# Female Surnames and California Law

1) Elizabeth Smith is marrying Robert Jones next week; she wants to be known thereafter as Mrs. Robert Jones;

2) Judy Kinney is marrying Lance Schwartz next week; she wants to be known thereafter as Judy Schwartz;

3) Mary Walker is marrying Steven White next week; she wants to continue to be known thereafter as Mary Walker;

4) Dr. Gertrude Stewart is marrying William Star next week; she wants to be known professionally thereafter as Dr. Gertrude Stewart, but socially as Mrs. William Star;

5) Susan Chambers has been married to Michael Chambers for years and has been known as either Susan Chambers or Mrs. Michael Chambers; she wants henceforward to have a separate identity and be known as Susan Knowles;

6) Sally Howes is marrying Hubert Wulf next week; she wants to be known thereafter as Sally Wulf-Howes;

7) Anne and John Reed have just dissolved their marriage; she wants to continue to be known as Anne Reed;

8) Sylvia and Joseph Brown have just dissolved their marriage; she wants to continue to be known as Mrs. Joseph Brown;

9) Nancy and Richard Black have just dissolved their marriage; she wants henceforth to be known by her maiden name, Nancy Scott;

10) Linda and James Adams have just dissolved their marriage; Linda received custody of the two Adams children; she wants henceforth to be known as Linda Silvers;

11) Stephanie Stumpf has never liked her childhood surname of Stumpf; she has now reached her majority and wants henceforth to be known as Stephanie Shaw;

12) Margaret Carr has been living with Peter Hay and although not married to him, she wants henceforth to be known as Mrs. Peter Hay;

13) The husband of Mrs. Jane (Henry) Edwards (the former Jane Jones) has just died; she wants to continue to be known as Mrs. Henry Edwards;

14) When Diane Murphy dissolved her marriage to Brian Murphy she retained the Murphy surname; she is now marrying Thomas O'Brien but wants to continue to be known as Diane Murphy.

These 14 hypotheticals are posed to illustrate the wide variety of name choices an adult[1] California woman faces today. The question is, are these surnames[2] "legal"? Yes, in every case. It is a principle of common law that "a person may ordinarily change his name at will," providing only that one does not do so "for fraudulent purposes"[3] or "interfere with the rights of others."[4] California cases confirm that the principle allowing a person to "change his name at will"[5] has "not been abrogated."[6] And California law provides two routes by which an adult may effect a name change: by the common law route of general usage[7] of the desired surname, or by a statutory procedure leading to a public record of the name change.[8]

But it is often questioned whether the surname of a married female in California is not governed by exceptions to this general rule. After all, it is "immemorial custom that a woman upon marriage abandons her maiden name and assumes the husband's surname."[9] And upon dissolution, the Family Law Act does direct the court to "restore" the maiden or former name of the wife.[10] It will be the purpose of this article to establish that, unlike the pattern of

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[1]This article is confined to the question of adult surnames. The right of a minor to change his name is a different question for "At common law a minor did not have the right to change his name," and California courts have held that "Continued application of that rule is recognized by the statute (Code Civ. Pro. § 1276)" although "fit parents . . . in the best interests of their child . . . may apply in his behalf" for a name change: *In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874, *hearing den.* (1968).

[2]"Surname" or "family name": "that which is derived from the common name of his parents, or is borne by him in common with other members of his family": 65 C.J.S., *Names*, § 3(a) (1966). California has accepted the dictionary definition that the surname is " 'the inherited last name taken by children and changed only legally' (Webster's 3d *New International Dictionary*)": *In re* Trower, 260 Cal. App. 2d at 78, 66 Cal. Rptr. at 875. Further, California cases "recognize that the father . . . has a protectible interest in having the child bear the paternal surname": *Id.* at 77, 66 Cal. Rptr. at 874.

[3]57 AM. JUR. 2d, *Name*, § 10 (1971).

[4]65 C.J.S., *Names* § 11(1) (1966).

[5]*E.g.*, Emery v. Kipp, 154 Cal. 83, 86, 97 P. 17, 19 (1908). *Cf.* Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (1970).

[6]*In re* Useldinger, 35 Cal. App. 2d 723, 726, 96 P.2d 958, 960 (1939). *In re* Trower, 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (1968).

[7]35 CAL. JUR. 2d, *Names*, § 5 (1957). *E.g.*, One "may lawfully change his name without resort to legal proceedings and by general usage . . . acquire another name": Everett v. Std. Acc. Ins. Co., 45 Cal. App. 332, 339, 187 P. 996, 999 (1919). If one "changes his name and uses and is known by the new name in all his affairs, it becomes his legal name . . . ": Ray v. American Photo Player Co., 46 Cal. App. 311, 314, 189 P. 130, 131 (1920).

[8]CAL. CODE OF CIV. PROC. § § 1275-79 (West 1972). 35 CAL. JUR. 2d, *Names*, § § 5-6 (1957). "[T]he purpose of the statutory procedure is simply to have, wherever possible, a record of the change": *In re* Ross, 8 Cal. 2d 608, 609, 67 P.2d 94, 95 (1937).

[9]57 AM. JUR. 2d, *Name*, § 9 (1971).

