REPORT ON THE CHANGE OF NAME ACT
R.S.A. 1973, c. 63

PART I

Comparative Analysis of "The Change of Name Act" in the Provinces of Canada--Specifically in Relation to Applications by Married Women on Behalf of Themselves and their Children

A. Conditions Requisite to the Application for Change of Name

British Columbia

Must be of age of majority, domiciled in the province for at least one year or resident in the province for at least two years immediately prior to date of application, (1972, c. 11, s. 4).

Alberta

Must be 18 years old and a bona fide resident of Alberta (1973, c. 63, s. 2).

Saskatchewan

Must be Canadian citizen or other British subject, of the age of 18 who resides in Saskatchewan (Bill 5, 1973, s. 3).

Manitoba

Must be Canadian citizen of age of 18 who has resided in Manitoba for at least one year immediately preceding the date of the application (1971, c. 69, s. 1(2)).

Ontario

Must be 18 years of age and have ordinary residence in Ontario for at least one year immediately before making the application (Bill 88, 1972, s. 2).

Quebec

Must be a Canadian citizen "of major age" who has been domiciled in Quebec for one year or more (1965, c. 77, s. 3).

New Brunswick

Must be British subject of age of 19 (1955, c. 5, s. 3(1)).

Prince Edward Island

Deed Poll

Nova Scotia

Must be a British subject by birth or naturalization (R.S. 1967, c. 30).

Newfoundland

Must be British subject by birth or naturalization, at least 19 years old, and domiciled in Newfoundland (1952, c. 165, s. 4).

Comment

The requirement that the applicant be a British subject is obviously out outdated. Canadian citizenship is much more preferable qualification.

As to residency or domicile, the requirement of residency seems to be more appropriate. Indeed five provinces require residency, as opposed to only two which require domicile (Newfoundland and Quebec). Nova Scotia, New Brunswick and Prince Edward Island have no domicile or residency requirements.

B. Body to which the Application is made

British Columbia

Director of Vital Statistics as appointed under the Vital Statistics Act. Upon refusal of the Director there are provisions allowing appeal to the Minister of Health Services and Hospital Insurance, the Lieutenant Governor in Council and a judge of the Supreme Court in Chambers respectively (1972, c. 11, s. 8).

The B.C. Act also contains a unique section allowing a court, upon granting a decree absolute for dissolution of marriage or for nullity of marriage to hear at the same time, petition by the wife for change of her surname, where the wife does not have custody of the minor children of the marriage. Because of a 1973 amendment to this section it seems that application can also be made at any time after granting the decree.

Where the wife does have lawful custody of the children application can be made to the Supreme Court to change the name of the children, with the written consent of the other parent (1972, c. 11, s. 3).

Alberta

The Director of Vital Statistics is charged with receiving and registering ever application for change of name (1973, c. 63, s. 14). The Director has discretion to refuse such application under s. 15(2) of said Act but in such case there can be an appeal to the Minister of the Executive Council charged with administration of this Act. Note that the director's discretion is very narrow.

Note however Supreme Court involvement in ss. 11, 13, and 21 of the Act (1973, c. 63). (See later discussion.)

Saskatchewan

Director of Vital Statistics in the Department of Public Health (see Act generally).

Manitoba

Recorder of Vital Statistics (see Act generally).

Ontario

Judge of the county or district court (R.S.O. 1970, c. 60, s. 11).

Quebec

Provincial Secretary (Lois du Quebec, 1965, c. 77, s. 3).

New Brunswick

Judge of the county court of the county in which the applicant has resided for a period of one year immediately prior to the making of the application (N.B. Acts 1955, c. 5, s. 10).

But s. 11 allows the residence requirement to be dispensed with.

Prince Edward Island

Director of Vital Statistics, the Registrar of Deeds and Prothonotary of the Supreme Court in which the applicant resides must all receive notice of the deed poll.

Nova Scotia

The Registrar General of the province must receive each application (R.S.N.S. 1967, c. 30, s. 3).

Newfoundland

The Minister of Provincial Affairs is initially charged with receiving all applications for change of name. If the Minister refuses to register the change there may be appeal to a judge of the Supreme Court in Chambers.

C. Who can Make Application for Change of Name?

British Columbia

Generally a person fulfilling the requirements of s. 4 can make application. Specifically: (a) a married man can change his surname or given name of wife (with consent of wife) (R.S. 1972, c. 11, s. 4(2)); (b) a married man can (with written consent of the mother and all children over 12) change the given name of unmarried minor children of whom he has lawful custody (R.S. 1972, c. 11, s. 4(4));

[Note: There is no specific provision for change of surname of children. It is only implied in R.S. 1972, c. 11, s. 4(2).]

