IN THE COURT OF APPEALS OF MARYLAND

NO. 105

SEPTEMBER TERM, 1972

MARY EMILY STUART

v.

BOARD OF SUPERVISORS OF ELECTIONS
FOR HOWARD COUNTY *et al.*

Murphy, C.J.
Barnes
McWilliams
Singley
Smith
Digges,
JJ.

Dissenting opinion by Smith, J.

Filed: October 9, 1972

I would affirm.

I do not see a constitutional issue in this case other than that of judicial legislation. The issue is not under what name one might prefer to permit a woman to register to vote, but what the General Assembly meant by "name" insofar as a married woman is concerned in its enactment of the laws relative to registration.

We start out with two bases, Article 8 of the Maryland Declaration of Rights providing "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other," and the oft expressed doctrine that the construction placed upon a statute by administrative officials soon after its enactment is strong, persuasive influence in determining the judicial construction and should not be disregarded except for the strongest and most urgent reasons. *Williams v. Loyola College*, 257 Md. 316, 329, 263 A.2d 5 (1970); *F. & M. Schaefer v. Comptroller*, 255 Md. 211, 218, 257 A.2d 416 (1969); *John McShain, Inc. v. Comptroller*, 202 Md. 68, 73, 95 A.2d 473 (1953); and *Smith v. Higinbothom*, 187 Md. 115, 132-33, 48 A.2d 754 (1946). When the General Assembly revised the election laws by the enactment of Chapter 392 of the Acts of 1967 it eliminated from the statute a specific provision relative to name. However, there is included a form with "Last Name," "First Name" and "Middle Name or Initial" appearing on it. Code (1971 Repl. Vol.) Art. 33, § 3-13(a) provides for prospective voters "to answer in the presence of the registrars all questions required on the registration forms." The provision in Code (1957)

Art. 33, § 23(c) for entering "[t]he name and age of every applicant" is but little different from the requirement of Code (1939) Art. 33, § 19 that "[u]nder the column 'Name'" should be entered "the name of the applicant, writing the surname first, and full given or Christian name after," which came into the Maryland law under § 15 of Chapter 22 of the Acts of 1882, apparently our first registration law, which became Code (1888) Art. 33, § 14.

Prior to the adoption of the 19th Amendment to the Constitution of the United States women were not permitted to vote in Maryland, *Leser v. Board of Registry*, 139 Md. 46, 114 A. 840 (1921), the provisions of Article 1, § 1 of the Constitution of Maryland limiting suffrage to males not having been eliminated until the adoption of a constitutional amendment by Maryland voters in 1956. It would seem that the General Assembly took special cognizance of women and their right to vote when it enacted Chapter 299 of the Acts of 1924, which became Code (1924) Art. 33, § 19, providing that "[a] female applicant for registration as a voter [should] not be required to state her exact age, but it [should] be sufficient for said applicant to state, in answer to any and all questions relating to her age, that she [would] be at least 21 years of age on the regular election day next succeeding the day of registration," a provision which remained in Article 33 until it was revised by Chapter 934 of the Acts of 1945. It chose to remain silent upon the subject of name, however, from which one might infer tacit approval of the prevailing practice.

In 1921, prior to the day of the so-called "permanent registration" now in effect, when a person once registered in a

given election district or precinct could continue to vote there notwithstanding the fact that he might move to some other address in that election district or precinct, Attorney General Alexander Armstrong was asked whether a woman who had registered and voted the preceding year and had since married was entitled to vote at a coming or subsequent election under the name which she bore at the time of registration. In 6 *Op. Att'y Gen.* 188 (1921), he replied in the affirmative, saying that the only ground upon which the right to vote might be challenged was that the person offering to vote was not a registered voter of the district or precinct in which application was made. He further said:

> "The case of a woman whose name has been changed by marriage is analogous to that of a person who has, since registration, changed his or her residence to some other residence within the district or precinct. In each of these instances no change of the registration books is necessary." *Id.* at 189.

It is interesting to note that in 1931 the Attorney General was asked to advise "as to the proper name to be used by a Catholic Sister or a Brother in a religious order when registering for voting purposes." In 16 *Op. Att'y Gen.* 144 (1931), he replied:

> "The law requires the giving of the correct legal name, and until a person's name has been changed in the manner provided by law, this name should be given when applying for registration purposes." *Id.* at 144.

2 Bishop, *Marriage, Divorce and Separation* § 1622 (1891), states:

> "The rule of law and custom is familiar, that marriage confers on the woman the husband's surname."

Like statements are to be found in 57 Am. Jur.2d *Name* § 9 (1971),

relied upon by the trial judge, and 65 C.J.S. *Name* § 3c (1966) . *See also* on the subject Annot., 35 A.L.R. 413 (1925).

In re Kayaloff, 9 F. Supp. 176 (S.D. N.Y. 1934), is interesting in this regard. There a married woman was seeking naturalization. She was a musician "known professionally by her maiden name." She feared that she might possibly suffer financial loss if her naturalization certificate showed her surname to be that of her husband. She saw another problem in that a discrepancy would exist between her musical union card and her naturalization certificate. The court, after stating that "[t]he union card should conform to the naturalization certificate rather than that the latter should yield to the union card," said:

> "Under the law of New York, as pronounced in *Chapman v. Phoenix National Bank*, 85 N.Y. 437, a woman, at her marriage, takes the surname of her husband. 'That,' it was there said, 'becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.'" *Id.* at 176.

The exact point here involved was before the court in *People v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945). Antonia E. Rago, admitted to the bar of Illinois in 1938, married MacFarland in 1944. She was admitted to practice under the name of Rago in the federal courts in Chicago and before the Supreme Court of the United States, in addition to the Illinois courts. She practiced under the name of Rago. She claimed that her husband expressly approved of her plans to continue her practice of law and her other business affairs under the name of Rago. She sought to register

under that name and challenged a provision of the Illinois law which provided that any registered voter who changed her name by marriage should "be required to register anew and authorize the cancellation of the previous registration." In holding that she was obliged to register under her married name, the court said:

> "Nothwithstanding petitioner's contention to the contrary, it is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname, with which is used her own given name." *Id.* at 67.

The courts in *Kayaloff* and in *Lipsky*, as have many of the authorities, relied upon *Chapman v. Phoenix Nat'l Bank of City of New York*, 85 N.Y. 437 (1881). There Verina S. Moore had married a man by the name of Chapman. The question actually before the court was the propriety of notice given after her marriage to an individual described as "Ver. S. Moore." The court there said:

> "Her name was then, and for more than three years had been, Verina S. Chapman. For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby." *Id.* at 449.

I am not impressed by the comment, citing *Romans v. State*, 178 Md. 588, 597, 16 A.2d 642 (1940), that a person has a common law right, absent a statute to the contrary, to "adopt any name by which he may become known, and by which he may transact business and execute contracts and sue or be sued." Rather, the question is, as I see it, what the General Assembly meant in the registration laws when "name" was mentioned.

It is conceded by all concerned that the uniform practice in Maryland has been for a married woman to register under the surname of her husband. This is in accordance with what I understand to be the authorities on the subject of name. It certainly is in accordance with custom. Therefore, I believe that to permit a married woman to register under a surname other than that of her husband she must either go through the process of having her name changed or the General Assembly must so provide. A holding to the contrary is in my humble opinion judicial legislation which is forbidden by the Maryland Declaration of Rights.