[10]CAL. CIV. CODE § 4362 (West Supp. 1972).

certain other states,[11] name changes for adult women in California are governed by the same rules that govern name changes for men in California: "Anyone may change his name"[12] but no name change is ever mandated. Thus, a female, married or single, who has reached her majority stands before the law with the same right to retain or change her surname as does a man: she may choose to retain her birth given name consistently throughout her life; she may or may not choose to change her surname upon a marriage or a dissolution.[13]

## I. CALIFORNIA STATUTES AND FEMALE SURNAMES

There are no California statutes which state affirmatively what surname an adult domiciliary of the state may or must use. The only California statutes that deal with names per se are those on "Change of Names," California Code of Civil Procedure, §§1275-1279.[14] These statutes have remained virtually unchanged since enacted in the original California Codes of 1872.[15] As they were proposed and enacted without controversy, there is no "legislative history" to throw light on the original legislators' intent. Further, the California woman's assertion of her rights as an individual and the existence of easier dissolution and remarriage, both recent phenomena, are the prime factors disrupting the traditional pattern of female surname usage today. So it is not surprising to find that these statutes are not designed to deal directly with the question of females and their legal surnames in the 1970's. And increased usage of the statutes has revealed certain peculiarities.[16]

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[11] *E.g.*, New York: Chapman v. Phoenix Nat'l Bank, 85 N.Y. 437 (1881) and *In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934); Illinois: People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945); Alabama: Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per cur.* 405 U.S. 970 (1972). *Cf.* KANOWITZ, WOMEN AND THE LAW 41-46 (1969), as summarized in Freeman, *The Legal Basis of the Sexual Caste System*, 5 VALPARAISO U. L. REV. 203, 212 (1971): "Legally, every married woman's surname is that of her husband, and no court will uphold her right to adopt a different name. Pragmatically, she can use another name only so long as her husband does not object."

[12] Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (1970).

[13] The customary way to change names at these junctures is, of course, by usage, not by the more formal statutory procedure.

[14] (West 1972).

[15] These statutes originally governed those doing business under fictitious names but such provisions are now in CAL. BUS. & PROF. CODE §§17900 *et seq.* (West Supp. 1972). Name change by minors is provided for in these statutes but is not the topic of the present article.

[16] *E.g.*, the peculiar provision of CAL. CODE OF CIV. PROC. §1276 calling for the name change petitioner to list his father, if living, or otherwise, near relatives (making no provision for actual notification of them), but with no provision for listing, much less notifying, a spouse or children, persons presumably vitally concerned in a name change. *Cf.* Sousa v. Freitas, 10 Cal. App. 3d 660, 663, 89 Cal. Rptr. 485, 487 (1970).

Yet these Change of Name statutes do establish an overall, clear policy towards names and name changes in California. With no reservations, exceptions, or restrictions between males and females, the statutes provide that any adult may apply for a name change by petitioning the superior court of the county where the person resides. One must give "his or her" present name and the reason for the change to the name proposed (§1276). §1277 calls upon the court to order "all persons interested" in such name change to appear 4 to 8 weeks hence to show cause why the application for the change "should not be granted."[17] Objections may be filed by anyone who can show the court "good reason" against such name change (§1278). At the hearing, the court may examine on oath the petitioner, remonstrants, or "other persons." The decision is in the court's discretion;[18] the only standard the statute sets is that the court make the order to change or dismiss the application according to what seems "right and proper." The goal of this statutory procedure is the certified copy of the name change decree of the court that is to be filed in the office of the Secretary of State (§1279) and thus be publicly available.[19]

Nowhere in these Change of Names statutes is there an assertion that this name change procedure is to be the exclusive method for effecting name changes in California. Nowhere is the common law method of changing one's surname by usage abrogated. Nor are there situations listed that demand a mandatory name change.[20] Nowhere in these statutes is a name change categorized as a privilege; it is treated as any other civil right of a California adult.

There are several other California statutes that touch on names which, when read with these Change of Names provisions, clarify the state's policy of recognizing an adult's right to the surname of his choice, whether that surname is acquired from one's father by birth, or by a conscious name change during adulthood.

Thus, the new Family Law Act nowhere requires that a married woman adopt her husband's surname. And the Act provides that in any dissolution the court "may restore the maiden or former name of the wife regardless of whether or not a request . . . was . . . in the

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[17]The order to show cause must be published in a county newspaper at least once a week for 4 successive weeks; if no newspaper in the county, it must be posted in 3 of the most public places in the county.

[18]On the bounds of the *Duty and Discretion of the court in passing upon Petition to change Name of Individual, see* Annot., 110 A.L.R. 219.

[19]CAL. GOV'T. CODE §12194 (West 1963) provides that the fee for filing a certified copy of the decree changing one's name is $5.00. However, the costly part of this procedure is the charge involved in publication.

[20]Before the California Constitutional revision of 1966, Const. Art. IV §25(6) read: "The Legislature shall not pass local or special laws in any of the following enumerated cases: . . . (6) Changing the names of persons . . . "

petition."[21] When this liberal provision was originally enacted in 1945, it was restricted by "if there is no living issue of the marriage." The qualifier was deleted within the year.[22] Consequently, a woman is free to choose her surname upon dissolution.[23]

In order to identify the person who desires to vote, the California Elections Code must cope with the question of legal surnames. This Code simply calls on each citizen to register in his "name at length."[24] It recognizes the three ways an elector can change his or her surname in California: by marriage, usage, or statutorily.[25] A special provision for women simply provides that "if" her surname is changed after registration by marriage or divorce, she is to sign both old and new names when she votes.[26] There is no provision that a married woman must register to vote under her husband's surname.[27] But a woman registrant is ordered to precede her given