(c) a married man (with written consent of father and mother and any child over 12) can change given name or surname of any unmarried minor children of his wife born prior to his marriage to her if she has lawful custody of them (s. 4(5)); (d) A divorced man or woman, a widowed man or woman and an unmarried mother may all make application (in respect of those children of whom they have lawful custody) to change given name or surname of such unmarried minor children. The divorced person must obtain consent of other spouse but such consent can be dispensed with under s. 4(6) of the same Act.

Comment on the B.C. Act

The B.C. Act (in R.S. 1972, c. 11, s. 4(3)) specifically provides that a married woman shall not, during the life of her husband, make application to change her surname. There are no provisions dealing with a change of surname by the wife who is separated from her husband and no provisions allowing a wife in such circumstances to change the surname of her children. Indeed the British Columbia Act is much stricter in this area than the old Alberta Act, which at least implied that a married woman not living with her husband might be able to apply to change her surname.

Alberta

In October of 1973 the Alberta Legislature passed a new Change of Name Act which in many ways closely

resembles the present Ontario Act (and in fact may prove to be an improvement over the latter). Under the new Alberta Act a married person may apply (a) to change the given name of the spouse of the married person [s. 5(1) (a)--see later comment]; (b) to change the given name of a child who is the child of the married person and his or her spouse [Quaere: Does this include the adopted child?]; (c) to change his or her surname. If there is application to change surname there must also be application for a like change of the surname of the spouse and each child who is also a child of the applicant and his or her spouse [s. 5(2)].

[Note that in all the above instances the spouse of the applicant must consent, even if the application is simply to change the child's name, although there does not seem to be explicit requirements that consent is to be in writing. In addition where the given name or surname of a child is to be changed the child must give his consent if he is 12 years of age or older.] See later discussion for provisions dispensing with consent.

S. 6 Widow/er--Under the new Act a widowed person can change given name of a child of widowed person (if that child is also the child of the deceased spouse). A widowed person can also apply for a change of surname in which case there must be application to change the surname of each child of the widowed person, if such child is also the child of the deceased spouse. There are provisions for the widowed mother who remarries as well [see s. 6(3)].

S. 7 Divorced Persons and their children--Divorced person with lawful custody of a child of the dissolved marriage may, with consent of other parent, apply to change given name or surname of the child. A divorced woman whose marriage has been dissolved and who remarries can change surname of child of dissolved marriage of whom she has custody to the surname of her new husband but both the new husband and former husband must consent.

S. 8--The mother of a child born out of wedlock can change given name or surname of her child to her own surname or proposed surname. [Note that the mother need not change the surname of her child when she makes application to change her own surname. This interpretation seems to emerge from the permissive as opposed to mandatory wording of s. 8(2) in the 1973 Act.]

This section also deals with a change of the child's surname to surname of the man whom the mother subsequently marries and with a change of child's surname to surname of the mother's common law husband. (See s. 8(3) and s. 8(4).) [Note that while the common law wife can change the child's surname to that of the common law husband, with his consent; she cannot change her own name to the surname of her common law husband [s. 1(4) and s. 10]!

S. 9--This section allows application by a guardian in various instances to change surname or given name of a child under guardianship.

Consent Provisions in the Alberta Act

Section 11 allows the courts to dispense with the necessity of obtaining consent under ss. 5, 6, 7, 8 and 9 where "the applicant is unable to obtain the consent of the other person." In s. 11, unlike s. 10 of the Ontario Act, there are no guidelines given as to the grounds for dispensing with such consent, other than the foregoing statement. This could prove to be an improvement over the Ontario Act, and it certainly alleviates the strict effect of s. 5 of the 1973 Alberta Act . . . if the section is properly used.

Comment on the new Alberta Change of Name Act

The new Act is certainly very similar to the present Ontario Act. S. 4 of the Alberta Act is closely modelled upon s. 3 of the 1972 amendment to the Ontario Act. Both allow a married person to apply for a change of surname and in such instance require additional application for the change of surname of the children. of the marriage--with the consent of the other spouse. The phrase "married person" is of course a marked improvement over the old s. 4 (R.S.A. 1970, c. 41), nevertheless several difficulties seem to emerge in the new s. 5 of the Alberta Act:

