Sex Discrimination
Birth Records
Names
22 MRSA 2761

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

April 8, 1977

Honorable Elizabeth H. Mitchell
House of Representatives
State House
Augusta, Maine

Dear Representative Mitchell:

You have requested an opinion regarding the constitutionality of L.D. 73,[1] as amended, and, by necessary implication, the pertinent parts of the underlying statute, Title 22 M.R.S.A. § 2761, sub-§ 4.[2] Our review of the law indicates that the statute, as it presently reads, discriminates against illegitimate children by compelling them to bear their mother's surnames. This mandatory surname requirement violates an illegitimate child's rights under both the Due Process and Equal Protection Clauses of the Constitution. The changes which would be made by L.D. 73, as amended, do not eliminate this discriminatory effect.

The statute in question is 22 M.R.S.A. § 2761, sub-§ 4. It provides that "in the case of a child born out of wedlock, the child's surname shall be entered on the certificate as that of the mother." There is no similar statute regarding the surnames of legitimate children.

At common law, a person could assume and use for all purposes any surname of his or her choice, providing that this was not done for a fraudulent purpose. Stuart v. Board of Supervisors, 266 Md. 440, 295 A.2d 223 (1972); State ex rel. Krupa v. Green, 144 Ohio App. 497, 177 N.E.2d 642 (1961); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956); Buyarsky, Petitioner, 322 Mass. 335, 77 N.E.2d 216 (1948). Maine is a

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1/ A copy of which is attached as Attachment A.

2/ A copy of which is attached as Attachment B.

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common law state. Copp v. Paradis, 130 Me. 464 (1931). Therefore, it is logical to presume that the common law principle of freedom to select a name is the law in Maine.3/

The right of Maine parents to select and have recorded the surname of their choice has been confirmed by a judgment of the Penobscot County Superior Court. Sheppard and Sawyer v. LaBrack (Civil Docket No. 76-207, October 12, 1976, Penobscot County Superior Court) enjoined the State Registrar of Vital Statistics from "refusing to accept for filing Certificates of Live Birth solely for the reason that the surname entered thereon is a hyphenated combination of the father's and mother's surname, or the mother's and father's surnames or the mother's surname alone."

Thus, in general a child may bear the surname of its parents' choice. Out of the class of newborn children who are to be given surnames, however, a subgroup, illegitimate children, are singled out and compelled to bear the maternal surname by § 2761, sub-§ 4.

Equal Protection

The United States Supreme Court hasindicated that the test to be applied in determining whether classifications involving illegitimate children violate the Equal Protection Clause is whether the end which the Legislature seeks to achieve is a permissible one, and whether the means chosen to effectuate that end have a rational basis and are reasonably related to the achievement of that end. Mathews v. Lucas, 427 U.S. 495 (1976). There are two possible purposes for requiring that illegitimate children bear maternal surnames. They are: (a) the protection of the putative father from having his name used; and (b) record-keeping necessity. Applying the test established by the Supreme Court to each of these justifications, it is clear that neither meets Constitutional requirements.

A. Protection of the Putative Father

The goal of protecting some putative fathers from having illegitimate children bear their surnames, which could expose them to embarrassment or prejudice in paternity actions, may be a legitimate end for state legislative concern. The means chosen

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3/ The proposition that the common law applies finds support in the decision of the Maine Supreme Judicial Court, In Re Susan E. Reben aka Susan E. Hirsch, 342 A.2d 688 (Me., 1975), a case dealing with the statutory name change procedure. The court found that with respect to name change, the common law philosophy was incorporated into statute. Thus, by implication, the common law exists in the area of initial name choice.

to accomplish this goal, however, are unreasonable. The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966). Here, the means chosen is not narrowly tailored to accomplish the purpose of protecting those putative fathers in need of protection; rather, it creates a classification of all illegitimate children and arbitrarily precludes any such child from bearing a paternal surname regardless of the relationship of that child and his or her father. The purpose of protecting some fathers may not be accomplished by invidious distinctions between classes of citizens. Massey v. Apollonio, 387 F. Supp. 373, 377 (D.C., Me., 1974).