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[21] CAL. CIV. CODE § 4362 (West Supp. 1972) and § 4457 (West 1970).
[22] CAL. CIV. CODE § 4512 (West 1970).
[23] However, Symposium, *The Work of the 1947 California Legislature*, 21 SO. CAL. L. R. 1, 35 (1947) points out that the statute's wording does leave the problem of whether such "restorations" may be at the demand of a husband who is anxious to deny his former wife any further use of his surname. The answer would seem to be "no" if an analogy may be drawn from *In re* McGehee, 147 Cal. App. 2d 25, 26, 304 P.2d 167, 168 (1956), for there the court said of a former husband who did not want his wife's child (born of her second marriage) to use his surname: "He may consider the name . . . to be 'exclusive,' but the law does not so consider it."
[24] CAL. ELECT. CODE § 310(b) (West Supp. 1972).
[25] "If an elector changes his name other than by marriage [*i.e.*, recognizing change by marriage] . . . he shall state that fact in his affidavit of registration, together with the former name, date of change [*i.e.*, recognizing change by usage] and if by decree of court, the court [*i.e.*, statutorily]." And "Whenever an elector . . . has lawfully changed his surname, he may reregister . . . giving: . . . (c) How his name was changed . . . . " CAL. ELECT. CODE § § 214-15 (West 1961). The Code, however, does place one restriction on name changes: a candidate cannot change his name during the year just before the election by usage: "If a candidate changes his name within one year of any election, his new name shall not appear . . . unless that change was made by: (a) Marriage. (b) Decree of any court of competent jurisdiction." CAL. ELECT. CODE § 10233 (West 1961).
[26] CAL. ELECT. CODE § 14404 (West 1961).
[27] A case can be found in which Election Code wording similar to California's was used to imply a mandatory change of surname upon marriage in that state: People *ex rel.* Rago v. Lipsky, 327 Ill. App. at 70, 63 N.E.2d at 645 (1945). But Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233, 237 (1971) argues that the California statute is "clearly permissive, not mandatory." Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552, 558 (1971), points out that the holding in *Lipsky* assumes that this woman had 2 names and that under these circumstances she could be ordered to use a particular 1 of the 2, *i.e.*, her husband's surname, for voting purposes and thus the case does "not stand for the proposition that a woman must change her name at the time of her marriage in order to vote in Illinois."
More recently the Maryland Court of Appeals, in the face of a statute similar to this California statute, held in Stuart v. Bd. of Supervisors of Elections, 226 Md. 440, 295 A.2d 223, 226 (1972) that although it was willing to concede that *Lipsky* "refused to allow a married woman to remain registered to vote under

name by "Miss" or "Mrs."[28] This is the one provision in the Elections Code that singles out the female voter for discriminatory treatment.[29] Such prefixes not only tend to violate California's general non-dictative names policy, but create ambiguity.[30] The better identification of voters comes from their social security numbers.[31]

Thus, the Elections Code along with the Change of Names and Family Law statutes demonstrates that a woman's name in California may be changed at marriage, upon termination of marriage, by usage, or through the statutory procedure. Furthermore, the Elections Code provisions are the clearest statutory indication that a woman has a protected right to change her surname upon marriage or termination of marriage but that such change is nowhere mandated.[32]

The California codes that call for a citizen to register oneself stipu-

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her birth given name," the better precedent for Maryland was State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961), which "approved the voter registration of a married woman in her birth given name which she had openly, notoriously and exclusively used subsequent to her marriage." The Maryland Court held that *Green* represented the law of Maryland which had "heretofore unequivocally recognized the common law right of any person . . . to 'adopt any name by which he may become known . . . ' [cite omitted]" and went on to reason that "If a married woman may lawfully adopt an assumed name . . . without legal proceedings, then . . . Maryland law manifestly permits a married woman to retain her birth given name by the same procedure of consistent, nonfraudulent use following her marriage": Stuart v. Board of Supervisors of Elections, 226 Md. 440, 295 A.2d 223, 226.

[28]CAL. ELECT. CODE § § 310(b), 321, 450 (West Supp. 1972).

[29]Recognition of this led to the introduction of 3 bills in the California Legislature in 1972:

SB 150 would amend CAL. ELECT. CODE § § 310, 321, 450: it would revise the requirement that a woman's name be preceded by prefix Miss or Mrs. in voter registration and precinct index to include prefix Ms., and add the requirement that a man's name be preceded by prefix Mr.

AB 298 would amend the same sections by deleting the requirement that a woman's name be preceded by Miss or Mrs. in voter registration, and by adding the requirement that voter's sex be indicated.

AB 489, the most comprehensive of the 3, would add § 53.5 to CAL. CIVIL CODE, requiring that Ms. rather than Miss or Mrs. be employed with respect to a female, when requested by the female, in any document, record, or printed form issued by state.

[30]Is the provision designed to indicate marital status? One must ask "why"? Since men registrants nowhere indicate their marital status, it seems of questionable utility to seek to know the marital status of the other half of the voters. Furthermore, since "Mrs." is not used exclusively by married women but is also commonly — and properly — used by divorcees and widows (65 C.J.S., *Names*, § 5(a) (1966): such titles are descriptive, not legal) it does not even give sure evidence of the women registrants' marital status. *Quaere:* should a woman voter who has retained her maiden name, though married, register as "Mrs." or "Miss"? California statutes nowhere define these 2 titles.

[31]*Cf.* CAL. ELECT. CODE § § 310(d), 321 (West Supp. 1972).

[32]References to names and name changes appear in the Business and Professions Code, but the provisions confine themselves to the requirement that notice of any name change must be given by the licensed professional to one's licensing board and thus provide no light on the present topic of female surnames except to note that no distinction is made between male and female professionals, and

late one's "real and full name"[33] or "name at length"[34] or "true full name."[35] This terminology calls on a citizen to register in a name by which he is truly known,[36] not necessarily his birth given name, nor a "legal name" determined by some set of technical common law rules. Even statutes governing complaints, arraignments, etc., simply call for use of "the names" of all parties,[37] or call for the defendant to declare his "true name"[38] if he does not wish to be proceeded against by the name used in the accusatory pleading. Thus, California policy on names as manifested through the statutes is consistent: while the state has an interest in being able to identify its citizens, it is not interested in dictating to any citizen, male or female, the name by which one is to be known.

