

# Discussion Paper 17 (1987) - Registration and Certification of Births and Deaths

## Parental Dispute Over Child's Surname

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The issue of registration of a child's surname at birth becomes more complex where there is disagreement between the parents. Until 1985 the Registry's practice in cases of dispute was to prefer the father's name for the child where the parents were married and the mother's where they were not married to each other.

In 1985 the New South Wales Equal Opportunity Tribunal heard the case of *Ms L v The Principal Registrar of Births Deaths and Marriages*. The case involved conflicting registrations made by the parents in respect of the birth of their child. The first registration was by the mother in her family name; the second, by the father in his name. In accordance with standard practice at the time, the Principal Registrar deleted the mother's notification from the register. As the parents were married the paternal name was allowed to prevail. The Equal Opportunity Tribunal found the Registry practice to be unlawful in that it constituted discrimination on the grounds of both sex and marriage. The Tribunal found that, whether the parents were married or not, the Principal Registrar was obliged to register the name indicated on the form of information first lodged at the Registry. Since February 1986, the Registry has recorded the date and time of lodgment of all forms of information of birth. In the rare event of there being two valid but competing notifications, the particulars in the earlier one will be registered.

In adopting this new practice, the Registry has exposed itself to a different criticism, for it is said that the new practice itself is discriminatory against women because her post-natal confinement places the mother at a disadvantage in the race to the Registry. Indeed, the change in practice prompted the press headlines "Get Me to the Registry on Time".

At present the problem is confined to birth registrations by parents who are married. The possibility of there being contradictory forms of birth notification for ex-nuptial children is slight because of the requirement that the father of an ex-nuptial child obtain the concurrence of the mother, or a court order, before he can apply to register a birth.

There is also another view of the registration procedure which must be considered. It is said that if the ultimate issue is the welfare of the child, and not the rights of parents to have their names made part of the child's name, there is no need to provide a mechanism for resolving disputes at the time of birth. The child's interests may be better served by use of the procedure to register a change of name later when proof is available that a name different from the one registered has been lawfully acquired by use and reputation. In the final analysis, it is argued, the court may order that steps be taken to change a child's name if it be in the best interests of the child to do so.

**The Commission's tentative view is that it is important for a mechanism to be devised which will enable a child's birth to be registered with particulars of a surname.** This will give effect to Principle 3 of the United Nations Declaration of the Rights of the Child 1959, which states that "the child shall be entitled from his birth to a name ...". It also recognises the child's right to an identity. However, the mechanism adopted should be administratively convenient and should not require the Principal Registrar to resolve disputes or exercise a discretion; that is the task of the Family Court.

In the vast majority of cases, the choice of a child's name will be made by agreement between the parents, and the Principal Registrar will not be involved further than to effect registration of the chosen name. Where the Registrar is notified of a disagreement between the parents over the child's surname, there are a number of ways in which the matter could be resolved with administrative convenience. These are listed below but it is stressed that the options proposed are directed solely at those rare instances where there is sustained disagreement between the parents. In most cases the surname registered will be chosen by the parents by mutual consent.

**Option 1 - Accept the current "first past the post" rule.**

**Option 2 - In the event of dispute, register the father's surname if the parents are married and the mother's if they are not.** Whilst this solution would offend some people it reflects current custom in much of Australian society and provides an administratively easy solution for the very few parents likely to be in dispute. It should be remembered that ultimately either parent may obtain a court order directing the other to accept registration of a name which the court holds to be in the best interests of the child.

**Option 3 - Place no surname on the Register.** When the child has acquired a surname by usage application would be made to add the surname to the register. (At present the Registrar requires evidence of 12 months' use of a particular name before it can be recorded in the register.) If either parent wants a different name entered on the register he or she can go to court to resolve the dispute on the basis of the interests of the child. This option is not favoured by the Commission; it would be contrary to the spirit of Principle 3 of the United Nations' Declaration (above), that every child has a right to a name at birth.

**Option 4 - In the event of dispute, register as the child's surname, a hyphenated combination of the surnames currently used by the parents, arranged in alphabetical order.** (A variant of this would allow the mother to use her unmarried surname even if she was not currently using it at the time of registration.) It has been argued that this would preserve the interests of both parents, whilst giving the child a stronger sense of identity than Option 3. This may involve forcing the registration of a surname which neither parent wants. This option could, however, contain a provision expressly entitling a parent to apply to a court for an order declaring the surname under which the child is to be registered (this entitlement is available in Victoria).

Only Option 1 could apply in the unlikely event of a dispute about a forename.

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[Details Recorded in Birth Registrations](#) | [Procedures for Birth Registration](#)  
[Registration of Name at Birth](#) | **[Parental Dispute of Over Child's Surname](#)**  
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