Such an overbroad classification is facially unreasonable, and it becomes even more clearly unreasonable when considered in light of the rest of the statute. The statute as it presently reads and as proposed to be amended allows the father, if he provides a written consent,[4/] to have his name listed on the birth certificate as the father. The Legislature has thereby demonstrated a willingness to have the putative father identified as a parent of the illegitimate child, and provided a mechanism for protecting the father through the requirement of written consent. In light of this, it cannot be said that penalizing illegitimate children and their parents by an absolute prohibition against the use of paternal surnames is reasonably necessary to protect those putative fathers who don't want their names associated with illegitimate children. This goal can be accomplished through the less broad method of written consent which the Legislature has already sanctioned with regard to the recording of father's surnames on the birth certificates of illegitimates.

B. Record-keeping Necessity

The argument that requiring illegitimate children to bear maternal surnames is necessary in order to insure accurate record-keeping fails as such a requirement is not a rational means of accomplishing the permissible state goal of maintaining accurate records of vital statistics. The purpose of birth records, from the state's point of view, is to maintain a record of when and where a child is born, and who its parent or parents are.[5/]

4/ By amendment the mother's consent will also be required before the father's name may be entered on the birth certificate.

5/ In addition, birth records are used to collect data which is transmitted to the Federal Government for statistical purposes.

Birth records are indexed by the child's surname and date of birth, so there can be no argument that it is necessary for the mother's and child's surnames to be the same in order to locate records, especially since this is generally not true for legitimate children. Furthermore, the argument of need to identify the child with the mother by identical surnames is unrealistic in light of the still prevalent practice of women assuming their husband's surnames on marriage. Many mothers of illegitimate children will eventually marry either the fathers of their children or another, and voluntarily assume their husband's surnames.

The idea that a particular surname must necessarily be recorded in order to have accurate records is refuted by the decision in Sheppard and Sawyer v. LaBrack, supra.

The state's interest in recording vital statistics is that of collecting facts, and maintaining a system for storing and retrieving those facts. The method chosen for recording illegitimate births creates a special system for recording some births which is different from that used for recording the majority of births, and which serves no rational purpose for identification of the child, ease in location of records, or for distinguishing illegitimate births.

Due Process

In determining whether a particular legislative classification has resulted in a denial of due process, a dual inquiry must be made.

> "What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970).

The governmental function involved here is that of recording, for the purpose of keeping records of vital statistics, the births of children. The private interest here is that of a parent or parents in their child and the surname they have chosen to give it.

The Supreme Court has recognized that the interest of parents in their children is a significant one. The rights to conceive and raise one's children have been deemed "essential." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and rights far more precious than property rights, May v. Anderson, 345 U.S. 528 (1953). "The care, custody and nurture of the child resides first in the parents," Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The Maine Supreme Judicial Court has also recognized that the interest of parents in their children is of "constitutional dimensions." Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me., 1973).

The significant interest of parents in the naming of their children cannot be overridden simply because the parents are not ceremonially married to one another.

> "To say that the test of equal protection should be the 'legal' rather than the 'biological' relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 75-76 (1968).

In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court considered the constitutionality of dependency proceedings under an Illinois law which conclusively presumed the unwed father to be unfit to have the custody of his children. The question raised was whether the means used to achieve the state's goal was constitutionally permissible. The Court found that the unwed father's interest in having custody of his children was "cognizable and substantial." (559) In determining that a conclusive presumption of unfitness was impermissible, the Court recognized that efficiency in making custody orders is not the only value recognized by the Constitution. The reasoning of the Court in Stanley is equally applicable here.

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly distains present realities in deference to past formalitiies, it needlessly risks running roughshod over the important interests of both parent

> and child. It therefore cannot stand." Stanley, supra, 657. See also Carrington v. Rash, 380 U.S. 89 (1965); Vlandis v. Kline, 412 U.S. 441 (1972).

Given the significance of the interests of parents, wed or unwed, in the bearing and raising of their children, including the selection of names for their children, it is a denial of due process to exclude those interests from consideration by a statutory presumption such as the Legislature has established here with regard to the surnames of illegitimate children.