## II. CALIFORNIA CASELAW AND FEMALE SURNAMES

The question of a female's legal surname is new in California jurisprudence insofar as it reflects a changed social order. No longer is this question a legal rarity that springs up when a married woman is sued under her maiden name[39] or when title to a piece of property has been left in the maiden name of a now-married female.[40] Today the "New Woman" as well as California's nonrestrictive dissolution and remarriage laws mean that the question of what is a female's "legal" surname arises much more frequently. The response must be found in weighing the state's interest in being able to identify its citizens and in preserving custom[41] versus the woman's right to be identified as an individual through a name personally meaningful to her.[42]

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there are no provisions assuming a name change upon the marriage of the licensed female professional: *e.g.*, CAL. BUS. & PROF. CODE § § 4094 (for pharmacists), 1654 (for dentists), etc. (West 1962).

[33] CAL. CIV. CODE § 4201 (West 1970) (marriage license).

[34] CAL. ELECT. CODE § 310(b) (West Supp. 1972) (voter registration).

[35] CAL. VEH. CODE § 12800 (West 1971) (driver's license application).

[36] CAL. VEH. CODE § 20 (West 1971), however, warns that it is "unlawful to use a false or fictitious name."

[37] CAL. CODE OF CIV. PROC. § 422.40 (West Supp. 1972).

[38] CAL. PEN. CODE § 989 (West 1970).

[39] Bogart v. Woodruff, 96 Cal. 609, 31 P. 618 (1892).

[40] Emery v. Kipp, 154 Cal. 83, 97 P. 17 (1908).

[41] Rider, *Legal Protection of the Manifestations of Individual Personality — The Identity-Indicia*, 33 S. CAL. L. REV. 31, 64 (1959) states "The public has an enormous interest in the nonconfusion of individual identities . . . . The most important is probably the public need in times of emergency to call on . . . individuals." One could also point out that a number would be the best means of identification but the custom of using names in our society has long been preserved.

[42] The importance of freedom of name choice for women is illustrated by Stuart's statement in Stuart v. Bd. of Supervisors of Elections, 266 Md. 440, 295 A.2d 223, 224 (1972) that "she would not have gotten married 'if . . . [the marriage] would have jeopardized my name.'" KANOWITZ, WOMEN AND THE LAW 41 (1969), states: "In a very real sense, the loss of a woman's surname represents the destruction of an important part of her personality . . . ."

The "New Woman," as described by Congresswoman Martha Griffiths, is the woman who will finish "high school, attend college, live alone, marry late, bear few children, and work outside the home" — a woman of today who is a provider, protector, a leader and not solely homemaker and protected follower.[43] To this "new woman" the submerging of her legal identity into that of her husband by becoming Mary (Mrs. John) Smith makes no more sense than it makes to her husband to become John (Mr. Mary) Jones.[44] In addition to not making sense, it would appear to be a clear violation of the Equal Protection Clause were such a change of identity legally demanded of her but not of her husband.

The more liberal divorce trend of the past 30 years[45] has frequently triggered the surname question. Every woman who has, in the traditional manner, taken her husband's surname at marriage faces the question upon dissolution of whether she wants to be identified by her former spouse's surname or whether to reestablish her identity in a different name. And if she remarries[46] she will have to decide once again whether to adopt yet another surname — that of her new spouse. Thus she comes to question the utility of exchanging her birth given surname for a spouse's name upon marriage.

But despite the identity-crises, inconvenience, and expense[47] involved in these name changes upon marriage, Western society has felt it appropriate that a married woman bear her husband's surname. The question here is whether California caselaw holds this custom to be 1) a mandate by the state because it arguably results in better identification of its citizens despite its possibly discriminatory aspects or 2) a privilege the law will extend to any woman who may wish to assume her husband's name and status.

That this custom is a "privilege" and not a "mandate" can be found in the continually reiterated holding that "California adopts

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More radically, Diane E. Richmond, in *Down Home: A New Focus on 13th Amendment Slavery*, 1 WOMEN'S RIGHTS L. R. 29 (Fall/Winter 1972/73) claims: "Women in this country are forced . . . to endure vestiges of slavery . . . . [M]arried women must adopt the surname of the paterfamilias, just as plantation blacks once did . . . ."

[43] Griffiths, *The Law Must Reflect the New Image of Women*, 23 HASTINGS L. J. 1, 2 (1971).

[44] 30 C.J., *Names*, § 17 (1923) outlines this option. However, the new edition, C.J.S., *Names*, (1966) does not mention it.

[45] *E.g.*, the California dissolution rate has increased from 3.7 per 1,000 population in 1966 to 5.3 per 1,000 in 1971, with a 4% increase noted in the first 9 months of 1972. BUREAU OF VITAL STATISTICS, STATE OF CALIFORNIA, VITAL STATISTICS: MARRIAGES AND DIVORCES.

[46] *E.g.*, in 1969, 23.4% of all marriages in California involved a bride who had been married at least once before: DEPT. OF PUBLIC HEALTH, STATE OF CALIFORNIA, MARRIAGE AND DIVORCE IN CALIFORNIA: 1966-69 (1971).

[47] *E.g.*, the expense to the State Dept. of Motor Vehicles or Voter Registrars to record these name changes.

the view that anyone may change his name without legal proceedings."[48] The use of "anyone" is not accidental: this right has been carefully worded by the courts to include both males and females.[49] In fact, the earliest California case spelling out the "principle of common law that a man may change his name at will and sue or be sued in any name by which he is known and recognized," [50] was in answer to a married woman property-owner's claim that she could not be sued in her maiden name (despite the fact that the property was still recorded in her maiden name).[51] The Court explained why it was not willing to let that fact bar the suit: if the state did not let a woman who holds property in her maiden name be sued over the property in her former name, then any man who had changed his name could never be sued in the former name even if the property were still so recorded.[52]

Besides a change "without proceedings," California also provides a statutory procedure for changing one's name, the simple purpose of which "is to have . . . a record"[53] of "his or her"[54] name change. Thus, it has been held that a court should normally grant any requested name change, and that a petition is not to be denied in the

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[48] Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (1970).

