COMMENTS

A Rose by Any Other Name

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In western society, traditionally when a woman marries she assumes her husband's surname. She does so even though she is not legally obliged to.[1] When children are born to that marriage, again it is the custom for the children to automatically assume their father's surname. While in the past this custom of assuming the father's surname may have worked, the social fabric of society has so vastly changed, that as we move into the 21st century, perhaps it is time to question and ultimately change this way of thinking. This paper proposes that when people move into a relationship of permanency, whether it be a common law or legal marriage, particularly when they contemplate having children, then the female should retain her surname and her children should also take her surname. In other words, it is suggested there ought to be a reversal of the custom of assuming surnames on a patrilineal basis, to one based on the matrilineal line. Equally where a woman has a child as the result of a casual or short term relationship, the child ought to be registered under the mother's surname.

This paper looks at the legal implications of implementing such a change by examining both the relevant legislation and case law. Also a brief analysis will be given as to why initially surnames were assumed on patrilineal lines and why the rationale for doing so no longer holds for today's society. It also looks at the social fabric of our current society, which justifies a move towards the matrilineal line to maintain consistency and to minimise confusion. By rethinking this issue, it is ultimately proposed that each couple

1 *D v B (Orse D)*[1979] Fam CA 38 at 46.

should make a deliberate 'choice' when it comes to their surname, rather than automatically following a "custom" for no better reason than that is the way it has always been. People need to carefully consider what is the most viable option for their life plans.

The Past

The role and status of women over the past century has dramatically changed, compared to that of men. Historically at common law a man and his wife became *one* person on marriage. This assumption of "one legal identity" meant that married women could not own property in their own right and in a sense were seen as the property of their husbands. Women were denied the same educational opportunities as men, as access to universities and higher education was blocked. Entry into professions such as law, engineering and medicine was difficult, if not impossible, and financial independence and participation in the workforce was discouraged. Primarily women were expected to marry and have children. If a woman had been at fault for the marriage ending, for example where she had committed adultery, then she had no claim on her husband for maintenance. Where she was abandoned or forced out by her husband, the custody of the children, irrespective of fault, went to the father. At common law, a mother had no parental rights. She was a person without power, although she was entitled to "reverence and respect".[2] Children were once labeled as "legitimate" or "illegitimate", the latter being a negative status, with wide legal implications particularly with respect to inheritance and maintenance. Until the end of the 19th century an "illegitmate child" was deemed to be "filius nullius", meaning the child of no-one, not even its mother. In *Barnardo and McHug*[3] the court recognised the mother had *a* right to the custody of her illegitimate child but this right was never equated to the common law right of men to the custody of their legitimate children. Australian courts supported this view even as late as 1974.[4] Defacto relationships existed but until relatively recently were considered socially unacceptable. Women, who had children outside wedlock, had no financial claim on the child's father for support. Consequently, until legislation[5] was introduced providing them with financial assistance, often the only financially viable option was to offer their children up for adoption.

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2 W Blackstone, *Commentaries on the Laws of England*, Vol 1, (publishers, town, 1766, Facsimile of First Edition, University of Chicago Press, 1979, p. 430

3 *Barnardo and McHugh* (1883) 10 QBD 454.

4 *Chignolia v Chignolia* (1974) 9 SASR 479.

5 *Maintenance Act 1837*(Tas); *Deserted Wives and Children Act 1840*(NSW); *Matrimonial Causes Act 1959* (Cth); *Social Security Act* (Cth); *Family Law Act 1975* (Cth); *Child Support Assessment Act 1989* (Cth).

