v. Montandon*, 242 Cal. App. 2d at 892.

284. *Bowers v. Burkhart*, 522 P.3d at 935 (citing lower court decision) (trial court found that "surname will likely encourage [Burkhart] and [Daughter's] bond and encourage [Burkart] to participate, stay involved with [Daughter], pay child support, and help raise [Daughter].").

285. *See, e.g., In re Andrews*, 454 N.W.2d 488, 489 (Neb. 1990) (factor number five of five is "whether the child's surname is different from the surname of the child's custodial parent."); *Minnig v. Nelson*, 613 N.W.2d at 27 (factor five of ten is "whether the surname is different from the surname of the child's custodial parent.").

with the *father*: there, the court found that sharing a surname with the custodial parent is a “legitimate point of concern” due to the confusion and embarrassment that might result in having a different name than the father.²⁸⁶ Only New Jersey appears to provide any kind of presumption in favor of the custodial parent: the state Supreme Court in 1995 held that the custodial parent’s choice of a child’s surname receives a rebuttable presumption that the decision is in the child’s best interests.²⁸⁷ Thus, where Australian cases tend to consider the child’s connection with the custodial parent and family—typically the mother, U.S. cases conversely focus on the potential estrangement from the non-custodial parent—typically the father.

III. ANALYSIS

The above discussion reveals the serious flaws in adopting a gender-neutral yet subjective test in order to remedy a formerly discriminatory and unconstitutional framework of decision-making for minor children. Such a system often fails to root out the gender bias in the results, which are based on widespread assumptions about tradition, parenthood, and gender, but simply disguises them by dressing them up as objective and neutral. Although purporting to adopt a standard of the best interests of the child, U.S. courts in reality adopt a standard of paternal rights to the naming of children, irrespective of custodial arrangements, marital status, or paternal involvement.²⁸⁸

The proposed U.S. Equal Rights Amendment, which would potentially have accomplished at least formal equal parental rights in the naming of children, failed to achieve ratification by the states.²⁸⁹

286. *Learn by Houck v. Haskell*, 598 N.Y.S.2d 595, 597 (App. Div. 1993).

287. *Gubernat v. Deremer*, 657 A.2d 856, 858 (N.J. 1995). The concurrence in *Schiffman* also advocates this approach: because custody includes the right to make decisions regarding the fundamental aspects of the child’s life, and those decisions are presumed to be in the child’s best interests, the same should apply to decisions about the child’s surname. *In re Marriage of Schiffman*, 169 Cal. Rptr. 918 (Mosk, J., concurring).

288. *See, e.g., Bowers v. Burkhart*, 522 P.3d at 935 (quoting *Hamby v. Jacobson*, 769 P.2d 273, 277 (Utah Ct. App. 1989) list of factors a court may consider: “(1) ‘the child’s preference in light of the child’s age and experience’; (2) ‘the effect of a name change on the development and preservation of the child’s relationship with each parent’; (3) ‘the length of time a child has used a name’; (4) ‘the difficulties, harassment or embarrassment a child may experience from bearing the present or proposed name’; and (5) ‘the possibility that a different name may cause insecurity and lack of identity.’”).

289. Alex Cohen & Wilfred U. Codrington III, *The Equal Rights Amendment Explained*, BRENNAN CENTER FOR JUSTICE (Mar. 8, 2024, 10:57 AM), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained?utm_medium=PANTHEON_STRIPPED&utm_source=PANTHEON_STRIPPED [https://perma.cc/WJ6E-8QXQ].

There exists, therefore, no formal right of legal gender equality in the United States. The explicit male preference that exists in some states has so far withstood heightened constitutional scrutiny under equal protection mandates, and the de facto male preference that appears in cases across the country is even harder to challenge because it usually reflects subjective judgments of judges rather than explicit gender preferences. There is no clear prohibition of such a preference, and individual cases would have to be tackled on a case-by-case basis with evidence of gender bias, which is difficult to uncover. Experience has revealed that trial judges are often willing to accept purported tradition and an implicit male right as sufficient to withstand any counter-arguments presented. Even when tradition is insufficient on its own, the father's given reasons are often judged as adequate in supporting the child's best interests even when they are weak and/or founded on the sex-based custom. Even relatively recently, courts have held that inherent in the traditional sex-based practice is a governmental interest strong enough to justify it, sometimes throwing in rather half-hearted claims about government convenience and consistency.²⁹⁰ Thus, even when formal legal principles support gender equality, the ways in which they are applied are nevertheless often skewed in practice.

