Smith *v.*. United States Casualty Co., 90 N.E. 947 (NY 1910)

New York Court of Appeals

Filed: February 8th, 1910
Precedential Status: Precedential
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Docket Number: Unknown
Judges: VANN, J.

The subject of this action is an accident insurance policy, dated November 2d 1901, which refers to the application as a part thereof, and to the warranties therein contained as part of the consideration of the contract. The application, addressed to the defendant, was signed by the insured under the name of "Maurice W. Mansfield," and the first declaration therein is the following: "I hereby apply for an accident insurance policy to be based on the following statements, which I warrant to be complete and true: (a) My *full* name is Maurice W. Mansfield." The name alone was in writing, the rest of the part quoted being in print, with the word "full" in italics.

The defendant pleaded a breach of warranty, in that "the *Page 422 true name of said applicant was Myron W. Maynard," of which fact it had no knowledge at the date of the policy, and that relying upon said statement in the application it "issued said policy of insurance in the false and fictitious name of Maurice W. Mansfield."

Upon the trial it appeared that the name of the father and mother of the insured was Maynard, and that he went by the name of Myron W. Maynard until about 1892, when he was twenty-two years of age. He then called himself Maurice W. Mansfield, and thenceforth, until the policy was issued in 1901, almost uniformly did his business, held himself out and was known and addressed by that name. The court charged the jury in substance that if the insured, when the application was made, had assumed and acquired the name of Maurice W. Mansfield, and regarded that as his name; if his acquaintances, the persons with whom he was associated and the people of the community where he lived knew him by that name, and he had "called himself by that name exclusively, or so exclusively and for such a length of time that he had thoroughly adopted it to such an extent that you can find it was his intention that he should be known by the name of Maurice W. Mansfield and thereafter retain that name; if you should find that he had to this extent acquired that name, then this representation in the application would not be false. But if it was not his name, and if he intended to conceal his real name and his identity by giving that name, knowing it was false; that is, if he had not acquired the name of Maurice W. Mansfield in any or all the ways I have stated, nor in any manner, then the statement in this application was false and no recovery can be had upon it." There was evidence to support the charge, whether the jury found for the plaintiff or the defendant. Exception was duly taken to that part of the charge whereby the jury was instructed in substance that if they should find that the insured had acquired the name of Maurice W. Mansfield, the statement in the application was not false and to whatever the court said on that subject.

The question presented by this appeal, therefore, is whether *Page 423 at common law a man can change his name in good faith and for an honest purpose, by adopting a new one and for many years transacting his business and holding himself out to his friends and acquaintances thereunder, with their acquiescence and recognition? A change of name by proceedings under the statute is not involved.

As the common law rests so largely upon the customs of the people, it is often necessary to search the history of remote periods, both in England and in this country, in order to learn its full scope and meaning. While the legal name of a person now consists of a given name, or one given by his parents, and a surname, or one descending from

them, history shows that this was not always the case. In the early life of all races surnames were unknown, while given names have been used from the most distant times to identify and distinguish a particular individual from his fellows. In England surnames were unknown until about the tenth century and they did not come into general use or become hereditary until many years later. (8 Nelson's Encyc. 386.) At first they were used, sometimes for an easy method of identification and at others from accident, caprice, taste and a multitude of other causes. Mr. Bardsley in his History of English Surnames gives thousands of instances of change through selection, the action of neighbors in applying descriptive epithets, the use of nicknames and pet names and the gradual development through circumstances and the necessity of identification as population increased. Thus the son of John or Peter became known as John's son or Peter's son and finally as Johnson or Peterson, aside from his given name. It is well known that the word meaning "son" in different languages, such as Fitz and Mac, was prefixed to the Christian name of the father to give the son a surname and "O" to give one to the grandson, and thus we have the names Fitz-Gerald, MacDonough, O'Brien and many others. The place of birth or residence, the name of an estate, the business pursued, physical characteristics, mental or moral qualities and the like, were turned into surnames. It is to be noted, however,*Page 424 that the surname in its origin was not as a rule inherited from the father, but either adopted by the son, or bestowed upon him by the people of the community where he lived. (Dudgeon's Origin of Surnames, 252.) Father and son did not always have the same surname and it was not regarded as important, for both frequently had more than one. Coke wrote in the forepart of the seventeenth century: "Special heed is to be taken of the name of baptism as a man cannot have two, though he may have divers surnames." (Coke Lit. [1st Am. ed.] 3, a.m.)

So in Button v. Wrightman (Popham's Reports, 56), the learned chief justice and reporter said: "Anciently men took most commonly their surnames from their places of habitation, especially men of estate, and artisans often took their names from their arts, but yet the law is not so precise in the case of surnames and, therefore, a grant made by or to John, son and heir of I.C. or filio juniori, I.S. is good, but for the Christian name, this always ought to be perfect."

Camden mentions a man with eight sons, each with a different surname and not one with that of his father. (Camden's Remains, 141.) In a scholarly opinion by Chief Judge DALY, to which we are much indebted, many instances are mentioned where the color of the individual as White, Black or Brown, his height or strength, as Little, Long, Hardy or Strong; mental or moral attributes as Good, Wiley, Gay, Moody or Wise, fixed the surname. (In reSnook, 2 Hilt. 566.)

The learned judge continued: "The surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. * * * It was in this way that the bulk of our surnames, that are not of foreign extraction, originated and became permanent. They grew into general use, without any law commanding their adoption, or prescribing any course or mode respecting them; * * * but though the custom is widespread and universal *Page 425 for all males to bear the names of their parents, there is nothing in law prohibiting a man from taking another name if he chooses. There is no penalty or punishment for so doing, nor any consequence growing out of it, except so far as it may lead to or cause a confounding of his identity."

The history of literature and art furnishes many examples of men who abandoned the name of their youth and chose the one made illustrious by their writings or paintings. Melanchthon's family name was Schwartzerde, meaning black-earth, but as soon as his literary talents developed and he began to forecast his future he changed it to the classical synonym by which he is known to history.

Rembrandt's father had the surname Gerretz, but the son, when his tastes broadened and his hand gained in cunning, changed it to Van Ryn on account of its greater dignity.

A predecessor of Honoré de Balzac was born a Guez, which means beggar, and grew to manhood under that surname. When he became conscious of his powers as a writer he did not wish his works to be published under that humble name, so he selected the surname Balzac from an estate that he owned. He made the name famous, and the later Balzac made it immortal.

Voltaire, Molière, Dantè, Petrarch, Richelieu, Loyola, Erasmus and Linnæus were assumed names. Napoleon Bonaparte changed his name after his amazing victories had lured him toward a crown and he wanted a grandername to aid his daring aspirations. The Duke of Wellington was not by blood a Wellesley but a Colley, his grandfather, Richard Colley, having assumed the name of a relative named Wesley, which was afterward expanded to Wellesley. (S. Baring-Gould's Famous Names and Their Story, 391.) This author in his chapter on Changed Names gives many examples of men well known to history who changed their names by simply adopting a new one in place of the old.

Mr. Walsh, in his Handbook of Literary Curiosities, makes an interesting statement at page 778: "Authors and actors know the value of a mouth-filling name. Herbert Lythe *Page 426 becomes famous as Maurice Barrymore, Bridget

O'Toole charms an audience as Rosa d'Erina, John H. Broadribb becomes Henry Irving. Samuel L. Clemens and Charles R. Browne attract attention under the eccentric masks of Mark Twain and Artemus Ward. John Rowlands would never have become a great explorer unless he had first changed his name to Henry M. Stanley. James B. Matthews and James B. Taylor might have remained lost among the mass of magazine contributors but for their cunning in dropping the James and standing forth as Brander Matthews and Bayard Taylor. Would Jacob W. Reid have succeeded as well as Whitelaw Reid?" While some of these names were merely professional pseudonyms, others were adopted as the real name and in time became the only name of the person who assumed it.