[49] *E.g.*, the "right to change *one's* personal name": *In re* Ross, 8 Cal. 2d 608, 609, 67 P.2d 94, 95 (1937); the "right to change *one's* name": *In re* Useldinger, 35 Cal. App. 2d 723, 726, 96 P.2d 958, 961 (1939), Turesky v. Sup. Ct. of Los Angeles Co., 97 Cal. App. 2d 838, 839, 218 P.2d 784, 785 (1950), *In re* McGehee, 147 Cal. App. 2d 25, 26, 304 P.2d 167, 168 (1956); the "right of a *person* to change his name": *In re* Weingand, 231 Cal. App. 2d 289, 294, 41 Cal. Rptr. 778, 782 (1964); the "right of a competent *adult* to change his name": *In re* Trower, 260 Cal. App. 2d 75, 76-77, 66 Cal. Rptr. 873, 874 (1968), *emphasis added.*

[50] Emery v. Kipp, 154 Cal. 83, 86, 97 P. 17, 19 (1908).

[51] *Id.* at 86, 97 P. at 18. *See also* Bogart v. Woodruff, 96 Cal. 609, 31 P. 618 (1892).

[52] *Id.* at 89, 97 P. at 20. The A.L.R. notes, 35 A.L.R. 417 and 45 A.L.R. 200, use *Emery v. Kipp* to stand for the principle that a woman's name is changed to her husband's by law upon marriage. The California court here is manifestly not taking that inflexible position. Here it only recognizes that her name changed upon marriage in fact in this case, and it does not hold that this de facto change can now act as a bar to a suit against her under the name in which she holds the property in the public records. Contrast this language of the California court with the language of a court that does hold that a woman's name is changed to that of her husband upon marriage by force of law: "[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 . . . ": Chapman v. Phoenix Nat'l Bank, 85 N.Y. 437, 449 (1881). However, the *Emery v. Kipp* rule is that "a judgment is valid . . . against a married woman sued as a *feme sole* and in her maiden name . . . in consonance with the principle of common law that a man may change his name at will and sue or be sued in any name in which he is known and recognized": *Id.* at 86, 97 P. at 19.

[53] Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (1970).

[54] CAL. CODE OF CIV. PROC. § 1276 (West 1972).

absence of a "substantial reason"[55] or "peculiar circumstances." [56] This policy of a citizen's right to change names is so strong that the California courts have held that even in the rare instance when a petition for a statutory name change is denied,[57] the court is not authorized to issue a "permanent injunction restraining petitioner from ever using the name."[58] The applicant is free to walk out of the courtroom that denied the petition and immediately begin to legally assume the desired name by *usage*.

Nowhere is the female, married or single, made an exception to these name change rules. Thus, one can conclude from a survey of California caselaw that a woman, married or single, has a right to change her name at will. For example, a married woman who has exercised her privilege and changed her name at the time of her marriage may still, at any time during or after the marriage, change that surname to one of her choice, including but not limited to a "change" back to her birth given surname.[59] Or a woman can continue to use her birth given name consistently throughout her life without changing to that of her husband upon marriage. For even if one were to posit a change to her husband's name by force of law on the wedding day, she could at that very moment begin to "change" to the name of her choice by usage, and thus negate any implied "legal" name change. In effect, then, the right of a married woman to *retain* her birth given or a former name after her marriage is a corollary to her right to *change* her name under California law. [60]

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[55] *In re* Ross, 8 Cal. 2d 608, 610, 67 P.2d 94, 96 (1937). *In re* McGehee, 147 Cal. App. 2d 25, 26, 304 P.2d 167, 168 (1956). *In re* Trower, 250 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873, 874 (1968).

[56] *In re* Useldinger, 35 Cal. App. 2d 723, 726-27, 96 P.2d 958, 960 (1939). The court, however, gives no examples here of "peculiar circumstances."

[57] *E.g.*, the "Petitioner has not acted in good faith": *In re* Weingand, 231 Cal. App. 2d 289, 294, 41 Cal. Rptr. 778, 782 (1964). Petitioner wanted the name "Lorie" so that he could pass himself off as Peter Lorre's son and use the actor's reputation to help in his own career. By contrast, in two other cases, a lower court's refusal to hear a name change petition because a citizen had not yet been a resident in the state for one year, was held to be arbitrary and an abuse of discretion: Turesky v. Sup. Ct. of Los Angeles Co., 97 Cal. App. 2d 838, 840, 218 P.2d 784, 785 (1950) and *In re* Smulevitz, 101 Cal. App. 2d 70, 224 P.2d 911 (1950).

[58] *In re* Weingand, 231 Cal. App. 2d 289, 294, 41 Cal. Rptr. 778, 782 (1964).

[59] This can, of course, be accomplished by either of two means: change by usage or change through court. If by usage, she should not only begin to use the name socially but she should notify the Internal Revenue Service, Social Security, Dept. of Motor Vehicles, State Franchise Board, Voter Registrar, etc., as well as her bank accounts, charge accounts, creditors, property deeds, schools, all ID cards, any legal documents, etc. If through the court, she may save herself attorney's fees by filling out herself and filing with her Superior Court the simple forms available, *e.g.*, in WEST'S CALIFORNIA CODE FORMS, CIVIL PROCEDURE (2d ed. 1972).