The fact that U.S. cases so frequently infuse "best interest" determinations with thoughts about the father's rights is revealed not only in the striking inconsistency of factors considered relevant, the weight given each factor, the shifting of the burden of proof, and in the results, but also in the judicial language itself. What exactly is the standard to be applied for a change of name? When the mother requests the change away from the father's name, then the standard is typically fairly onerous—"substantial welfare of the child"²⁹¹—and the burden is placed on the mother as the requestor to establish it. But when the father requests the change away from the mother's name, then often the standard is simply the best interests of the child, with some courts placing the burden on the parent *objecting* to the change (again, the mother) rather than the one requesting it.²⁹²

Moreover, when it comes to the child's best interests, what is relevant to the evaluation? When the mother wants the name change, then an important factor against the change is the father's lack of misconduct and his payment of child support. Conversely, when the father wants the change, again his prior support is used to justify in

290. *Sanders v. Silverthorn*, 906 So.2d at 526.

291. *See, e.g., Spatz v. Spatz*, 258 N.W.2d at 815 (the substantial welfare of the child must require the change of the child's surname).

292. *S v. H.*, 412 N.E.2d 1257 (Ind. App. 1980).

favor of the change to his own name.²⁹³ In neither type of case is the mother's prior support or involvement in the child's life mentioned as a factor in her favor. Misconduct of the parent is also relevant when it comes to the father's preferences—in other words, a lack of paternal misconduct leans in his favor in the analysis, but a lack of maternal misconduct does not play in the decision.

There is a decided lack of clarity in what exactly the “best interest” of the child actually means in these surname cases.²⁹⁴ The Arizona Court of Appeals, for example, stated that “although the court in *Laks* recognized the father's interest in having his children bear his name, it held that the best interests of the children was controlling.”²⁹⁵ What does it mean to say that the best interests of the child are controlling, but the father also has an independent interest that must be contended with? If the controlling factor is the child's best interest, then the father's interests are arguably irrelevant. There is an inherent tension and lack of clarity in a standard that also must contend with the father's interest alone. Indeed, some cases appear to have applied the best interest standard as a pretense or in name only.²⁹⁶ Requiring no evidence of the actual interests of the child, they appear to have simply assumed that the father's name inherently represents the child's best interests, unless the mother can show a strong reason to think otherwise (e.g., abandonment or misconduct). This collapses the ostensibly neutral standard into a default presumption for the father, which is precisely what the best interest standard was supposed to replace. While the empirical results of these disputes appear to be shifting somewhat in very recent years, a review of cases finds that U.S. fathers are still likely to prevail in trial court decisions concerning the names of their children, whether the father is the requesting or the objecting party.²⁹⁷

By contrast, while the Australian surname custom is similarly consistent and persistent as in the United States, the former has clearly rejected the legal significance of the custom in statutes and cases.²⁹⁸ The United States eventually came to that same determination officially (a few states notwithstanding), such that both countries now generally apply a best interests of the child standard in these decisions.²⁹⁹ Yet, with an identical standard, informed by identical

293. See *Matter of Bafumo*, 98 N.Y.S.3d 341 (App. Div. 2019).

294. *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1008 (Ariz. Ct. App. 1993).

295. *Id.*

296. See *Pizziconi v. Yarbrough*, 868 P.2d 1005; *Matter of Bafumo*, 98 N.Y.S.3d 341.

297. See *West v. Wright*, 283 A.2d 401; *Newman v. King*, 433 S.W.2d at 423.

298. See *In re Chapman* (1978) FLC 90-510; *D v. B (Orse D)* [1979] Fam 38, 46.

299. See *Fitzroy & Clauson* [2017] FCCA 46; *Daves v. Nastos*, 711 P.2d at 319.

English common law, the results are strikingly different.³⁰⁰ Neither the wishes of the parents, nor their behavior as parents appear as significant factors in these decisions.³⁰¹ Australian courts give deference to the custodial parent (typically the mother), and emphasize the family identity and unity inherent in the custodial family's surname, with discussion of practical issues in daily life such as school enrollment and management, medical records and visits, etc.³⁰² U.S. courts have rarely emphasized those factors, instead focusing on the needs of the non-custodial parent.³⁰³

While purporting to enforce the common law, U.S. courts dealing with surname disputes in effect altered it in order to maintain the custom and status quo that denied surname rights to women.³⁰⁴ Those courts invested surnames with considerable hierarchical meaning well beyond an individual's chosen moniker.³⁰⁵ Though they fell just short of explicitly holding as much, American cases nevertheless implied that a man's surname was akin to a property right, which he then was entitled to impart upon his wife and children, even to the point of demanding that the wife be forced to retain his stamp of ownership after divorce.³⁰⁶ That property right extended to bestowing his surname upon his progeny as well.³⁰⁷ The mother's surname, by contrast, was perceived as a fleeting and transitory identifier³⁰⁸ that she has neither interest nor rights in. Only men's names served as true, permanent symbols of their identity³⁰⁹ and their authority over the family. English common law, however, explicitly rejects the concept of the surname as a property right,³¹⁰ subject to legal mandate or gender preference. Yet the U.S. systems purported to follow that legal history, and even justified their decisions by reference to