Many other instances of voluntary change of name, both given and surname, might be added, but we will mention only two more. In Larke's "General Grant and His Campaigns" (p. 13) it is stated, and the fact is well known, that "General Grant's baptismal name was Hiram Ulysses and he bore that appellation until he was appointed a cadet at West Point. General Hamer, who nominated him for a cadetship, by some means got his name mixed up with that of his brother. He was, therefore, appointed as `Ulysses Sidney Grant,' and that name once so recorded on the books of the military academy could not be changed. He was baptized into the military school as U.S. Grant and he has ever since been thus designated."

Another instance, equally well established by current history, is that of President Cleveland, who had the baptismal name of Stephen G. Cleveland. After he entered his teens he omitted the word "Stephen" and assumed the name of Grover Cleveland, by which he was known throughout his distinguished career.

Out of the groundwork of custom, as shown by the early history of the subject, the common law sprang and was gradually developed. The ancient custom was for the son to adopt *Page 427 a surname at will, regardless of that borne by his father, and the practice, continued occasionally until the present time, has extended to the given name also. If the insurance policy in question had been issued, under the same circumstances, to General Grant or President Cleveland, would it have been valid? Indeed, it may well be asked, would it have been valid if issued to either of those noted men, had it followed the name given at birth instead of the one acquired by adoption and by which they were known while filling the most exalted positions and will be known for all time?

There are but few decisions directly in point, although there are many dicta by eminent judges recognizing as an established rule that a man may change his name, Christian, surname, or both, without resort to legal proceedings.

In Doe ex dem. Luscombe v. Yates (5 Barn. Ald. 544) there was a devise of an estate to one Manning, provided within three years after entering into possession he should procure his name "to be altered and changed to my name of Luscombe, by act or acts of Parliament, or some other effectual way for that purpose," and in default of thus changing his name the devise was to become void. Without applying to Parliament for an act of relief or to the king for a license, he adopted the name of Luscombe, and used it for all purposes to the exclusion of his former surname. It was held that he was entitled to retain the estate, the court through Chief Justice ABBOTT saying: "A name assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him and by which he is constantly called, becomes for all purposes that occur to my mind as much and effectually his name as if he had obtained an act of Parliament to confer it upon him."

In Laflin Rand Co. v. Steytler (146 Pa. St. 434) an act authorizing the formation of limited partnerships required the articles of association to "set forth the full names of" the members. The adopted name of one of the partners was given as his full name, and an attempt was made to hold the special partners liable as general partners for that reason.*Page 428 The court defeated the effort and, in discussing the question, said: "A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father and such prænomina as his parents choose to put before it, and appropriate circumstances may require Sr. or Jr. as a further constituent part, but all this is only a general rule form which the individual may depart if he chooses. The legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. Without the aid of that act, a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name."

The case last cited was soon followed by another in the same court to the effect that the requirement of the statute as to "full names" was "met by giving the names in the form habitually used by those persons in business and by which they are generally known in the community." (Gearing v. Carroll, 151 Pa. St. 79, 84. See, also, England v. New York Pub. Co., 8 Daly, 375, 381; Cooper v. Burr, 45 Barb. 9, 34; Bell v. Sun Printing Pub. Co., 42 N.Y. Super. Ct. 567, 569; City Council v.King, 4 McCord, 487; Hommel v. Devinney, 39 Mich. 522;Binfield v. State, 15 Neb. 484; Linton v. First NationalBank, 10 Fed. Rep. 894; The King v. Inhabitants ofBillingshurst, 3 Maule S. 250.)
The elementary writers are uniform in laying down the rule that at common law a man may change his name at will.

Mr. Throckmorton, in his article on Names in the Cyclopedia of Law and Procedure, says: "It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to

legal proceedings, and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth." (29 Cyc. 271.)

So a writer in the American English Encyclopædia of Law says: "At common law a man may lawfully change his *Page 429 name, or by general usage or habit acquire another name than that originally borne by him, and this without the intervention of either the sovereign, the courts, or Parliament; and the common law, unless changed by statute, of course obtains in the United States." (21 Am. Eng. Encyc. of Law [2d ed.], 311.)

"One may legally name himself, or change his name, or acquire a name by reputation, general usage, and habit." (2 Fiero Sp. Pro. [2d ed.] 847.)

The subject is not affected by the various statutes, commencing in 1847 and continuing with some expansion and changes to the present time, whereby a change of name is authorized by judicial proceedings. (L. 1847, ch. 464; Code Civ. Pro. §§ 2410-2415.) As was said by the Supreme Court of Pennsylvania of a similar statute in that state, this legislation is simply in affirmance and aid of the common law to make a definite point of time when the change shall take effect. (Laflin Rand Co. v. Steytler,supra.) It does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name. The statutory method has some advantages, because it is speedy, definite and a matter of record, so as to be easily proved even after the death of all contemporaneous witnesses. In one respect, however, the statute may limit the common-law right, in that it provides that on and after the day specified in the order of the court for the change to take effect, the applicant shall "be known by the name which is thereby authorized to be assumed, and by no other name." (Code Civ. Pro. § 2415.) It may well be, therefore, that after a man has acquired a name by judicial decree, he cannot acquire another without resorting to the courts.

The other questions discussed by counsel have also been examined, but we find none requiring reversal and the judgment should, therefore, be affirmed, with costs.

CULLEN, Ch. J., GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT and CHASE, JJ., concur.

Judgment affirmed.*Page 430

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941 S.W.2d 501 (1997)

Melissa J. **NEAL**, Appellant,
v.
Bruce L. **NEAL**, Respondent.

No. 79376.

Supreme Court of Missouri, En Banc.

March 25, 1997.

502*502 James D. McNabb, Marshfield, for appellant.

Kenneth F. Thompson, Marshfield, for respondent.

COVINGTON, Judge.

Melissa J. **Neal** appeals the trial court's refusal to restore her maiden name, the trial court's order changing the name of the minor child born of the marriage, and the court's award of child support. Melissa J. **Neal** (Wife) and Bruce L. **Neal** (Husband) were married on September 10, 1994. They separated in February of 1995. Wife was pregnant. She filed a petition for dissolution of marriage in March, in which she requested, inter alia, orders relative

to the minor child yet to be born and restoration of her maiden name. Husband answered, denying that the marriage was irretrievably broken and requesting nothing other than a dismissal of Wife's petition. On July 16, 1995, Wife gave birth to the parties' child, a son. On the birth certificate she denominated her maiden name, Gintz, as the child's surname. She did not include the name of Husband on the birth certificate. The parties were divorced by a decree of dissolution filed on September 14, 1995. The court awarded custody of the minor child to Wife and specific visitation to Husband, ordered Husband to pay the sum of $275 per month as child support, found Form 14 under Rule 88.01 not to be applicable, and ordered Husband to provide major medical insurance coverage for the minor child. The court also ordered correction of the Certificate of Live Birth to reflect that Husband is the natural father of the minor child and ordered the surname of the minor child changed to **Neal**. Wife appealed. After opinion by the court of appeals, this Court granted transfer. The judgment of the trial court is reversed and the cause is remanded for further proceedings.