The statute in question establishes a classification which discriminates between illegitimate children and all other children by denying to illegitimate children an opportunity available to all other children - that of bearing any name but the maternal surname. The goal of protecting putative fathers can be achieved in a non-discriminatory manner, and is already sanctioned by the Legislature, making such an extreme method as a total prohibition unreasonable. The argument that the classification is necessary for the orderly keeping of birth records is not rationally related to the classification made when viewed in light of the realities of the record-keeping function. The conclusive presumption that all putative fathers need such protection discriminates against those fathers who desire to have their illegitimate children bear their surnames by providing no mechanism for these fathers to rebut the presumption that they do not want to be associated with their children. We conclude, therefore, that Title 22 M.R.S.A. § 2761, sub-§ 4, and the portion of L.D. 73, as amended, which requires, without exception, that children conceived and born out of wedlock must bear the maternal surname, are unconstitutional in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

JEB/ec
Enclosures

Attachment A

ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document **No. 73**

H. P. 52 House of Representatives, January 12, 1977

Referred to the Committee on Legal Affairs. Sent up for concurrence and ordered printed.

EDWIN H. PERT, Clerk

Presented by Mr. Cote of Lewiston.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED SEVENTY-SEVEN

AN ACT Pertaining to Birth Records.

Be it enacted by the People of the State of Maine, as follows:

22 MRSA § 2761, sub-§ 4 is repealed and the following enacted in its place:

4. Illegitimate child. If the mother was not married either at the time of conception or birth, the child shall bear the mother's last name and the name of the putative father shall not be entered on the certificate of birth without the written consent of the mother and the person to be named as the putative father, unless a determination of paternity has been made by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered on the birth certificate.

STATEMENT OF FACT

The purpose of this bill is to require the consent of both parents in order to add the name of the putative father on a birth record. The law is unclear at present as to whether the name of the putative father can be added by his signature only or the consent of both parents.

STATE OF MAINE
HOUSE OF REPRESENTATIVES
108TH LEGISLATURE (Filing No. H-8)
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 52, L.D. 73, Bill, "AN ACT Pertaining to Birth Records."

Amend the Bill by striking out everything after the amending clause and inserting in its place the following:

'4. Illegitimate child. In the case of a child conceived and born out of lawful wedlock, the child's last name shall be entered on the certificate as that of the mother, and the name of the putative father shall not be entered on the certificate of birth without the written consent of the mother and the person to be named as the putative father. However, if a determination of paternity has been made by a court of competent jurisdiction, then the name of the father as determined by the court shall be entered on the birth certificate.'

Statement of Fact

The purpose of this amendment is to clarify the language and remove an ambiguous definition of "illegitimate child."

Reported by the Committee on Legal Affairs.

Reproduced and distributed under the direction of the Clerk of the House.
2/2/77

(Filing No. H-8)

STATE OF MAINE
HOUSE OF REPRESENTATIVES (Filing No. H-12)
108TH LEGISLATURE
FIRST REGULAR SESSION

HOUSE AMENDMENT "A" to COMMITTEE AMENDMENT "A" to L.D. 73, Bill, "AN ACT Pertaining to Birth Records."

Amend the Amendment by inserting after the underlined word and punctuation "father." in the 8th line the following underlined sentence:

'The signature of the mother and putative father on the written consent shall be acknowledged before an official authorized to take oaths.'

Statement of Fact

This amendment requires notarized signatures to the consent form required of the mother and putative father of an illegitimate child, if the birth certificate includes the name of the father.

Filed by Mr. Biron of Lewiston.

Reproduced and distributed under the direction of the Clerk of the House.
2/3/77

(Filing No. H-12)

CHAPTER 703

BIRTH RECORDS

§ 2761. Registration of live births

A certificate of each live birth which occurs in this State shall be filed with the clerk of the municipality in which such live birth occurred within 7 days after the date of birth.

1. Certificate from hospital. When the live birth occurs in a hospital or related institution, the person in charge of such institution shall be responsible for entering information on the certificate, for securing signatures required on the certificate, and for filing the certificate with the clerk of the municipality.

2. Date of birth. On each such certificate, the physician in attendance shall verify or provide the date of birth and medical information required within 5 days after birth.

3. Certificate prepared and filed. Except as provided in this section, the certificate shall be prepared and filed by:

A. The physician or other person in attendance on the birth, or in the absence of such a person;

B. The father; or in the absence of both of these,

C. The mother; or in the absence of the aforesaid, and in the inability of the mother,

D. The person in charge of the premises where the live birth occurred.

4. Illegitimate child. In the case of the birth of an illegitimate child, the name of the putative father shall not be entered on the certificate without his written consent. In the case of a birth of a child out of wedlock, the child's surname shall be entered on the certificate as that of the mother.

5. Certificate signed by father and mother. In every case, the father or mother of the child shall sign the certificate and shall attest to the accuracy of the personal data entered thereon in