[60] One case which seems to imply that California may require a name change by the woman to her husband's upon marriage is Handley v. Handley, 179 Cal.

Proof of this name "independence" is found in the recent holding that "There is nothing in the law that provides that the legal name of a wife becomes changed . . . when her husband assumes another name or . . . has it recorded under the statutory procedure, in the absence of her consent, acquiescence, or concurrent change by herself."[61]

## III. CALIFORNIA: A FORBUSH OR A STUART STATE?

Two recent cases, reaching opposite results, serve to illustrate how other jurisdictions have handled challenges by women to female surname rules — challenges California courts may be called on to answer in the near future. One is a case out of the U.S. District Court, Middle District, Alabama, Sept. 28, 1971, affirmed per curiam and without opinion by the U.S. Supreme Court on March 6, 1972, *Forbush v. Wallace.*[62] The other is a Maryland Court of Appeals case, *Stuart v. Board of Supervisors of Elections,*[63] handed down Oct. 9, 1972.

In *Forbush v. Wallace*, Wendy Forbush, the wife of Ronald Carver, on behalf of herself and all women similarly situated, petitioned the federal court for injunctive relief from Alabama's "unwritten regulation" that all married women must use their husband's surname on their driver's license. *Forbush* contended it was a denial of Equal Protection to deny her a license in her birth given name, the name she used in all her business affairs, simply because she was a married woman.[64] Furthermore, she challenged the validity of the state's claim that by common law her "legal" name is her husband's surname.[65]

The state alleged a "significant interest in maintaining close watch over its licensees" since the license is used not only in keeping driving records but also for identification.

The issue was recognizably the "constitutional rights of women" versus "state interest" or, "whether a state may impose a burden on one sex that it does not on the other."[66] The resolution of the issue

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App. 2d 742, 3 Cal. Rptr. 910 (1960) which points out in its rationale for declaring the marriage void her "refusal to take his name," but since this accusation is linked throughout the opinion with her refusal to live in a home provided by him, one cannot tell whether the court attached any weight to the independent fact of her not using his surname.

[61] Sousa v. Freitas, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (1970).

[62] Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per cur.* 405 U.S. 970 (1972).

[63] Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A.2d 223 (1972).

[64] Forbush v. Wallace, 341 F. Supp. at 219.

[65] *Id.*

[66] But "we need not decide whether sex has followed race into the fold of suspect classification." 341 F. Supp. at 221.

was signalled early in the opinion when the Court stated that this "burden placed upon women . . . does not appear to be particularly onerous."

On the basis of two cases, the Court posited without further examination that it is Alabama common law that "upon marriage the wife by operation of law takes the husband's surname." Thus, the Department's requirement that one obtain one's license in one's "legal name" means that a married woman must take the license in her husband's name.

The Court then had left only the task of determining if this state law had "any rational basis" which justified upholding it "despite the existence of discrimination." The Court found such a basis in two alleged facts: 1) the custom of the husband's surname denominating a wedded couple — "a tradition extending back into the heritage of most western civilizations" (no citations given) and 2) "administrative convenience" plus the "administrative inconvenience and cost" to the state if the state were to have to change its procedures. In balancing the women's interest versus the state's interest the Court concluded that the injury done to women in denying them the use of their chosen name "if any . . . is *de minimis*" and upheld the existing unwritten regulation of Alabama.

In contrast to the holding in *Forbush* is the decision in *Stuart v. Board of Supervisiors of Elections.* Mary Emily Stuart, the wife of Samuel H. Austell, appealed when the Board of Supervisors of Elections cancelled her registration after she registered in her maiden name — the surname she had used exclusively, consistently and nonfraudulently despite her marriage to Austell. The Board of Supervisors contended that "a woman's legal surname becomes that of her husband upon marraige."[67] Stuart contended that, barring fraud, under the common law of Maryland, "a wife could assume the husband's name if she desired, or retain her own name or be known by any other name she wished."[68]

The Appeals Court upheld Stuart on the common law issue (and thus the constitutional questions also raised in the appeal were never reached).

In outlining the rationale for its decision, the Court noted that no Maryland statute dictates a woman's surname and that the correct legal name of a married woman under common law principles has occasioned "a sharp split of authorities." Thus, the Board of Supervisors relied on *Rago v. Lipsky*[69] and *Forbush*[70] while Stuart relied on

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[67] Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223, 224.
[68] *Id.*
[69] People *ex rel.* Rago v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945).
[70] *Forbush* was based upon Alabama common law; since it was affirmed summarily by the USSC without opinion, it was not constitutional authority binding

*Krupa v. Green.*[71] The Court upheld *Green* as representing the correct view of Maryland common law because the case law of the state had "unequivocally recognized the common law right of any person . . . 'to adopt any name by which [to] become known . . . transact business . . . sue or be sued.' "[72] Thus, if a married woman may lawfully adopt an assumed name without legal proceedings, then "Maryland law manifestly permits a married woman to retain her birth given name by . . . use."[73]

The Court concluded by pointing out that any married woman may "choose" to adopt the surname of her husband, that in fact most women do, but that the "custom and tradition of the majority" does not operate as a "rule of law binding upon all." It is particularly noted that the common law of England which was incorporated into Maryland law adopts this same view.[74]

Which of these cases is the better view? Which would be the view of the California courts if a Voter Registrar, or the Department of Motor Vehicles, or a husband, insisted that a married woman's legal surname were her husband's?