The first issue is Wife's claim of trial court error in refusing to restore her maiden name, Gintz. *Matter of Natale,* 527 S.W.2d 402 (Mo.App.1975), controls disposition of the issue. In *Natale,* the Missouri Court of Appeals, Eastern District, provided a thorough summary of the common law and statutory rights to change of name. In that case, Judith Natale, with her husband's consent, petitioned pursuant to section 527.270, RSMo 1969, and Rule 95.01 to have her maiden name restored. She desired to change her name for purposes of professional and personal identity and convenience to her husband and herself in carrying out their professional careers. The trial court denied the petition for change of name. The trial court's refusal was based upon the fact that the petitioner was lawfully married and residing with her legal spouse. Under such circumstances, the trial court reasoned, the granting of the petition could be detrimental to others in the future. *Id.* at 403.

In reversing the judgment, the court of appeals provided historical background of the common law right to change of name, regardless of marital status. The court noted that the common law and statutory methods of changing names coexist for the reason that no constitutional or statutory mandate has invalidated the common law. *Id.* at 402. The court of appeals found that, although it is within the trial court's discretion to find a change of name to be detrimental, the scope of discretion in the trial court to deny a petition for change of name is narrow, even within the marital relationship. *Id.* at 405.

Following the teachings of *Natale,* the court of appeals in *Miller v. Miller,* 670 S.W.2d 591 (Mo.App.1984), addressed precisely the issue presented here, a request pursuant to a dissolution proceeding that wife's maiden name be restored. Because there were two children born to Mr. and Mrs. Miller, the trial court refused to change Mrs. Miller's name. As the court of appeals stated in reversing the trial court, no law presumes that it is detrimental for a child to have a name that is different from the parent. *Id.* at 593. A general concern of possible detriment is insufficient to deny a petition for change of name in light of the obvious legislative intent that such a procedure 503*503 be available, *id.,* and by reason of the teachings of *Natale.*

In the present case, the trial court provided no reason for its declination to order restoration of Wife's maiden name. There is no substantial evidence to support the trial court's decision. To place the question of the evidence relative to the restoration of Wife's maiden name in context, it is necessary to make reference to the sparse evidence relative to the Husband's request for the child's change of name. The issue of the child's change of name was raised for the first time on cross examination of Wife after her direct evidence on the petition. Wife had

received no notice of Husband's intent to seek a change of name for the minor child. In response to her husband's attorney's inquiry about whether she would object to the child's name being changed to **Neal**, Wife responded that she did not want the child's name to be changed. When asked the reason, she responded that it could be confusing in school if the child's name were different from hers. She then acknowledged upon further questioning by Husband's counsel that numerous children in school have names different from the names of their parents. No other evidence was introduced. Under the teachings of *Natale* and *Miller,* the trial court erred in refusing to restore Wife's maiden name.

Wife next contends the trial court erred in granting Husband's request to change the child's name to **Neal**, Husband's surname. Wife attacks the trial court's decision on abuse of discretion grounds; however, there is a threshold issue that must be decided, and that issue is dispositive.

There is no clear direction with respect to the process by which a minor child's name may be changed in a dissolution of marriage proceeding. Outside of the dissolution context, a child's name may be changed by the child's petitioning, by and through a next friend, pursuant to section 527.270, RSMo 1994, and Rule 95.01; *see also* Rules 95.02—03. No Missouri court has previously been called upon to decide whether the court in a dissolution proceeding has authority to change the name of a child of the marriage, or whether such a name change can be accomplished only through a change of name petition filed under section 527.270 and Rules 95.01 et seq. Considering, however, the common law right that coexists in Missouri with any statutory right, *Natale*, 527 S.W.2d at 405, and the court's equitable powers to enter judgment on any matter in the best interests of the child, sections 452.375-410, RSMo 1994, the trial court cannot be said to lack authority to change the name of a minor child in a dissolution proceeding.

To hold that the trial court in a dissolution proceeding has authority to change the name of a minor child does not, however, confer upon the trial court authority to change a child's name in the absence of proper procedure. Proper procedure first requires that notice be given by the party seeking to have the child's name changed. Notice is required because in changing a child's name the trial court's discretion is guided by a determination of what is in the best interests of the child. *Schubert v. Tolivar,* 905 S.W.2d 924, 926 (Mo.App.1995); *Cobb by Webb v. Cobb,* 844 S.W.2d 7, 9 (Mo. App.1992); *Kirksey v. Abbott,* 591 S.W.2d 751, 752 (Mo.App.1979). Without notice and the opportunity for adequate preparation for hearing on the issue by both parents, the trial court cannot be assured that evidence with respect to best interests has been fully developed. It is conceivable, furthermore, that in some cases either party may petition for appointment of a guardian ad litem to assist the court in its determination of what name is in the child's best interest. Additionally, where a guardian ad litem has been or may be appointed for the purpose of representing other of the child's interests, the guardian ad litem should have notice of any request for change of name.

A party seeking to change a minor child's name as part of a proceeding for dissolution of marriage must, therefore, include in the petition for dissolution of marriage, or in a separate count of the pleading, a separate averment stating that the party seeks to have the child's name changed and the name that is proposed. In addition, the petition shall state the reason for the desired name change. These minimal requirements serve not only to provide adequate notice to 504*504 the opposing party and any guardian ad litem that may be appointed in the proceeding, but, also, to meet the requirements of section 527.270 and Rules 95.01 et seq. in all ways pertinent to the change of name of a minor child.

In the present case, there was no notice to Wife of Husband's intent to change the name of the minor child. Absent advance notice to the opposing party of the request for change of name, the name to which the child's name is sought to be changed, and the reason for the desire to change, or consent by the opposing party, the trial court lacked authority to order a change of name for a minor child in a dissolution proceeding. The trial court erred in changing the name of the minor child.

Because the trial court erred in granting Husband's request to change the child's name to **Neal** for the reasons stated above, it is unnecessary to reach the question of whether there was sufficient evidence in the record to prove that the name change was in the best interest of the child.

Wife also claims that the trial court erred by awarding child support in the amount of $275 per month because that amount was not appropriate, nor was it in conformity with Rule 88.01. The decree simply states that "Form 14 is not applicable in this case due to Respondent's other debts."

In *Woolridge v. Woolridge*, 915 S.W.2d 372 (Mo.App.1996), the Missouri Court of Appeals, Western District, undertook to explain the requirements of Rule 88.01 and Civil Procedure Form Number 14 and provided a thorough road map for the trial court for making the required findings. For meaningful appellate review, the trial court is required to determine and find for the record the presumed correct child support pursuant to Rule 88.01, utilizing Civil Procedure Form No. 14. *Id.* at 379. This is a mathematical calculation, the mandatory use of which ensures that the child support guidelines will be considered in every case as mandated in section 452.340.7, RSMo 1994, and Rule 88.01. *Id.* The *Woolridge* opinion also thoroughly explains to the trial court how to make findings to rebut the presumed correct child support amount calculated pursuant to Form 14 when the trial court determines that the amount is unjust or inappropriate after consideration of all the relevant factors. *Id.* at 379, 382-83.

Here, the trial court did not find for the record the presumed correct child support amount calculated pursuant to Form 14. Meaningful appellate review is, therefore, not possible, either to determine the presumed correct child support amount or to determine whether the trial court's attempt to rebut any child support amount calculated pursuant to Form 14 was proper. The inadequacy of the record in these respects requires reversal. On remand, the trial court should follow the detailed prescriptions contained within *Woolridge* first to determine and find for the record the presumed correct child support amount and, then, to make a proper record with respect to why the presumed correct child support amount should be rebutted, if the trial court so determines.