(a) The mandatory requirement that the married applicant who applies for a change of surname, also apply

for a like change of the surname of the spouse and each child of the marriage with the consent of his or her spouse gives rise to the implication that s. 4 comtemplates applications only by married couples who are living together. Indeed, one can scarcely imagine a husband, separated from his wife, consenting to her application to change her surname, his surname and the surname of each child of the marriage. This problem is discussed in an article by Jennifer Bankier entitled "Change of Name and the Married Woman" (1973) 21 Chitty's Law Journal 302-306. As Ms. Bankier points out:

> It appears unlikely that most husbands will be prepared to agree in writing to adopt [the new surname chosen by the wife] as is required by s. 10(1) (1972, Bill 88). In consequence it would seem to be practically if not theoretically impossible for a married woman to use the procedures of the Act, unless the spouses have been living apart from 5 years, in which case the judge can dispense with the husband's consent under s. 10(1) and no change will be made in his name. [1]

S. 5 of the Alberta Act contains the same practical difficulty, as pointed out by Ms. Bankier in relation to the Ontario Act. However because the provisions

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[1] Page 304: Note that s. 10(3) of the Ontario Act, which encompasses much broader grounds for dispensing with consent, applies only to an application by a divorced person under s. 6 of the Act, R.S.O. 1970, c. 60. Therefore, for s. 4 of the 1970 Act as amended by Bill 88, the only ground for dispensing with consent, is separation of the spouses for 5 years.

dispensing with consent seem to be broader in the Alberta Act than in the Ontario Act it may be possible to evade, to some extent, the weakness of the latter, but only if the court chooses to use its discretion broadly. Otherwise, it is submitted that s. 5 of the New Alberta Act, will actually in practice prohibit applications by separated spouses.

(b) Further, the Act fails to give any indication as to the criteria that will be used in deciding whether the various applications will be accepted. Bearing in mind the extensive case law in the United States on this area, one can only hope that Alberta courts will begin to develop the bare bones of the statute in a similar manner.

Saskatchewan

The Saskatchewan Act is poorly worded in several sections. S. 4 (1965, c. 408) states that a married man, a person of the age of 18, a widower or widow over the age of 18, may make application for a change of name. S. 13 then states that the registration of change of surname by a married man, widow or widower automatically effects a like change in the surname of the wife of the married man and in the surname of each of the unmarried infant children of the married man, widow or widower.

Further, section 4 allows a married man to apply to change the given names of his wife or unmarried infant children; and a widow or widower to change given names of unmarried infant children. A married woman

on the other hand, is explicitly denied (during the life of her husband) the privilege of changing the surname acquired from him. Quaere: Because s. 3 of the Saskatchewan Act explicitly states that the Act does not deal with the change of the surname of a female resulting from marriage would it be possible for a married woman who continued to function under her maiden name [and thus did not "acquire the husband's surname" within the meaning of s. 4(4)] to evade the effects of s. 4(4)? Note that s. 4(4) of the Saskatchewan Act explicitly covers only the wife who has acquired her husband's surname.

In a somewhat queerly worded section (s. 5) the Legislature has also seen fit to allow a mother to change the surname of unmarried infant children to her surname on marriage with the consent of her husband if such children are not the children of the husband. An implication arising from this section is that while the married woman cannot change her surname (if such surname was acquired from her husband) she would be allowed to change the surname of children but only to that of her present husband.

S. 5(2) (which was added by Bill No. 5 of 1973) also allows the unmarried mother to make application for herself and her unmarried infant children.

S. 6 of the same Act rather simply states that a person whose marriage has been dissolved can apply to

change his or her name and the name of all unmarried infant children of whom the applicant has lawful custody. Note that there is no provision similar to s. 5 as amended by R.S. 1972, c. 11, of the British Columbia Change of Name Act.

Comment on the Saskatchewan Act

The Saskatchewan Act certainly offers no improvements over the new Alberta Act in relation to the specific problem of the separated spouses. Its s. 4(4) is even more conservative than the old Alberta s. 4 (R.S.A. 1970, c. 41).

However a section analogous to s. 3 of the Saskatchewan Act (1965, c. 408) should have been included in the new Alberta Act to explain the status of the Act, i.e., its relation to change of name by female upon marriage, its relation to adopted children.

Manitoba

Under the Manitoba Act there is a general section stating that a person who fulfills the age, residency and citizenship requirements may make application for a change of name (note that "name" in most Change of Name Acts includes given name and surname).