Society as it then was, evidently promoted the male interest. This was seen as functional and in the best interests of all. It was what society deemed acceptable behaviour and evidently a woman, who acquired the much desired status of *marriage*, was expected to assume her husband's name. As she had become *one* with him, she naturally assumed his legal identity... 'Mrs John Smith'. People did not question this. It was the custom and just as their mothers and grandmothers had done, they abandoned their "maiden" names and adopted their husband's surname. When children were born, as both their parents were "Smith", it was logical that they should also be "Smith". The family was linked by their surname, identifying them as one social unit, usually cohabiting for "better or for worse" under the same roof. On marriage couples vowed to remain with one another until death.[6] Legislation and social values at the time reinforced this,[7] as prior to the introduction of the *Family Law Act* in 1975 divorce was neither socially acceptable, nor easy to obtain.

A period of change

As society changed the definition of "family" as a nuclear unit, which remained intact "til death do you part," became too narrow and failed to reflect the diversification of society. Divorce, separation, blended families, defacto families, single parent households, foster families and many other "family" groupings are common in modern western society. With the flexible and varied type of family groupings in today's western world, which tend to be fluid rather than static,[8] the patrilineal assumption of the "family name" is often not practical and for many children creates confusion . A significant percentage of "children in Australia live in more than one family type during their childhood"[9] and as they grow older the likelihood that they will not be living with both natural parents increases. When this occurs, statistically most children live with their mother.[10] These changing social patterns make it important to examine our past customs and traditions, and question their relevance to today's society.

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6 *Hyde v Hyde and Woodmansee* (1886) LR 1 P & D 130 . Ordinary J defining marriage as "the volunatry union for life of one man and one woman, to the exclusion of all others" at 133. This definition is restated in ss 46(1) and 69(2) *Family Law Act 1975* (Cth).

7 *Matrimonial Causes Act 1959* (Cth).

8 ALRC 88.2, A Statistics, para 2.19.

9 *Matrimonial Causes Act 1959* (Cth).

10 *Matrimonial Causes Act 1959* (Cth).

Over time, particularly in the past 50 years, through the agitation of lobby groups and social and political activists, society has slowly changed. Its values, customs and laws have altered to accommodate and reflect the new directions of a changing world. Legislative responses to such social change include, for example, the enactment of the *Married Women's Property Act 1882* (Eng) which, together with its Australian equivalents, was an important milestone in the emancipation of women.[11] The status of women was also enhanced when in the twentieth century they finally they won the right to vote.[12] Their entry into tertiary institutions and in time their acceptance into the "traditionally" male professions and ultimately the workforce, provided opportunities for women to acquire financial independence and to pursue careers. The *Family Law Act 1975* (Cth) introduced "no fault divorce," which among other things made divorce readily available and allowed the courts to divide "matrimonial property" where there was an "irreconcilable breakdown" of the marriage.[13] Some states and territories gave legal recognition to defacto relationships, enacting legislation to regulate property division and maintenance.[14] The *Child Support (Assessment) Act 1989* (Cth) introduced a legislative scheme to ensure that children obtained financial support from both their parents, even though they may not live with them.

Such legislation was enacted in recognition of the fact that people in the twentieth century had different values, expectations and living patterns to past generations. Society had taken a different direction and legislation needed to adapt to this, otherwise it would be out of touch.

Present

As we move into the next century, we are bombarded with the statistics of divorce. Approximately one in three marriages ends in divorce, with the rate estimated to be on the rise.[15] Where couples have separated, divorced or terminated their defacto relationships, the children usually live with their mothers.[16] After separation or divorce, many women revert back to their

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11 *Married Women's Property Act 1879* (NSW); *Married Women's Property Act 1870* (Vic); *Married Women's Property Act 1890* (Qld).

12 *Commonwealth Franchise Act 1902* (Cth); women in South Australia gained the right to vote in 1897.

13 Sections 48(1), 78 & 79 of the *Family Law Act 1975* (Cth).

14 E.g *Defacto Relationships Act 1984* (NSW); *Family Relationships Act 1975* (SA).

15 "In 1994 one could estimate that about 42.9 per cent of all marriages were likely to end in divorce". S Parker, *et al Australian Family Law in Context*, LBC, Sydney, (1996), p 47.