The judgment of the trial court is reversed and the cause is remanded. The trial court is directed on remand to issue an order changing Wife's name as prayed and to make findings and enter its judgment awarding the correct child support in a manner consistent with this opinion. The trial court's order changing the name of the minor child is reversed, without prejudice to Husband's bringing a procedurally authorized action for change of name of the minor child.

HOLSTEIN, C.J., BENTON, PRICE, LIMBAUGH and ROBERTSON, JJ., and LAURA DENVIR STITH, Special Judge, concur.

WHITE, J., not sitting.

527 S.W.2d 402 (1975)

In the Matter of Judith Eleanor NATALE, a/k/a Judith Natale Montage, Petitioner, Appellant.

No. 35880.

Missouri Court of Appeals, St. Louis District, Division One.

July 29, 1975.

Judith Eleanor Natale a/k/a, Judith Natale Montage pro se.

Ellen Fulghum Watkins, Nat. Org. for Women, St. Louis Chapter, St. Louis, for appellant.

DOWD, Judge.

Petitioner appeals from the denial of her Petition for Change of Name requesting a court order changing her name from Judith Eleanor Natale, the name she had used 403*403 following her marriage to Daniel Natale, to Judith Natale Montage. The petition alleged: that petitioner was twenty-nine years old and a resident of St. Louis County; that petitioner desired to change her name for purposes of professional and personal identity and convenience to her husband and herself in carrying out their professional careers; that petitioner had never been convicted of any felony, misdemeanor, or offense involving moral turpitude; and, that petitioner's requested name change would not defraud any of her creditors, was proper and not detrimental to the interests of any other person. An affidavit was filed with the petition in which petitioner's husband stated that he concurred with petitioner's request for a change of name.

The evidence at the hearing on the petition consisted solely of petitioner's testimony confirming the allegations of the petition. Petitioner's husband was an Administrator in the Parkway School District who did not list his home phone number in order to avoid calls from parents and children during his free time. Petitioner was a law student at St. Louis University, expecting to graduate in May, 1974.[1] She desired to list her home phone number as an attorney. Prior to her marriage, the petitioner had not used the name Montage but had been known by three surnames due to her mother's remarriage and petitioner's adoption. While petitioner and her spouse had certain joint obligations such as charge accounts and leased their home and paid for utilities in the husband's name, no evidence was admitted which indicated that any of the couple's creditors would be defrauded by granting the name change petition.

On August 21, 1973, the court entered its order and judgment denying the Petition for Change of Name on the ground that "Petitioner is lawfully married and resides with her legal spouse" and "that under such circumstances the granting of said petition could be detrimental to others in the future." The court's order did not specify who the "others" were, but at the hearing, the court had commented, "Where a married couple who do have and in the future are likely to have many obligations for which they are liable, I can see circumstances that would be detrimental . . ." It appears, therefore, that the trial court found that the fact of a woman's ongoing marriage is prima facie evidence of detriment to creditors sufficient to deny her petition for change of name.

The thrust of petitioner's first argument is that she has the right at common law to change her name, regardless of her marital status. Section 1.010 (RSMo 1969, V.A. M.S.) adopts, as the common law of Missouri, the laws of England in existence prior to the fourth year of the reign of James the First which are of a general nature and which have not been invalidated,

expressly or impliedly, by the United States Constitution, Missouri Constitution or Missouri Statute. A survey of the common law of England is, therefore, useful.

Surnames arose as descriptive terms applied to individuals to differentiate between parties with the same baptismal name, eventually becoming a required part of a person's legal name. Even so, names could be adopted and abandoned at will, and all members of a family, including the husband and wife, were not necessarily known by the same surname. Gradually, the custom that all members of the family bear the same, fixed surname developed as surnames lost their character as descriptions of particular individuals. Since the husband and wife customarily adopted the name of the spouse with the most property and since men typically held more property than women, most women took the husband's name. However, the custom never became law. The English common law view was that a woman's surname was not bound to 404*404 her marital status and arose only through her use of a name.[2]

The law of England adopted by Section 1.010, *supra,* recognized the right to change name by the nonfraudulent use of another. The right was never limited to males; indeed, it was through this common law method that a woman changed her surname to that of her husband after marriage. *Cowley v. Cowley,*(1901) A.C. 450, 460; 19 Halsbury, Laws of England (3d ed.), p. 829; 32 Md.L.Rev. 409 (1972); Lamber, *A Married Woman's Surname: Is Custom Law?,* 1973 Wash.U.L.Q. 779. As Section 1.010, *supra,* does not purport to prohibit married females from exercising their common law rights, married women in Missouri are free to adopt another name by the common law method if this right has not been invalidated by constitutional or statutory mandate.

This court is unaware of any constitutional or statutory provision which abrogates the English common law right to change names through usage, Section 417.200 (RSMo 1969, V.A.M.S.) notwithstanding. This statute provides that the transaction of business under a fictitious name not previously registered with the secretary of state is a misdemeanor. The construction given the statute comports with the common law right to change names. Contracts entered under a fictitious name are valid in themselves, but the act of contracting without registration constitutes a misdemeanor. *State v. Euge,* 400 S.W.2d 119 (Mo.1966). No holding in Missouri directly confirms the common law right to change names through usage, but the courts have indicated that a person's name is the designation given to the individual by himself or herself and others and that an individual may change his or her name. *State ex rel. Kansas City Public Service Co. v. Cowan,* 356 Mo. 674, 203 S.W.2d 407, 408 (Mo. banc 1947); *State v. Deppe,* 286 S.W.2d 776, 781 (Mo.1956); *State ex rel. Rainey v. Crowe,* 382 S.W.2d 38, 42 (Mo.App.1964).

Policy argues in favor of acknowledging that a woman may exercise the common law right to change names. The custom of restricting a married woman's right to use a surname other than her husband's is an outgrowth of societal compulsion and economic coercion[3] inconsistent with developments 405*405 granting women equal legal rights. The concept that the husband and wife are one,[4] the "one" being the husband, has been abandoned. Insistence that a married couple use one name, the husband's, is equally outmoded.

Petitioner chose to petition for a court ordered change of name under Section 527.270 (RSMo.1969, V.A.M.S.) rather than use the common law method to change her name. What has previously been said in reference to petitioner's common law right to change names, therefore, simply confirms petitioner's right to utilize the statutory procedure for changing

names. Section 527.270, supra, and Rule 95.01, V.A. M.R. which is its counterpart do not abrogate and are merely supplemental to the common law method of name change. Under the common law, the change of name is accomplished by usage or habit, and under the statutory method, the change is accomplished by court order and public record. The primary difference between the two methods is, therefore, the speed and certainty of the change of name under the statutory procedure. 57 Am.Jur.2d, *Name,*§ 11 (1971); 65 C.J.S. *Names* § 11(2) (1966). While no Missouri case has yet considered the relationship between the common law and statutory method of name change, the court's view that the common law and statutory methods of changing name coexist is consistent with the language of Section 1.010, *supra,* since Section 527.270 (RSMo 1969, V.A.M.S.) does not expressly abrogate the common law or invalidate the common law by inconsistency.