The Act then proceeds to cite specific qualifications to this general statement:

(a) A married person can change the GIVEN name of his or her spouse (with written consent of the spouse) and given name of any unmarried infant children of the applicant. Note that there is no mention of application by a married person for change of surname of spouse or children. The Act impliedly deals with this in the general s. 1(1) (S.M. 1971, c. 69). In this sense the Manitoba Act is deficient. Not only does it fail to mention the separated spouse but it does not deal specifically with a change of surname by a married person. One can only assume that the Act intended to allow a change of surname by the married person and that such change of surname could affect the spouse and children. This assumption emerges only in s. 2(8) which states that an application for a change of name by a married person must include the written consent of the spouse of the applicant. Thus, while the Manitoba Act is an improvement over the Saskatchewan Act in that it does not specifically prohibit a married woman from making application for change of name, it is confusing in its failure to specifically state when and how a married person may make application for change of surname.

(b) A widow or widower can make application to change GIVEN name or names of unmarried infant children. Note that the section (S.M. 1971, c. 69, s 2(3)) makes no mention of application for change of surname by the widow/er nor is there mention of the question as to

whether the widow/er need have lawful custody of the children. This latter question is dealt with in the present B.C. Act.

(c) Unmarried mother may change her name and name of unmarried infant children born out of wedlock, or she may if she subsequently marries, make application to change name of unmarried infant child born out of wedlock. (Note that the Act does not state whether the change of name must be to that of her present husband (s. 2(4) and (5).)

(d) A married woman can change name of unmarried infant children born to her of a previous marriage to the name of her present husband with the consent of her present husband and if she has custody of those children. (Note that she must mail notice of the proposed application to her previous husband but the Act does not state that her previous husband must consent.)

(e) The Manitoba Act, unlike any other Change of Name Act in Canada, specifically states that an application by a divorced person for a change of name or for change of name of children of whom the applicant has custody will not be accepted unless the applicant is at the time of the application, unmarried. The signigicance of this requirement seems important only in relation to the Manitoba Act itself vis-a-vis the specific provisions of s. 2(3), (4), (5), and (6).

Comment on Manitoba Act

The new Alberta Act seems to be an advancement over the Manitoba Act. The latter seems too ambiguous to offer any statement vis-a-vis the possibility of allowing a change of name by a married woman separated from her husband although s. 2(8) could be interpreted to impliedly include such a change.

Ontario

The Ontario Change of Name Act was the most advanced Act--until the new Alberta Change of Name Act was introduced. It was the only statute that seemed to provide a measure of equality between the married woman and the married man.

(a) S. 4, as amended by Bill 88 in 1972, provided that a married person could apply for a change of surname, as long as there was similar application for change of spouse's surname as well as the surname of "all unmarried infant children of the husband or of the marriage."[2] The practical difficulties with this section have already been pointed out in the discussion of the new Alberta Act (supra). One further comment could be made to point out that the Ontario s. 4 could prove to be extremely difficult to apply in practice because of the narrow grounds

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[2]This amendment was made as a result of recommendations contained in the Ontario Law Reform Commission, Report on Change of Name Act, Department of Justice, 1971.

contained in s. 10(1) for dispensing with spousal consent[3] [which consent is required in order to proceed under s. 4].

(b) A widow or widower may apply for change of name, and again there must be an accompanying application to change surname of all unmarried infant children (Note: there is no requirement that the children be in the applicant's custody). (R.S.O. 1970, c. 60, s. 5.)

(c) A divorced person, with consent of estranged spouse, may apply to change name of unmarried infant children of whom he has lawful custody. A divorced woman can, upon remarriage change surname of unmarried infant children to her surname on remarriage, with consent of husband (R.S.O. 1970, c. 60, s. 6). [Note: There are broader grounds for dispensing with consent under s. 6 as opposed to s. 4 of the Ontario Act. S. 10(3) of the 1972 amendment which specifically applies to s. 6 allows the judge to dispense with consent where the other parent does not contribute to the support of the applicant or the children, cannot be found, is incapable of giving consent, or for any reason to a person whose consent ought to be dispensed with.]

(d) There are also provisions in the Act dealing with the unmarried mother and her children. In 1972 a section dealing with the deserted mother was repealed, presumably because of the change in s. 4.

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[3]See footnote 1 for explanation of s. 10 of the Ontario Act.

Comment

The Ontario Act, until 1973, was definitely superior to most other Canadian Change of Name Acts, mainly because of s. 4. However there are flaws in the Act which should be examined and criticized--as they have by Ms. Bankier in her recent article on the new Ontario Act. Ms. Bankier makes the following criticisms:

(a) The Act does not deal specifically with the separated spouses. While s. 4 would seem to include such applicants, in actual fact the wording and requirements of the section make it difficult for the separated spouse to achieve a change of name. As Ms. Bankier suggests at page 305 of her article:

> The difficulties faced by separated spouses who wish to effect a change in their surname without amending the name of the other spouse could be eliminated by changing the word "shall" in s. 4(1) to "may". This would [in turn] permit the elimination of that portion of s. 10(1) which presently permits the consent of the other spouse to be dispensed with only where the parties have been separated for five years.