16 In Australia based on the statistics provided by the Australian Bureau of Statistics, it was estimated that in 1996 19% of families with dependent children were "one parent families". Of these, 87% of the children lived with their mothers, while 13% resided

maiden names.[17] Often these women remarry or assume a defacto relationship. Two families may join together and form what is commonly referred to as a blended family.[18] Many people may form one or several other unions during their lifetime and one difficulty is by what name should the children, who form part of these new households, carry? Some people have opted for hyphenated surnames, which may be practical if your name is "Smith-Jones" but often surnames are not that simple. Also there is the problem of how far can we extend hyphenated names. Smith-Jones marries Newton-Howard...and their children become "Smith-Jones-Newton-Howard"? This issue was referred to by Justice Warnick in *Mahoney and Mckenzie.*[19]

Alternatively, why should the children of Mr and Mrs Jones, after their parents separate or divorce , and where they live with their mother, adopt for example, her new husband's or partner's name of 'Cross'? Why should they assume a name which has no biological link to them?[20] Even if they hyphenated the surname to "Cross-Jones," the name often become cumbersome and one is dropped. To achieve unity and to present a cohesive family unit to the outside world, it is generally easier for those who cohabit to have the same surname...after all this is the tradition we are used to.[21] However, relationships are not always permanent and so Mrs Jones, who now is Mrs Cross, as are her children, may terminate this relationship or her partner leaves. She may then revert to her maiden name...and the children? Why would they remain Cross when their mother, who they reside with, is now Brown? So again we have a name change. What if she repartners? And so on.

Proposal

This could be avoided and at the same time ensure that the "paramount interests" of the children is the overriding concern.[22] If on marriage Jill

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with their fathers.

17 *Fooks and McCarthy* [1994] FLC 92-450 ; *Mahoney and Mckenzie (*1993) 16 Fam LR 803; [1993] FLC 92-408.

18 In 1992 the ABS estimated there were approximately 450 000 children in Australia living in blended or step families.

19 *Mahoney and Mckenzie* (1993) 16 Fam LR 803.

20 *Skrabl and Leach* [1989] FLC 92-016. Rowlands J stated in that case the decision was whether to allow a child to change her surname to an "artificial" one where there was no blood connection.

21 His Honour said that "it is normal for the child to use the original name although the custodial mother may remarry or revert to her maiden name- that is currently our general custom."

22 *Family Law Act 1975* (Cth), s 68E.

Brown remained Jill Brown, then John Jones can either chose to become John Brown or retain his name. So far there is no problem. Sometimes working couples, after marriage choose not to alter their name in the work force. When the children are born, the couple now must make a decision. In the past, people automatically registered the children's birth under the father's surname. It was commonly thought a legitimate child had to take his or her father's surname, as it was seen as a "legal name," which the child inherited from his father.[23]Whereas an 'illegitimate' child did not necessarily assume the father's surname. Legislation in some states, such as Queensland, in fact used to direct couples to register the children of the marriage under the father's surname.[24] This legislation has since been amended leaving the election of the surname to the discretion of the parents.[25] The current position at law appears to be that a legitimate child by *tradition* takes the surname of his or her father, whereas an illegitimate child does not.

Given the high incidence of divorce, separation and repartnering, perhaps it would be more practical for the children to assume the mother's surname, if she retained her surname on marriage. The husband can change his name to his wife's name or not, just as women do now. Should the marriage dissolve, bearing in mind the statistics, and given that children generally remain with the mother, then there is no "identity" crisis, as the surname has not changed. The residential parent's surname and the children's surname is the same. There is no confusion. If the woman repartners, then her new partner can either assume her surname or not, but hers and the children's surname remain unchanged. Should children be born to this subsequent union, then they would also take the mother's surname and consequently would have the same surname as their step brothers and sisters. Therefore consistency would be maintained. The child's identification to their surname would remain unaltered irrespective of how many different households or families they became attached to during their childhood. Some might argue but what about the male line? It is evident it will go through the female line. So John Jones, to ensure there will always be Jones' would need to encourage his daughters to retain their name on marriage and for that name to be used by her children.