Petitioner's second argument urges that the trial court abused its discretion by denying the petition for change of name. The scope of discretion to deny a petition for change of name is narrow. Although no court in Missouri has previously considered the trial court's discretion to deny a name change petition, the advantages of the statutory procedure as against the common law method oblige this court to restrict the trial court's discretion. The statutory procedure accomplishes the change of name quickly and provides a means of notification to third parties under Rule 95.03 and Section 527.290 (RSMo 1969, V.A.M.S.). The petitioner also avoids any risk of prosecution for use of an unregistered, fictitious name under Section 417.200, *supra,* by using the statutory rather than common law method.

Our research had disclosed no appellate decision in any state which affirmed the trial court's denial of a married woman's name change petition on the ground of an ongoing marriage. *Petition of Hauptly,* 312 N.E.2d 857 (Ind.1974); *Marshall v. State,* 301 So.2d 477 (Fla.App.1974); *Application of Halligan,* 46 A.D.2d 170, 361 N.Y.S.2d 458 (1974); *Application of Lawrence,* 133 N.J.Super. 408, 337 A.2d 49 (Super.Ct.App. Div.1975). These cases hold that it is an abuse of discretion to deny a married woman her name change on grounds other than those specified in the statute or at common law or that it is an abuse of discretion to deny the petition on grounds which lack evidentiary support.

We are persuaded that the trial court abused its discretion in denying petitioner her requested name change. Both Rule 95.01, and Section 527.270 (RSMo 1969, V.A. M.S.) provide:

"Hereafter every person desiring to change his or her name may present a petition to that effect, verified by affidavit, to the circuit court in the county of 406*406 the petitioner's residence, which petition shall set forth the petitioner's full name, the new name desired, and concise statement of the reason for such desired change; and it shall be the duty of the judge or such court to order such change be made, and spread upon the records of the court, in proper form, if such judge is satisfied that the desired change would be proper and not detrimental to the interests of any other person."

In view of petitioner's common law right to change her name, the requested name change is proper. A husband no longer has the right to beat his wife with a switch no larger than his thumb. *Bradley v. State,* Walker Miss.Rep., 156 (1824); *State v. Rhodes,* 61 N.C. 453 (1868); 1 W. Blackstone, Commentaries 444-445. The law will not keep a wife under her husband's thumb by compelling her to keep his name once she has chosen another. The record before us is devoid of evidence of harm to third parties. Since petitioner's husband joined in her petition, no harm to her husband can be presumed, and possible harm to children born to the

marriage in the future is too speculative. No harm to the state is shown by the record since petitioner did not request a name which is bizarre, obscene, offensive, or of a governmental body.

While the trial court's order did not indicate what parties petitioner's name change would harm, the court appears to have been concerned with detriment to creditors of petitioner and her spouse. The damage to the couple's creditors is no greater than that to the creditor of any person whose name has been changed, yet creditors have not complained of undue harm when women have assumed their husband's name upon marriage or changed their names following divorce pursuant to Section 452.100 (RSMo 1969, V.A.M.S.). Given the notice provided creditors by Rule 95.03 and Section 527.290, *supra,* it is at least as possible to defraud a creditor by nondisclosure of the existence of a spouse with the same name as the existence of a spouse with a different name. In addition, it does not seem difficult or uncommon to include the spouse's name, whether it be the same or different, whenever marital status is requested by creditors.

It should be noted in this regard that a wife's property is not automatically subject to the debts of her husband and that a wife is deemed a femme sole for most purposes. §§ 451.250, 451.290 (RSMo 1969, V.A.M.S.). It is difficult to imagine prima facie harm to creditors under these circumstances. Both spouses will be known when they seek credit together. The husband's creditors have no automatic right to proceed against the wife's property. The wife's creditors gain an unexpected advantage if they have extended credit to a woman an believed to be single who is married and whose husband is found to be obligated for the particular debt involved. In times past, the management of a woman was "given" to the woman's husband by her father in the marriage ceremony. The woman was symbolically, if not literally, traded from father to husband like a chattel. Today, a woman is under new management, her own. If a married woman can obtain credit in her own name, creditors are not automatically damaged by permitting a woman to select the name under which she will seek credit.

A name change petition is not self executing. The trial judge retains the discretion under Rule 95.01, *supra,* to deny a petition if he has before him some evidence that third parties will be harmed by the name change. The fact that a woman is married, however, is not prima facie evidence of harm to third parties. This court need not decide precisely what evidence is required to deny the name change. The record contains no evidence of harm to petitioner's spouse, future children, or creditors; and, since the name Montage is not bizarre, obscene, offensive; or, of a governmental body the state is not harmed by the use of that name.

Constitutional claims presented in petitioner's third argument are not properly 407*407before the court; thus, the court is not deprived of its jurisdiction under *State ex rel. Pickwick Stage Lines v. Barton,* 222 Mo.App. 1236, 4 S.W.2d 852, 855 (1928), or *Kircher v. Evers,* 210 S.W. 917 (Mo.App. 1919). Petitioner's brief argues hypothetically that her constitutional rights are infringed *if* the laws of Missouri prohibit a married woman from choosing a surname other than her husband's or compel a married couple to select and use one surname exclusively. Since this court has not so interpreted the law, petitioner's constitutional claims are not before the court.

The judgment is reversed and the trial court directed to issue its order changing petitioner's name as prayed.

WEIER, P. J. and RENDLEN, J., concur.

[1] Petitioner has graduated from Law School and is now a member of the Missouri Bar.

[2] This historical summary is drawn from 32 Md.L.Rev. 409 (1972) and Lamber, *A Married Woman's Surname: Is Custom Law?,* 1973 Wash.U.L.Q. 779. In the United States, recent cases declare that English common law allows a woman to retain her birth-given name after marriage unless she adopts her husband's name through usage. *State ex rel. Krupa v. Green,* 114 Ohio App. 497, 177 N.E.2d 616 (1961); *Stuart v. Board of Supervisors of Elections for Howard County,* 266 Md. 440, 295 A.2d 223 (1972); *Kruzel v. Podell,* 226 N.W.2d 458 (Wis. 1975); *Dunn v. Palermo,* 522 S.W.2d 679 (Tenn.1975); *Custer v. Bonadies,* 30 Conn. Supp. 385, 318 A.2d 639 (1974). But see *People ex rel. Rago v. Lipsky,*327 Ill.App. 63, 63 N.E.2d 642 (1945).

[3] It is not difficult to understand a married woman's assumption of her husband's name given the disabilities and privileges afforded a married woman under the common law. Blackstone set out the law relating to husband and wife, and enunciated the now famous rule that the husband and wife were one. 1. W. Blackstone, Commentaries 442. The husband was obligated to supply his wife with necessaries and to pay her debts so long as she comported herself as a proper wife. The husband and wife were prohibited from giving evidence for or against each other in most legal proceedings, and the wife could not sue or be sued without joining the husband. The wife was presumed to act under her husband's coercion. 1 Blackstone, *supra,* at 442-444. The last doctrine was utilized to make the husband alone liable for the couple's joint torts, *Dailey v. Houston,* 58 Mo. 361 (1874); to make the husband jointly liable for his wife's torts, *Nichols v. Nichols,* 147 Mo. 387, 48 S.W. 947 (1898); and to presume that the husband alone was liable for torts and crimes committed by the wife in his presence, *Smith v. Schoene,* 67 Mo.App. 604 (1896); *State v. Murray,* 316 Mo. 31, 292 S.W. 434 (1926). A wife had no capacity to contract at common law. *Sharkey v. McDermott,* 16 Mo. App. 80 (1884).