(b) S. 2(1) should be amended to clarify its effects on the common law. At present, the Ontario Act assumes like other Change of Name Acts, that a married woman's name is changed to that of her husband upon marriage. And yet the courts do not seem to have clearly decided, either in Canada or in the United States, the

effect of marriage upon the woman's maiden name. The Royal Commission on the Status of Women Report, Queen's Printer (Ottawa) 1970 made the following statement at p. 235 of its report:

> Contrary to what people think there is no law which requires a woman to adopt her husband's name upon marriage. The change of name is a custom. But while the law does not precisely state that a married woman's legal name is her husband's, this well established social practice is tacitly implied in some legislation and administrative practices. This is true in particular of the provincial Change of Name Acts. . . .

The Ontario Act is not the only Change of Name Act to fall prey to this essential ambiguity. None of the Canadian Acts clearly relate common law practice to the statute. Thus the status of the separated married woman is not the only problem needing clarification; for all Acts in this concern seem unable to clearly deal with change of name upon marriage or with the status of the common law right to change surname and given name at will.

Quebec

In the Quebec Act no distinction is made between the married man, the married woman, the widow, the widower, the divorced, separated or the unmarried. S. 3 of the 1965 Act ostensibly encompasses all of these possible applicánts in its general wording; the section allows any Canadian citizen fulfilling age and domicile

requirements to submit an application for change of name providing he or she has "serious reasons". S. 8 further provides that a change of family name shall benefit the unemanicapted minor children of the applicant, his children to be born, and the descendents of all of them. One can only assume that the background of civil law is sufficiently detailed to allow the Quebec courts to interpret and use this very general Act, for the statute itself is extremely brief. There is no statement as to the status of the Act, nor is there any express dealing with the married woman whether divorced or separated. In addition there are no appeal provisions in the Act, or provisions for dispensing with notice of change of name.

New Brunswick

(a) Ss. 2, 3(2) and 4 of the New Brunswick Act 1955, c. 5, make it clear that a married woman may not apply under the Act to change her name. [Note: that the Act does not apply to change of surname by a woman upon marriage, or to adoption of maiden name by a woman upon the annulment or dissolution of her marriage as amended in 1958, c. 17).] There is no implication in the Act that a woman who is merely separated from her husband might apply under the Act to change her surname or the surname of her children.

(b) By way of contrast a married man may apply for a change of surname. When he does so, he must apply for change of surname of wife and all of "his or their unmarried infant children." (The foregoing phrase gives rise to the implication that a married man could not apply to change the name of children born to his wife by another man.) The wife must consent to any application by the married man although, according to s. 9(1) of the Act no consent will be required where the spouses have been separated for 5 years or more (in which case the husband's application for change of name shall not affect his wife's name).

(c) A widower or widow can apply under s. 5 for a change of surname as long as such application includes application to change surname of unmarried infant children (s. 5(1)).

(d) A divorced person can apply to change name of unmarried infant children of whom he or she has lawful custody, with the consent of the other parent. A divorced woman who remarries may change surname of child to surname on remarriage, "with consent of husband". (Note: The Act is not clear as to which husband must consent--her former or her present husband, s. 6.)

Comment

S. 9 of the New Brunswick Act deals separately with the consent of the wife where there is application by her husband for change of surname; and with consent of divorced

spouses, the deserted wife, the unmarried mother or a widowed mother. S 9(1) deals with the consent of wife where the spouses are married and specifically provides that a consent can be dispensed with where the wife has been living apart from her husband for a period of five years immediately prior to the application. In such case the Act states that no change in the wife's name shall be effected. However it fails to mention the children of the marriage who may be living with the mother. Quaere: Would it be possible for the husband to change the children's names even though he would not effect a change in the wife's name if the spouses had been living apart for more than five years?

S. 9(2) deals with the consent provisions required in s. 6(3) and (4), s. 7 and s. 8. Here consent can be dispensed with where the other spouse does not contribute to the support of the applicant or the children, cannot be found, is incapable of giving consent, "or for any reason is a person whose consent ought to be dispensed with."