300. See *Daves v. Nastos*, 711 P.2d at 318–19 (emphasis added); *D v. B* (Orse D), [1979] Fam 38, 46.

301. See *Daves v. Nastos*, 711 P.2d at 318–19 (emphasis added); *D v. B* (Orse D) [1979] Fam 38, 46.

302. See Fitzroy & Clauson [2017] FCCA 46.

303. See, e.g., *In re Andrews By & Through Andrews*, 454 N.W.2d at 489.

304. *Bowers v. Burkhardt*, 522 P.3d at 935 (citing lower court decision) (trial court found that “surname will likely encourage [Burkhardt] and [Daughter’s] bond and encourage [Burkhardt] to participate, stay involved with [Daughter], pay child support, and help raise [Daughter].”).

305. *Id.*

306. *Pilch v. Pilch*, 447 So.2d 989 (Fla. Dist. Ct. App. 1984).

307. *Anthony*, *supra* note 42, at 232–33, 237–38.

308. See Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 5 (1996) (noting that “men do not have the same sense of possibility about the transitory nature of names or identity in relation to others”); Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN’S L.J. 321, 355 (1998) (describing the “discontinuous, temporary, [and] adaptive” nature of women’s names) (citation omitted).

309. DALE SPENDER, *MAN MADE LANGUAGE* 24 (1980).

310. *Cowley v. Cowley* [1901] A.C. 450.

it. During the same period, Australian law and cases largely followed the English legal history, denying the notion of any proprietary, paternal nature of surnames.³¹¹

In the face of the manipulated legal history and a legal framework and tradition presumed to be based on ancient principles, Australia and the United States engaged with English common law in different ways in the enforcement of the tradition. The customary practice was powerful in both nations, and the status quo was successfully maintained for generations. Yet in the United States, legal mechanisms sprang into action much more vigorously to impose the custom when it was met with resistance. So wedded was the system to the patriarchal principles upon which the customs were based, that the common law was manipulated and reinvented in order to justify the compulsory compliance with the status quo. Much as the history of women's surnames in England was morphed and erased in collective memory, the common law of surnames was altered in the United States to state a principle which the common law had never actually stated. The states and their courts are still today struggling to come to terms with—and in some cases strongly resisting—the rescinding of the male naming preference. Yet in Australia, while the patronymic surname practices were wrongly considered a reflection of ancient tradition, the common law of surnames was nevertheless maintained.³¹² The absence of legal disputes involving married women's surnames indicates that their existence merited no formal intervention. When disputes involving children made their way to the Australian courts, those tribunals again adhered more closely to the common law of names, and rejected as a legal principle what had undoubtedly been ordinary as a social one.³¹³ The patronymic presumption was not only rejected as a formal legal principle, but also clearly rejected in practice, given the frequency of decisions allowing the custodial mother to change the surname of the child.

CONCLUSION

U.S. Supreme Court Justice Oliver Wendell Holmes observed that the law is founded not in logic, but in the “prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men”³¹⁴ Scarcely could be found more clear support of Holmes’

311. *D v. B (Orse D)* [1979] Fam 38, 46.

312. *Id.*

313. See *In re Chapman* (1978) FLC 90-510; *D v. B (Orse D)* [1979] Fam 38, 46.

314. OLIVER WENDELL HOLMES, JR., COMMON LAW 1 (2013), <http://www.gutenberg.org/files/2449/2449-h/2449-h.htm> [<https://perma.cc/AV3Q-NHSR>].

assertion than the jurisprudence surrounding surnames in the United States and Australia. Rather than a mechanical process of divining objective truth, the comparative landscapes expose a lengthy history of judges inserting individual and societal biases and assumptions into their decisions and the standards they create to guide them.

The law of surnames has been—and in some ways still is—guided by moral sentiment, habit, prejudice, and stereotype. Over and above that, the controlling views of custom are founded on a flawed view of historical practice and tradition. The commonly employed presumption of historical universality is clearly factually inaccurate. The notion of custom is subject to interpretation and thus is easily manipulated. Historical events highlighting the independent legal identity of women have been eradicated from collective memory, reinforcing and justifying a dominant status quo that eliminated the rights and individuality of women, including with respect to autonomy in their names. In discarding the historical narrative, a powerful “tradition” replaced it that was not, in fact, traditional at all. Yet the concept rooted itself so deeply it still remains one of the most commonly expected gender-specific practices of modern times. The results of child surname disputes in Australia and the United States demonstrate that interpretation of the common law is itself subject to cultural manipulation, at times artificially beholden to the status quo while purporting to be both neutral and undeniable. A single legal history is thereby utilized to support remarkably disparate outcomes in the hands of various adjudicators. The ostensibly consistent and objective common law is thus revealed to be malleable and volatile, dependent in its application upon desired ends.