Marriage also had a considerable impact on property rights. Blackstone said that all of the wife's chattels vested in the husband, 2 Blackstone, Commentaries 433, and this principal was adopted in Missouri. *Hunt v. Thompson,* 61 Mo. 148 (1875). The husband owned all of the wife's personal property, including choses in action which had been reduced to possession, *Hunt v. Thompson, supra,* and any wages earned or services performed by the wife, *Plummer v. Trost,* 81 Mo. 425 (1884). All rents and profits from a wife's lands belonged to her husband. 2 Blackstone, *supra,* at 434; *Dillenberger v. Wrisberg,* 10 Mo.App. 465 (1881). A husband could dispose of his wife's property as he wished, 2 Blackstone, *supra,* and the wife's property was liable for the debts of her husband. 2 Blackstone, *supra*; *Grimes v. Long,* 48 Mo. 340 (1871). The husband's right of curtesy was a larger interest than the dower right accorded the wife. 2 Blackstone, *supra,* at 433.

[4] 1 W. Blackstone, Commentaries 442.

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400 S.W.2d 119 (1966)

STATE of Missouri, Respondent,
v.
Harvey F. EUGE, Appellant.

No. 51030.

Supreme Court of Missouri, Division No. 1.

March 14, 1966.

120*120 No brief filed for appellant.

Norman H. Anderson, Atty. Gen., Donald L. Randolph, Asst. Atty. Gen., Jefferson City, for respondent.

DONNELLY, Judge.

Defendant, Harvey F. Euge, was convicted of obtaining money with intent to cheat and defraud by means of a bogus check under § 561.450 RSMo 1959, V.A. M.S., by a jury in the

Circuit Court of the City of St. Louis, and his punishment was assessed at imprisonment in the custody of the State Department of Corrections for a term of two years. Following rendition of judgment and imposition of sentence in accordance with the verdict, an appeal was perfected to this Court.

The defendant has filed no brief in this Court. The case is before us on the transcript of the record and the brief of the respondent. Therefore, we consider such of the assignments of the motion for a new trial as are sufficient to comply with the requirements of Rule 27.20(a), V.A. M.R. State v. Fraley, Mo.Sup., 369 S.W. 2d 195.

Defendant assigns as error the overruling of his motions for directed verdict wherein he alleged that under the evidence he is not guilty of the offense charged against him because the check in issue was merely a check returned for insufficient funds. This assignment of error is sufficient to dispose of this case on appeal.

Section 561.450 RSMo 1959, V.A.M.S., under which defendant was prosecuted, provides that: "Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever * * * by means or by use, of any false or bogus check or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds * * * shall be deemed guilty of a felony * * *."

The charging portion of the indictment reads as follows:

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present, That HARVEY F. EUGE between October 17th, and the 22nd day of October, one thousand nine hundred and sixty-three, at the City of St. Louis aforesaid, unlawfully, feloniously, designedly, fraudulently, with intent to cheat BANK OF ST. LOUIS, INCORPORATED, a Corporation, in the care and custody of HAROLD RATHMAN, by means and by use of a certain check purportedly drawn by one DAYTON MITCHELL HORN on an account in the MANCHESTER BANK of ST. LOUIS, a Corporation, and dated October 17th, 1963 and that HARVEY F. EUGE did present and tender the aforesaid check to HAROLD RATHMAN and the said HAROLD 121*121 RATHMAN relying on the purported genuineness of the said check and being induced and deceived thereby did then and there give to the said HARVEY F. EUGE the sum of forty-five dollars, lawful money of the United States; the money and property of the said BANK OF ST. LOUIS, INCORPORATED, a corporation; and the said HARVEY F. EUGE at the time unlawfully, feloniously, and with intent to cheat and defraud did obtain the aforesaid money and property from BANK of ST. LOUIS INCORPORATED, a corporation, and the defendant knew at the time he tendered the said check that the name of DAYTON MITCHELL HORN was in fact the name of a fictitious person and that the aforesaid check was bogus; contrary to Section 561.450, Missouri Revised Statutes, in such case made and provided, and against the peace and dignity of the State."

The State's evidence justifies the following statement: On September 19, 1963, defendant *Harvey F. Euge* went to the Manchester Bank of St. Louis, deposited $40 cash in a checking account under the name *Dayton Mitchell Horn* and ordered checks printed. Mrs. Daisy Hayes, an employee of the Manchester Bank, identified defendant at the trial as the man who opened the *Horn* account. Defendant had an account at the Bank of St. Louis from December 31, 1959, until January 28, 1963, when it was closed by the bank. This account was in the name of *Harvey F. Euge.* On October 17 or 18, 1963 (there is a conflict in the

evidence as to the correct date), defendant went to a teller's window at the Bank of St. Louis and re-opened his account in the name *Harvey F. Euge.* He deposited a check in the amount of $45 on the Manchester Bank of St. Louis, drawn to cash, signed by *Dayton Mitchell Horn,* and endorsed on the back by *Harvey Euge.* He received a deposit slip in return showing a $45 deposit in the *Harvey F. Euge* account. Immediately thereafter he wrote a check in the amount of $45 on the *Harvey F. Euge* account in the Bank of St. Louis, presented it to the teller at the Bank of St. Louis, and was given $45 cash. The Bank of St. Louis processed the *Horn* check and it was returned by the Manchester Bank, marked "insufficient funds."

The question is whether the proof supports a charge under § 561.450 RSMo 1959, V.A.M.S.

In construing § 561.450 RSMo 1959, V.A.M.S., we have pointed out in State v. Bird, Mo.Sup., 242 S.W.2d 576, 577, and State v. Robinson, Mo.Sup., 255 S.W.2d 811, 814,"* * * that the legislature has distinguished between a genuine check drawn on a bank in which the drawer *knows he has no funds* and a *false or bogus check,* i. e., one drawn on a non-existent bank, or by or payable to a fictitious person. * *"

In State v. Scott, Mo.Sup., 230 S.W.2d 764, 767, we held, "* * * the State must prove the particular method to cheat and defraud which is prohibited by statute and which is charged in the information." The indictment in the instant case does not charge defendant with obtaining money by means of a check drawn by him on a bank in which he *knew he had no funds.* The record affirmatively shows that funds were in the *Horn* account at the Manchester Bank when the *Horn* check was presented to it.

It was returned marked "insufficient funds."

Therefore, the question narrows to whether the proof supports a charge that defendant obtained money with intent to cheat and defraud by means of a bogus check.

In State v. Todd, Mo.Sup., 372 S.W.2d 133, at 136, we stated: "* * * A bogus check is one drawn on a non-existent bank, or by or payable to a fictitious person. State v. Robinson, Mo., 255 S.W.2d 811, 814[2]; State v. Bird, Mo., 242 S.W.2d 576, 577[2]. All of the evidence tended to prove that the drawers of the checks were fictitious persons. Therefore, the pretended accounts were non-existent. Cheating and defrauding 122*122 `by means or by use, of any false or bogus check' is specifically proscribed by § 561.450. * * *"

In State v. Todd, supra, payment of nine checks deposited was refused by the banks on which they were drawn and the evidence showed those banks did not have any accounts in the names of the purported makers. In State v. Hartman, 364 Mo. 1109, 273 S.W.2d 198, defendant obtained money by endorsing, and receiving cash for, a payroll check, allegedly drawn by a shoe company, which was not a check of the shoe company and which was drawn to a person not employed by the company, and by a person not authorized to draw checks in behalf of the company. There was substantial evidence that the bank had no account out of which the check could be paid. The payee was held to be a fictitious person and the evidence was held sufficient to sustain a conviction. In State v. Polakoff, 361 Mo. 929, 237 S.W.2d 173, the defendant, Abe Elmer Polakoff, signed a check using the name Mrs. Blanch Watson, but the evidence was that there was no money in the bank belonging to him in his name or in the name of Blanch Watson. In State v. Fraley, supra, defendant obtained money by endorsing, and receiving cash for, a check which named as payee a fictitious person not an employee of the company and signed by fictitious persons not authorized to sign checks for the company. The checks in all of these cases were clearly bogus checks.