Again then, the separated spouse (in this case the husband) will find it much more difficult to change his surname (if he is not on good terms with his wife!), than the divorced spouse, the unmarried mother, the widowed mother, or the deserted mother. It is submitted that this practical difference should be changed, so that provisions for dispensing with consent are the same in all cases. (This submission is of course made with the pre-existing submission that change of name should be capable of being easily effected under the various Acts.)

Comment

Again there is little in the New Brunswick Act to offer encouragement to the wife who is separated from her husband. Even the old Alberta Act was more lenient towards her than the present New Brunswick Change of Name Act.

Prince Edward Island

Prince Edward Island has maintained the old common law right to change a name. Its deed poll system is similar to that in present use in England.

Nova Scotia

The Nova Scotia Act particularly s. 2(4) [R.S. 1967, c. 30] is in some aspects an advancement over s. 4 of the Ontario Act. S. 2(1) and s. 2(2), when read together with s. 4, allow a married man to apply for a change of surname (which application if accepted shall also effect a like change with surname of the wife and unmarried infant children). The wife of course must consent to the application.

Similarly a married man can make application to effect a change in the given name of his wife and children (again with consent of wife). These subsections are no improvement over the Ontario Act but subsections (3) and (4) of s. 2 do seem to be somewhat more explicit than the Ontario Act-vis-a-vis their statements on the status

of the married woman who is separated from her husband. While it is true that the Ontario Act gives married women and men equal status, it seems to ignore the separated spouses and indeed s. 4 impliedly excludes them in its requirement that any application affect the spouse and unmarried children of the applicant. S 2(3) and s. 2(4) of the Nova Scotia Act, on the other hand, deal expressly with the separated spouses. S. 2(3) provides that a married woman living with her husband shall not effect a change of the surname "acquired by her from such husband".[4] S. 2(4) provides that a married woman <u>not</u> living with her husband "shall upon complying with this Act be entitled to have the change of her name registered." To the writer's knowledge this subsection is the only explicit statement in Canada on the status of separated spouses and their right to apply for a change of name. However even this subsection is deficient in that there is no provision allowing the separated spouses to change the surname of unmarried infant children in their custody, nor is there any statement as to the effect of such change upon the husband.

The Act also typically deals with the right of the widow and the widower to change his or her surname, given name and the surname or given name of all unmarried

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[4]Again the assumption is made that a change of name is made upon marriage.

infant children. (The surname of unmarried infant children must be changed when the application is made to change the widow or widower's surname.)

Comment

S. 2(4) of the Nova Scotia Act should be inserted into each of the provincial Change of Name Acts. In addition there should be separate provision for the children of separated spouses.

Newfoundland

Like other Acts in Canada the Newfoundland statute begins with a general statement as to who may apply under the Act. S. 4(1) (1952, c. 165) states that any person fulfilling the age, citizenship and domicile requirements may change his name. S. 4(2), (3), (4) and (5) proceed to qualify that general statement. S. 4(2) states that a married man may change his surname, or the given name of his wife, but only with the consent of the latter. S. 4(3) states that a married woman may not "during her marriage" change her surname. (This subsection would seem to negate any possiblity of application by a woman who is separated from her husband.) S. 4(4) states that a married man (with consent of the mother) may change the given name of unmarried minor children in his lawful custody as well as the given name of unmarried minor children born to his wife by another man as long as he obtains, in this latter

instance, the consent of both the mother and the father. [Note: That s. 4(4) applies only to the given name of such children for as s. 4(7) explicitly states the surname of unmarried minor children born to the wife before the applicant's marriage to her cannot be changed under the Change of Name Act (although there may be provision for change in other Acts). S. 4(5) allows a widow or a widower with lawful custody of an unmarried infant child to apply to change the given name of such child.]

Comment

There is no mention in the Newfoundland Act of the specific effect of application for change of surname (by a married man, widow or widower) upon the surname of unmarried infant children in his or her custody. In addition the Act does not deal with the divorced applicant; in fact there is not even a statement to the effect that such persons are not covered by the Act. (Compare with the New Brunswick Act and the Ontario Act, both of which expressly state that the Change of Name Act does not cover the adoption of a maiden name by a divorced woman.)

D. General Conclusion

The Alberta Change of Name Act as amended in 1973 is an improvement over the old Act particularly in the rewording of s. 5 (1973, c. 63). However, it is submitted that the statute still bears a grave deficiency in its failure to clearly deal with the status of the separated

spouses, and their children. This is not a minor 'technical' difficulty nor is it merely a theoretical problem. Indeed, the writer while in the process of research and preparing this paper, was presented with this very issue by Student Legal Services. A married woman, legally separated from her husband, had approached Student Legal Services in an attempt to discover whether or not it was possible to revert to her maiden name. At present no one is able to answer her question simply because the new statute has not specifically dealt with the issue. S. 5 might be interpreted to include the separated spouses, but even if it is so interpreted there remains the difficult problem of consent. When the husband of an applicant learns that the effect of his consent to his wife's application is to change both his and her surname (s. 5(2)(a)), he will in all probability quickly refuse to consent to such change thus necessitating Supreme Court intervention under s. 11 of the Act.