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23 Blacktone, above, n 2, p 447; *Pizzinato V Pizzinato* (1967) 10 FLR 374; *In The Marriage of Parkes* [1982] FLC 91-231; *Attorney-Genral (Vic) v Commonwealth* (1962) 107 CLR 529.

24 Section 27A of the *Registration of Births, Deaths and Marriages Act* 1962-1987, stated that where a person was registered as the father of a child then the surname of the child "should" be the surname of the father. This Act was amended in 1991 by amending s 27A and inserting the new sections 27C & 27D

25 Above, n 22.

There have been a number of reported cases, where males after separation or divorce claim the children of that relationship are not biologically theirs, even though they are registered under their surname. They request DNA testing to disprove their paternity.[26] and thereby exclude their financial obligation to pay child maintenance. This emphasises the point, that with children we can clearly identify the biological mother, as she gives birth to the child. Apart from cases where mothers give birth outside medical facilities and then abandon the child, or where babies have been "swapped" at birth in maternity wards, the mother's identity can be established without relying on tests, such as DNA. With males, irrespective of whether children are born within wedlock or a stable defacto relationship, there is no absolute guarantee that the child is biologically theirs. Perhaps this is another reason why the surname should follow that of the mothers, as the biological link is more certain.

Changing the child's registered surname

The case law states the 'welfare of the children' is the overriding consideration whenever there is a request to alter the child's "surname".[27] The cases primarily deal with situations where the mothers have followed tradition and on marriage assumed their husband's surname, as have their children. After the relationships dissolved, the mothers reverted back to their maiden names and requested the court's permission to change their child's surname, with whom they lived, to their surname, to eliminate confusion for the child. The court in *Chapman and Palmer*[28] clearly stated, in such cases, the court would not assume a preference for either the patrilineal or matrilineal line as the basis for its decision. It rejected the view there was any prima facie principle a child should continue to use the father's surname. The court held that it all turned on what would be in the "best interests of the child". The court then set out the factors that ought to be considered where a change of the surname was called for. These are :

(a) the welfare of the child as the paramount consideration.
(b) the short and long-term effects of any changing of the child's surname.
(c) 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.

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26 *In Re C and D* [1998]Fam CA 98

27 *In Re C and D* [1978]Fam CA 98 ; *Arthur and Comben* (1977) 3 Fam LR 11; [1976] FLC 90-245; *Chapman and Palmer*[1978] FLC 90-510; (1978) 4 Fam LR 462 "We believe that each case should be approached in an even handed manner with the object of making a decision that will promote the welfare of the child" at 471.

28 *Chapman and Palmer* (1978) 4 Fam LR 462.

(d) Any confusion of identity which may arise for the child if his or her name is changed or not changed.

(e) The effect which any change to surnames may have on the relationship between the child and the parent whose name the child bore during the marriage.

(f) The effect of frequent or random changes of name.

Evidently this relates to cases whereby the parties cannot agree. If children are registered at birth under their mother's surname, even though divorce, separation or repartnering may later occur, as the mother has continued to use her own "surname", there would be no need to change the child's surname. By taking the mother's surname at birth, the child's surname need never be altered. Consequently, there would be no confusion to the child's identity, no negative repercussions flowing from random or frequent name changes and no embarrassment, as the child's name would be the same as that of the parent with whom they are statistically most likely to reside. In summary, by registering a child at birth under the mother's surname, then all of the factors the court in *Chapman and Palmer* considered relevant to the child's identity and best interests would be satisfactorily addressed.