These cases do not assist us in determining the issue in the instant case. Here, the alleged bogus check was written by defendant *Euge* under the assumed name of *Horn* on the *Horn* account in the Manchester Bank and there was money, though insufficient, in said account. The check was drawn by a fictitious person. *Horn* was fictitious. Was the check drawn by a fictitious person under the rule set forth in State v. Todd, supra, and therefore violative of § 561.450 RSMo 1959, V.A.M.S.? We think not.

Section 417.200 RSMo 1959, V.A. M.S., provides that it shall be unlawful to transact business under a fictitious name without first registering said name with the Secretary of State, and § 417.230 RSMo 1959, V.A.M.S., makes failure to register a misdemeanor. However, a person may assume a different name from his true one and may make contracts under his fictitious name. Sims v. Missouri State Life Ins. Co., 223 Mo.App. 1150, 23 S.W.2d 1075, 1078; 65 C.J.S. Names § 9, pp. 9-11. In his dealings with the Manchester Bank, defendant assumed the name *Horn.* He entered into a contract with the bank that, in return for his cash deposit, the bank would, when demanded, pay funds from the *Horn* account in such sums and to such persons as the depositor should direct. 7 Am.Jur., Banks, § 503, p. 358. This contract with the bank was not unlawful, nor did it contemplate the performance of an unlawful act. Defendant deposited cash in the *Horn* account. If he contemplated drawing money out of the account by signing the *Horn* name, he contemplated obtaining money which was his property. Under these circumstances, defendant may have violated § 417.230, supra, a misdemeanor. However, his contract with the Manchester Bank was not void. Bassen v. Monckton, 308 Mo. 641, 274 S.W. 404; Kusnetzky v. Security Ins. Co., 313 Mo. 143, 281 S.W. 47, 45 A.L.R. 189. Had the Manchester Bank honored the check, defendant would have had no recourse against the bank.

In State v. Tomlinson, Mo.Sup., 364 S.W. 2d 529, defendant Tomlinson was charged with attempting to obtain money by means of a false check on the Bank of St. Ann given to National Food Store, to which check he signed the name of his brother-in-law, Larry D. Rohmann. Defendant had authority to sign Rohmann's name to checks. Rohmann had an account at the bank some months prior to the day the check was written. The Court concluded that Rohmann and the defendant may have conspired to cheat and defraud the National Food Store but that, to convict the 123*123 defendant, it must have been shown that the defendant knew when he signed the check that there were no funds in the bank.

In the case before us, defendant opened an account under the name *Dayton Mitchell Horn* by depositing $40 cash in the Manchester Bank. He subsequently drew a check in the amount of $45 on said account and signed it with the name *Dayton Mitchell Horn.* Defendant had authority to sign the name *Dayton Mitchell Horn* to the check. There was an account at the bank the day the check was written. Defendant could not have known when he signed the check that there were no funds in the *Horn* account because the evidence shows there were funds in the account. The check was returned marked "insufficient funds." Under this evidence, we do not consider the check a bogus check under § 561.450 RSMo 1959, V.A.M.S. The determining factor is that there were funds, though insufficient, in the *Dayton Mitchell Horn* account when the check was written. It is possible that defendant could have been charged under § 561.460 RSMo 1959, V.A.M.S., for drawing an insufficient funds check. However, he was not charged thereunder and we do not rule the question here.

We consider this case to represent an exception to the rule announced in State v. Todd, supra, and cases cited therein, to the effect that a bogus check is one drawn on a non-existent bank, or by or payable to a fictitious person. Here, though the check was drawn by a

fictitious person (defendant by use of the assumed name *Horn*), the check was not a bogus check because there was a *Horn* account in the Manchester Bank and money in the account when the check was drawn on the account. The check was drawn by a fictitious person but on an existing account. These facts distinguish the instant case from the Todd case where there was no evidence of existent accounts in the names of fictitious persons.

We hold the State's evidence was insufficient to prove defendant guilty of obtaining money by use of a bogus check. The trial court should have directed an acquittal. The judgment is reversed and defendant discharged.

All concur.

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593 F.2d 46

55 A.L.R.Fed. 507

UNITED STATES of America, Plaintiff-Appellee,
v.
Forrest Richard COX, Defendant-Appellant.

No. 78-5251.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 29, 1978.
Decided Feb. 26, 1979.

Gershwin A. Drain, Kenneth R. Sasse, F. Randall Karfonta, Detroit, Mich., for defendant-appellant.

James K. Robinson, U. S. Atty., Kenneth J. Haber, Asst. U. S. Atty., Detroit, Mich., for plaintiff-appellee.

Before LIVELY, Circuit Judge, and PHILLIPS and PECK, Senior Circuit Judges.

LIVELY, Circuit Judge.

The defendant appeals from his conviction, after a jury trial, for making a false statement in an application for a passport in violation of 18 U.S.C. § 1542 (1976).[1] The indictment stated the charge upon which the conviction was based as follows:

2

That on or about March 11, 1975, in the Eastern District of Michigan, Southern Division, FORREST RICHARD COX, JR., defendant herein, willfully, unlawfully and knowingly did make and aid and abet in the making of a false statement in an application for a passport with intent to induce and secure for his own use the issuance thereof under the authority of the United States, contrary to the laws regulating the issuance of such passports and the rules prescribed pursuant to such laws, in that, in such application, executed at Detroit, Michigan, in the name of "Carl Richard Stein", Forrest Richard Cox, Jr., defendant herein, stated and caused to be stated that his name was "Carl Richard Stein" whereas in truth and fact,

as he then knew, his name was not "Carl Richard Stein"; in violation of Section 1542 and 2, Title 18, United States Code.

3

Two other charges related to use of the name Carl Richard Stein were dismissed on motion of the government prior to trial.

4

The evidence introduced by the government proved two things: that the defendant was employed by the City of Detroit under the name Forrest Richard Cox and that he applied for a passport under the name Carl Richard Stein. His supervisor, a city personnel officer and several fellow employees all identified the defendant as Cox. At least one of these witnesses stated that she had also known the defendant to use a Muslim name on occasion.

5

The defendant took the stand and admitted making the passport application in the name of Stein. He testified he knew that athletes and entertainment personalities commonly adopted assumed names and that he thought there was nothing wrong in his doing it as well. The defendant explained that he had become interested in establishing a business of making hand tooled leather bags and that he assumed the name in furtherance of that ambition. He related that he had been convicted of a felony (grand larceny) seven years earlier while he was a college student and that he wanted to create a new identity, free of the stigma of his conviction. He stated that he had no other convictions and felt he was entitled to start over. He obtained a new driver's license and a new social security card in the name of Carl Richard Stein and established credit in that name with one or more Detroit financial institutions. On cross-examination the defendant testified that he had never filed for "an assumed name change" and had never registered his business under an assumed name.