In light of the above problem in the new statute the following submission is made:

(a) Section 5 of the present Act should specifically be confined to married applicants who are at the time of the application, living together.

(b) A new section should be added to deal specifically with separated spouses and children in their respective custody. In this instance an application by one spouse to change his or her surname should have no effect

on the surname of the other spouse, or upon the unmarried infant children not in the legal custody of the applicant.

Consent to change of applicant's surname should not be required, although consent should be necessary where there is accompanying application to change surname of children in the applicant's legal custody. In addition, the Act must outline in some detail the grounds upon which the requirement of such a consent can be dispensed with, i.e., where it would be in the best interests of the child to dispense with consent so as to allow the child's surname to correspond with that of the applicants. The court should in the consideration of the paramount interests of the child act in the position of in loco parentis. Thus a special subsection allowing the court to dispense with parental consent to application for the change of a child's surname "where it would be in the best interests of the child" should definitely be a part of any change of name statute.[5] United States courts have approached the problem of dispensing with parental consent

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[5]Note that although the new s. 11 of the Alberta Act is sufficiently broad to allow the court to deal with the dispensing of consent in a competent matter; it is submitted that the section should not be used in cases involving application to change the name of unmarried infant children of divorced or separated parents. Where such applications are involved a special subsection should be added to deal with the dispensing of consent. This subsection would hopefully act as an aid to the court when it is faced with the issue as to what grounds should be considered in dispensing with consent where children of divorced or separated parents are involved.

in such a manner and their approach seems to have worked reasonably well.[6]

PART II

THE AMERICAN APPROACH TO THE PROBLEM OF SEPARATED PARENTS' APPLICATIONS FOR CHANGE OF NAME:

In most American jurisdictions statutory provisions for formal changes of name are regarded as merely supplemental to the common law. Thus while an application to a court of law may be necessary in order to secure formal recognition of change of name by the various administrative agencies, failure to petition the court under the Change of Name statute will not prevent the would be applicant from exercising this common law right to change his name. Unfortunately social security systems, franchise laws, passport regulations, School Board by-laws, Department of Highways regulations, etc. may refuse to recognize a change of name until a formal petition for change of name is presented and upheld by the court. This

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[6]Note that several jurisdictions in the U.S.A. are rather strict in their dispensing of consent "where it would be in the best interests of the child". Thus it has been held in numerous cases that embarrassment of the child due to the difference between his name and that of his mother is not a sufficient reason to permit application for change of the child's name by the mother. The writer disagrees with this view on the grounds that such embarrassment could have grave effects upon the child's essential well being at school and upon his social position in relation to his peers.

administrative obstinancy necessitates a clear understanding of the formal procedures for change of name that are available in the various states. Specifically, discussion will be confined to the procedure followed in applications by separated or divorced spouses on behalf of unmarried infant children in their custody.

(a) In 1973, Hawaii was the only state specifically requiring a woman to adopt her husband's name. All other states, seem to apply the English common law and thus allow a woman to select any name she chooses as long as it is used consistently and without fraud. Thus many married women in the United States continue to function under their maiden name and when divorce or separation occurs no change of name is required.[7] However an entirely different procedure must be followed where the woman has assumed her husband's name during the course of marriage. While many American statutes specifically provide for the restoration of the maiden name with divorce decree or at least impliedly assume that a divorced woman can resume her maiden name without formal permission [Kentucky; In Re Westermans Will, 401 Ill. 489; 82 NE 2D 474 (1948)]; other States have forbidden the restoration of the maiden name upon divorce where there are minor children in the

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[7]This common law right to maintain the maiden name while not specifically abrogated by statute is often ignored especially by American administrative agencies. Hence there are many contentious cases (between these agencies and irate American women) presently before the courts. See Forbush v. Wallace 341 Supp. 217 (M.D. Ala. 1971).

the custody of the mother [Arkansas Statutes para. 34-1216 (1962); Mich. Stat. Ann para 181 (1957); W. Va. Code Ann. para. 48-2-23 Supp. 1969.].