Currently if the parent, who no longer resides with the family, cannot be found or has no contact with them or is dead, then often changes are made to a child's surname without any problems. Sometimes the other partner freely consents to the child's name being changed. Although the child's surname has been altered without any conflict between the parents, the fact remains their name has *changed* and for some children this may be confusing. If the parent does not register this change with the Department of Births, Deaths and Marriages, then the child's name by usage and their registered name will be different, which again may confuse or embarrass the child. Ultimately the issue of "changing a child's surname" arises when the parent, who does not reside with the children, refuses to allow the children to change their surname to the surname being used by the residential parent. From the perspective of issues relating to identity, confusion and consistency it makes practical sense that one way to eliminate these issues would be for women to retain their surnames on marriage and for their children to assume that surname at birth. Evidently, if after the divorce, the children lived with their father, rather than their mother and where the child had been registered under the mother's surname, then we would have the reverse problem currently faced. In such cases, the father would need the mother's permission to change the child's surname or alternatively obtain a court order.

Statistically, this would be much less significant a problem, as generally the children reside with their mothers.

Current Law

There is nothing in the *Marriage Act 1961* which requires a woman to legally take her husband's name upon marriage. In fact the *Marriage Regulations* clearly state this is a custom, not a legal requirement. In the legislation relating to registration of births, deaths and marriages, which is state based, again there is no legal requirement that the child must assume the father's surname. In all jurisdictions, the parents of a child are allowed a choice in the surname that is entered in the register of births.[29] They can elect the father's surname, the mother's surname or a combination of both. Tasmania, NSW and South Australia go even further by allowing the parents to choose any surname whatsoever.[30] In NSW the legislation simply states the birth registration certificate must state the child's name and where the name selected is prohibited or the parents cannot agree, then the Registrar may assign the child a name.[31] Where the child has been registered under a particular name in NSW and the parent(s) seek to alter this, then the procedure is set out in the legislation.[32] Other states have similar requirements.

The issue of a child's surname is also a matter over which the Family Court has jurisdiction under the *Family Law Act.* Unless there is a court order to the contrary, a child's surname is a long term decision involving both parents. Such a matter would fall within a parenting order, in particular, a specific issues order under ss 65D and 64B of *the Family Law Act.*

In *Mahoney and McKenzie*[33] there was a suggestion a failure to allow a woman to change the child's name to her surname was a form of discrimination under the *Sex Discrimination Act 1984* and also contravened Article 16 paragraph 1(g) of the '*Convention on the Elimination of all forms of Discrimination Against Women*'. Justice Warnick in *Mahoney's* case looked briefly at this but considered *Chapman and Palmer* had clearly dealt

29 Births, Deaths and Marriages Act (NSW), s 21(1).

30 *Births,Deaths and Marriages Registration Act 1996* (SA), s 21(2). In NSW and Tasmania there is no legislative provision but the result of administrative practice. The only limitation is that the surname selected cannot be obscene, offensive or too long. In Tasmania the parents have to provide a good reason as to why the child is to be given a surname different to either of its parents

31 *Registration of Births, Deaths and Marriages Act* 1973 (NSW) s 21(1).

32 *Registration of Births, Deaths and Marriages Act* 1973 (NSW) s 21(1).

33 *Mahoney and McKenzie* (1993) 16 Fam LR 803.

with this issue by stating that courts could not act on a presumption either way. Most of the state legislation, relating to the registration of names, appears to be worded to ensure it does not appear discriminatory.

Conclusion

As there is no legal impediment to putting this proposal into effect, then really it is an issue of choice. It is not argued everyone *must* assume the matrilineal line when it comes to naming children. What is proposed is the matrilineal name makes practical sense in our society. Instead of people automatically following a custom that worked in a society vastly different from today's, they should make a deliberate and rational choice. People need to become aware that in fact they do have a *choice* and before electing to use one surname or another, they ought to carefully consider their options, their lifestyle and possible pathways. After all "a rose by any other name will smell as sweet".