The above review of California statutes and caselaw on female surnames indicates that California shares the Maryland view. California statutes make provision for both adult males and females to change their surnames when and if they so desire. Caselaw has interpreted this right expansively. Married females are not made an exception to this general rule. Thus, California, like Maryland, adopts the English common law view, that though a woman can assume her husband's surname upon marriage, she may choose to retain her own name, or be known by any other name she assumes. The Maryland case stressed that if the woman is not following the more common custom of taking her husband's name and is instead using another name as her legal name, she should use such name "exclusively, consistently, and nonfraudently." California may also want to stress this.[75]

As for *Forbush*, it is open to attack on several grounds. To establish the major presmise in the case, i.e., that Alabama has adopted a

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upon Maryland in applying Maryland common law.

[71] State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961).

[72] Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223, 226. *Cf.* Romans v. State, 178 Md. 588, 597, 16 A.2d 642, 646 (1940).

[73] Stuart v. Board of Supervisors of Elections, 266 Md. 440, 295 A.2d 223, 226.

[74] *Id.* at 227. For a further discussion of the English common law view, *see* MacDougall, *Married Women's Common Law Right to their own Surnames*, 1 WOMEN'S RIGHTS L. R. 2 (Fall/Winter 1972/73).

[75] As pointed out by Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552, 557-58 (1971) any woman who uses two names (*e.g.*, one socially, another professionally) will be subject to the state's dictating which name she must use "consistently" on legal documents.

common law that a married female's only legal surname is her husband's, the Court pointed to only two cases, *Roberts v. Grayson* (1937)[76] and *Bentley v. State* (1954).[77] Yet a closer reading of these cases reveals their inability to establish this major premise. [78] Therefore, Alabama's contention that one's "legal name" means husband's surname in the case of all married females, is not established.

The further argument, that Wendy Forbush's request would result in the "confusion" of each driver getting licenses "in any number of names" is similarly not viable. One person, one legal name, one license, would certainly continue to be the rule. Wendy Forbush is asking only that her own license be issued in the surname she actually uses, so that a person everyone knows as "Wendy Forbush" will not bear a driver's license as "Wendy Carver."

In addition, the "rational basis" for the Alabama law, *i.e.*, that the custom of the husband's name alone denominating the wedded couple "is a tradition extending back into the heritage of most western civilizations," is not substantially true.[79] For instance, in England there is no past or current law that a wife takes the hus-

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[76] Roberts v. Grayson, 233 Ala. 658, 173 So. 38 (1937).

[77] Bentley v. State, 37 Ala. App. 463, 70 So. 2d 430 (1954).

[78] The only issue in Roberts v. Grayson, 233 Ala. 658, 173 So. 38 (1937) was the legal first, or given, name of a widow in Alabama. There was no challenge to the widow's using her former husband's surname. Thus, this case held only that the executrix of the estate (decedent's daughter) could not plead no-notice of the doctor's bill for her mother's final illness because the bill presented contained the misnomer "Mrs. C.J. Jones" instead of the legally correct "Hattie W. Jones." In Bentley v. State, 37 Ala. App. 463, 70 So.2d 430 (1954), the issue was whether it would be presumed that it was the wife who had removed to their new domicile furniture which belonged to the husband, and which was subject to lien for unpaid rent for their old residence. In holding that it would not be so presumed, the court emphasized that this decision was based on the fact that it is the husband who fixes the marital domicile and the law "imposes on the wife the duty of following her husband to the matrimonial residence . . . and her refusal to do so . . . renders her guilty of abandonment." Only in passing dicta did the court mention that it was this same husband who "furnishes the name" and bears the "obligation of supporting" the wife. *Id.*, 70 So. 2d at 432.

[79] On the contrary, such a tradition — where it can be found to exist at all — is hard to locate in western civilization until very modern times.

Thus, the early English writers on Anglo-Saxon legal tradition, like deGlanville, Bracton, Coke, and even the 18th-century Blackstone, can be read cover to cover, without finding reference to any such tradition. One can read the many volumes of the grand legal historians, like Pollock, Maitland, Holdsworth, and find no reference to such a tradition at any time in England. In fact, the contemporary 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957) § 1350, points out that any name change by the woman upon marriage today in England is at her instigation and choosing and not as a matter of law or legal tradition.

On the Continent the medieval historians such as I. MARC BLOCH, FEUDAL SOCIETY, 138-41 (1961) demonstrate the original flexibility of surname usage. Thus, in France, not only did a medieval wife retain her own family name, but the children might alternate between the paternal and maternal family names, or the daughters take the maternal surname, and the sons the paternal surname. In modern time, I PLANIOL, TREATISE ON THE CIVIL LAW § § 390-92 (12th

band's surname as her legal name,[80] and even the custom of her doing so is "apparently comparatively recent."[81]

Similarly the rationale of the "inconvenience and cost" of changing motor vehicle license records to reflect the surname a woman driver actually uses, is unrealistic. If Wendy Forbush and others similarly situated were allowed to use their birth given names consistently throughout their lives, they would in fact save the state license bureau the current "inconvenience and cost" it incurs every time a female in Alabama reregisters due to marriage, divorce, remarriage, or reversion to her maiden name upon the death of a spouse — all changes Alabama must now accommodate. If Alabama's purpose in its Husband's Surname rule is to know if a female is married and to whom, that information is much more accurately obtained by asking directly on the application form.

The Court's final argument is that a married woman is *not* absolutely prevented from using her maiden name on her license in Alabama. She can always "change" her name to her birth given name

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ed. 1959) states that "Nothing in the law assumes that marriage entails the change of her name . . . because a name indicates descent. A married woman has . . . no name other than that of her . . . maiden name received from her father" even though § 392 continues that her "universal right" to "use her husband's name" during an on-going marriage has been "recognized by the law."

And among the vast numbers of Spanish-speaking peoples in the world it is the custom to this day that the wife's name is added to the husband's so that a double surname is evolved which is borne by husband and wife. And thus, all children bear the family names of both father and mother.