The States which expressly or impliedly allow a married woman to resume her maiden name may do so in one of two ways:

(a) the married woman may be allowed to reassume her maiden name by simply holding it out as her own;

(b) the married woman may be forced to resort to a formal judicial proceeding.

The States requiring a formal judicial proceeding (i.e., Connecticut, Nebraska, Illinois, Pennsylvania, Minnesota) often do not provide any criteria for the grounds upon which the application for judicial name change will be recognized. Thus the problem arises as to whether spouses who are separated will be granted the same considerations, vis-a-vis their application for change of name, as spouses who are divorced. In New Hampshire, for example, it has been held in more than one instance, that a legal separation differs from a divorce in that the name of the wife cannot be changed. (See Desaulnier v. Desaulnier 83 A 2d 604).

The foregoing brief analysis indicates that married women seeking to revert to their maiden names in the United States are faced with the same problems as Canadian women applying under the various provincial statutes.

(b) An understanding of the rights of married women to revert to their maiden name is of course intimately connected with the problem of change of surname of unmarried infant children in their custody. The mother who does revert to her maiden name upon separation or divorce, or who remarries and thus acquires a new surname, faces additional problems when she subsequently applies to change the name of any children in her custody (remember that the child of a marriage bears its father's name as a family name. This is codifies in various statutes throughout the United States). In New York for example, the petition for change of a minor's name formerly had to be signed by both parents [Re Lyons 19 N.Y.S. 2d 839. Fortunately the statute was subsequently amended to provide that a single parent upon giving proper notice could make application on behalf of minor children in his or her custody without the consent of the other spouse "where the interests of the infant will be substantially promoted by the change" (Galanter v. Galanter, 133 N.Y.S. 29, 267).

Courts have interpreted this last phrase somewhat randomly, in instances of applications by mothers (see footnote No. 5, supra) on grounds that the father has a prima facie interest in having children of the marriage bear his surname. Thus a change of the child's name will not be granted merely to spare the child minor inconvenience

or embarrassment. [In Degerberg v. McCormick 187 A. 2d 436] for example Short (Vice-Chancellor) made the following statement at p. 440:

> ...the defendants suggest that it would be embarassing and humiliating to the child to require him to carry the Degerberg surname among his friends at school, church and neighbourhood. In the absence of such misconduct on the part of the father as to bring shame and disgrace upon the child, this defence has been consistently rejected by our courts.

The courts, as evidenced by the foregoing statement, will not apply the new amendment unless the father has deserted the children, refused to pay maintenance, committed a crime, is incapable of granting consent, or in any other way has demonstrated his lack of parental concern for the child (see Kay v. Kay 112 NE 2D 562). There are some exceptions to this general rule (see Clinton v. Morrow 247 SW 2d 1015) where the court has emphasized the embarassment of the child as a significant factor in its acceptance of the petition for change of the child's name. Generally however minor embarrassment is not considered to be sufficient reason for allowing the child's name to be changed, especially where the court considers that the change would further weaken the bonds between the child and its natural father (assuming, of course that the court considers these bonds to be worth preserving).

(c) Cases involving application for change of name by separated parents on behalf of unmarried infant children do not seem as prolific as those by divorced

parents. Often this is due to the fact that several American jurisdictions prohibit the separated mother from changing her own surname (Desaulier, supra); thus there is little reason for change of the child's name. However in Webber v. Webber (167 S 2d 519) a Louisiana court permitted the christian name given by the mother to a child born during the pendency of a separation suit to reamin the child's legal name, notwithstanding the father's objections to the mother's choice. The decision was not based on the statutory proceedings provided in the Louisiana civil code for change of name (Louisiana is a civil law jurisdiction) but rather on the court's general discretion to decide the issue as part of the separation suit.

(d) Even where the court refuses the formal application for change of the child's name this does not seem to abrogate the common law right of the children involved to use any name they so desire--provided that the court does not issue a restraining order. (However, such right is often overlooked or even ignored by the various administrative agencies, supra.) Thus in Application of Shipley 205 NYS 2d 581, even though the formal application for change of name was refused, the children were not enjoined from informally adopting the name of their stepfather.

CONCLUSION

Throughout the United States and Canada change of name problems are becoming of major emotional and symbolic significance to women who are separated, divorced, unmarried,

or remarried. Concurrently, the children in their custody are deeply affected by any developments of the law in this area. The new Alberta statute seems to be a great improvement over the old Act but there remains the serious failure to deal properly with separated spouses and their children. In this area the American jurisdictions offer an interesting and rather complex compilation of case law which may prove of some assistance to Alberta courts in their development of criteria for assessing validity of applications for change of name.