It is the German and Italian Civil Codes which today decree that the married woman's name is by force of law her husband's surname. The German Civil Code of 1896, § 1355, a section still effective today despite the Family Law revisions of the 1950's, holds that "The wife takes the surname of the husband." The Italian Code of 1942, § 144 says that "The husband is the head of the family. The wife follows his civil status, takes his surname . . . ."

For the flexible statutes the Scandinavian countries have devised in the last decade *re* female surnames, *see* the appropriate articles in Symposium, *The Status of Women*, 20AM.J.COMP.L. 585-723 (1972).

Furthermore, the assertion that it is a "custom common to all 50 states" implies more than is literally true. Though it is a social custom widespread in all the states it is not a custom enforced by law in all states, *cf.* Stuart v. Bd. of Supervisors of Elections for Maryland. For Wisconsin, *see* MacDougall, *Married Women's . . . Surnames*, 1 WOMEN'S RIGHTS L. R. 2 (Fall/Winter 1972/73). For Missouri, *see* Krauskopf, *Sex Discrimination*, 37 MO. L. REV. 377, 378-79 (1972). And it is the conclusion of the author of this article that on the basis of the statutes and caselaw in California it is not enforceable custom in this state.

[80] 22 HALSBURY'S STATUTES OF ENGLAND at 1211-12 (3d ed. 1968): "There is no statute law which regulates the right of any person . . . to change his surname . . . and to adopt any name by which he chooses . . . to be known . . . formalities are not legally necessary, but are convenient." 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957) § 1350: "When a woman on her marriage assumes, as she usually does . . . the surname of her husband . . . she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage . . . ."

[81] C. L'ESTRANGE EWEN, A HISTORY OF SURNAMES OF THE BRITISH ISLES 391 (1931).

through the state's regular name change procedure. This signals the discriminatory cost Alabama's unwritten regulation is placing on married women: she must "petition" the court and pay the legal costs and fees this entails[82] in order to use her patronymic — a right enjoyed by all males and single females.

## IV. CONCLUSIONS AND SUGGESTED STATUTORY MODIFICATIONS *RE* FEMALE SURNAMES

This article has demonstrated that present California law protects a woman's right to retain her birth given surname throughout her life, or to assume her husband's surname, or to assume an independent surname as her own. The great majority of California women still choose to assume their husband's surname upon marriage, some out of a conscious desire to blend their identity with their husband's, others simply because society seems to "expect" them to do so. The law protects this practice as it protects any desired, nonfraudulent name change. A growing minority of women choose to retain an independent name upon marriage, some out of a conscious desire to reinforce the idea that marriage is a union of two equal, individual partners, others to avoid the hassle of a name change which would upset their established identification within the community. The law protects this right in accord with its policy of not dictating names or name changes to its citizens. The state has an interest in being able to identify its citizens but such interest has never been interpreted in California to effect an abrogation of the common law right to self-determination of name.

If orderliness in the state's public records were the all-important goal in our society, each citizen would be obligated to use the surname of birth exclusively, consistently, and nonfraudulently throughout his life. In accord with such an ideal the custom of unrecorded name changes for vast numbers of women upon marriage would be eliminated.[83] Clearly, however, such name consistency is not demanded by California law. The state protects desired name changes. Most American women have been raised to expect to change their surname upon marriage and often find their status in the community improved by identification with their husband's surname, especially if he is in a more prestigious occupation. However, this

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[82] Legal costs and fees in California for a similar court proceeding include at least $5.00 in filing fees, approximately $50.00 in publication costs, plus attorney's fees.

[83] *Cf.* dicta in Emery v. Kipp, 154 Cal. 83, 89, 97 P. 17, 20 (1908) reacting to a common problem arising out of our present name change patterns for women: "No steps . . . under our existing laws serve to give a party . . . knowledge . . . that [the woman] had married . . . . The law [should] have provided that when a woman in whose maiden name title to real property stands shall marry, she shall cause recordation . . . to give notice . . . to the world . . . ."

practice clearly has certain negative effects. Too often it leads to property being recorded in a name no longer used, to tracing problems in estates, to a series of name changes in connection with voting registration, driver's licenses, tax records, bank accounts, charge accounts, credit references, etc. Thus, the state need not encourage the practice. Especially since the rationale for such female name changes has largely disappeared. When the doctrine of coverture prevailed in the Anglo-Saxon world, i.e., when women lost all legal rights upon marriage in favor of their husbands,[84] it might have made sense for them to abandon the use of their individual name. However, since the civil disabilities of married women have been removed in California,[85] this rationale no longer is persuasive.

What effect would the passage of the Equal Rights Amendment have on female surnames in California? Those who have studied the Amendment have concluded that it will prohibit the husband's name being legally imposed on the wife by any state against her will. [86] However, since California has already ruled that sex is a "suspect classification"[87] it seems that California has already arrived at this vantage point without the ERA.

Realistically it is to be expected that women will follow different patterns regarding surnames for many years. Although the state should not choose to dictate her name it has an interest in being informed of her choice. Two minor statutory modifications would help effect this. The certificate of registry of marriage should be amended to show the surname the bride will use in the future and the final decree of dissolution filed with the county recorder should show the surname by which the former wife will in the future be known.

*M. J. Hamilton*

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[84] I BLACKSTONE, COMMENTARIES *442: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . " *See also* Article, *Coverture — The Married Woman's Defense?*, 6 U.C.D. L. REV. 83 (1973).

[85] Saving the provision that community property is "under the management and control of the husband" CAL. CIV. CODE § 5105 (West 1970).

[86] Brown, Emerson, Falk, Freedman, *The Equal Rights Amendment*, 80 YALE L. J. 871, 940 (1971).

[87] Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).