6

At the conclusion of all the evidence counsel for the defendant made a motion for a judgment of acquittal. Though the record with respect to this motion does not appear to be complete, the thrust of the defense argument in support of the motion was that the only material question on the passport application relates to the citizenship of the applicant, a question which was answered truthfully in this case. The district court denied the motion, holding that it "would be a material false statement in connection with a passport application" if a person applied "in a name other than your own" and supplied documentation in support of that name.

7

A motion for acquittal pursuant to Rule 29, Fed.R.Crim.P., takes the place of a motion for directed verdict and raises the question of whether the evidence is sufficient to support a verdict. As the court pointed out in United States v. Jones, 174 F.2d 746, 748 (7th Cir. 1949), a motion for acquittal "is a challenge to the Government in the presence of the court that the Government has failed in its proof. The motion is not required by the rules to be in writing or to specify the grounds therefor." We conclude that the issue of sufficiency of the evidence was properly before the court.

8

The gravamen of the offense denounced in section 1542 is the making of a false statement. The securing or use of a passport is only made criminal if false statements are proven to have been involved in its procurement. "If the misrepresentation is withdrawn nothing culpable remains in the use." Browder v. United States, **312 U.S. 335**, 337, 61 S.Ct. 599, 601, 85 L.Ed. 862 (1941). The question to be answered is whether the defendant in this case made a false statement in his application by using the name Carl Richard Stein.

9

Under the law of Michigan, where the defendant had lived since infancy except while away in college, a person may adopt any name he chooses, as at common law. In Piotrowski v. Piotrowski, 71 Mich.App. 213, 215-16, 247 N.W.2d 354, 355 (1976), the court stated this rule as follows:

10

Under the common law a person may adopt any name he or she wishes, without resort to any court and without any legal proceedings, provided it is not done for fraudulent purposes.

11

The statutory name change procedure in Michigan, M.C.L.A. § 711.1, is not exclusive; it merely provides an additional method for effecting a name change as a matter of public record. 71 Mich.App. at 216, 247 N.W.2d 354. There was no showing that the defendant assumed the name Stein for fraudulent purposes. In the absence of such proof he was legally entitled to use that name as his own.

12

It is interesting to note that regulations of the Department of State recognize that a name may be changed without court action. The following appears in Subpart B of passport regulations:

13

An applicant whose name has been changed by court order or decree shall submit with his application a certified copy of the order or decree. An applicant who has changed his name by the adoption of a new name without formal court proceedings shall submit with his application evidence that he has publicly and exclusively used the adopted name over a long period of time.

14

22 CFR § 51.24 (1977). (emphasis added).

15

The record does not disclose whether or not the defendant complied with this regulation. That is immaterial to the decision of this case. Since the Department of State may have a legitimate interest in learning whether applicants for passports have changed their names at some time, failure to supply the information required by § 51.24 might be grounds for refusing to issue a passport. However, this failure would not make the applicant guilty of violating section 1542 unless the name was not legally adopted.

16

The court has not overlooked the fact that federal law controls the meaning of the language used in this federal statute. However, the statute does not define "false statement" with respect to use of a legally assumed name which is different from the name given at birth, and there appears to be no decisional authority from federal courts on the subject. In such a situation we apply two widely accepted rules of statutory construction. The first is that criminal statutes are to be strictly construed. The second rule is that statutes are to be interpreted with reference to the common law and where there is no indication to the contrary, given their common law meaning. United States v. Monasterski, **567 F.2d 677**, 681-82 (6th Cir. 1977). Applying these principles to section 1542 we conclude that it is not violated by one who lists a legally adopted name on a passport application. The term " false statement," strictly construed, cannot be held to include use of a legally adopted name. Under the common law a person may freely change his or her name without any legal formalities. Thus, application of both rules of statutory construction leads to the conclusion that there was no evidence that the defendant made a false statement on his passport application.

Rule 29, Fed.R.Crim.P., states in part:

17
The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

18
The district court should have granted the defendant's motion for judgment of acquittal since the evidence did not sustain a conviction for the offense of making a false statement on a passport application.

19
The judgment of the district court is reversed. The cause is remanded with direction to dismiss the indictment.

1
S 1542. False statement in application and use of passport

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

IN RE: the PETITION OF VARIABLE for Change of Name

Court of Appeals of New Mexico.

IN RE: the PETITION OF VARIABLE for Change of Name, Petitioner-Appellant, v. District Court Judge Nan G. NASH, Respondent-Appellee.

No. 28,488.

Decided: June 27, 2008

Variable, Los Alamos, NM, Pro Se Appellant. Gary K. King, Attorney General, Santa Fe, NM, for Appellee.

OPINION

{1} Petitioner appeals the denial of his name change request. In our notice, we proposed to affirm. Petitioner has timely responded. Not persuaded by his arguments, we affirm.

{2} Petitioner filed a request in district court to change his name to "Fuck Censorship!" The district court denied the request stating that the "proposed name change would be obscene, offensive and would not comport with common decency." This denial is consistent with our view as stated in In re Mokiligon, 2005-NMCA-021, ¶3, 137 N.M. 22, 106 P.3d 584, that courts may deny a name-change request when the choice of name is offensive to common decency and good taste. We review the district court's denial of the name-change request for abuse of discretion. Id. ¶2.

{3} Petitioner argues on appeal that he is entitled to call himself whatever he wishes. He argues that the First Amendment to the United States Constitution gives him that right and that it is improper government censorship to deny him that right.

{4} We do not believe that the district court's action infringes on Petitioner's right to free speech. Petitioner has a right under the common law to assume any name that he wants so long as no fraud or misrepresentation is involved. In re Ferner, 295 N.J.Super. 409, 685 A.2d 78, 80 (Ct. Law Div.1996); In re Rivera, 165 Misc.2d 307, 627 N.Y.S.2d 241, 244 (Civ.Ct.1995). He may do so without making any application to the state. Thus, under the common law, Petitioner may exercise his right to free speech and use any name at all. However, once Petitioner files an application for a name change pursuant to NMSA 1978, § 40-8-1 (1989), and seeks the approval of the courts for a name, it becomes the responsibility of the courts to ensure that there are no lawful objections to the name change. See In re Mokiligon, 2005-NMCA-021, ¶¶3-4, 137 N.M. 22, 106 P.3d 584 (requiring the court to show that lawful objections exist to the name change application); Rivera, 627 N.Y.S.2d at 244 (stating that petition for name change becomes subject to close scrutiny once court approval is sought).

{5} Petitioner may make a political statement by changing his name, but once he seeks the state's imprimatur he is subject to the court's discretion in granting the government's approval of the name. As the court in Lee v. Ventura County Superior Court, 9 Cal.App.4th 510, 11 Cal.Rptr.2d 763, 764 (1992), stated in denying the petition of Lee to change his name to "nigger," one has a common law right to assume any name, and a right to engage in a social experiment, but one does not have a right to require the state to participate in the experiment. Moreover,

"the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Id. at 767 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)).

{6} A name-change request made pursuant to statute gives the state the authority to place certain limits on the name by permitting the court to refuse the name when the applicant has an improper motive, when there is the possibility of fraud on the public, and when the choice of name is bizarre, unduly lengthy, ridiculous, or offensive to common decency and good taste. See In re Mokiligon, 2005-NMCA-021, ¶¶4-6, 8, 137 N.M. 22, 106 P.3d 584.

{7} We conclude that the district court did not abuse its discretion in finding that Petitioner's proposed name change "would be obscene, offensive and would not comport with common decency." Petitioner is entitled to assume whatever name he desires, absent fraud or misrepresentation, but any statutory name change will be subject to the district court's scrutiny. Here, as in Lee, "[s]ince [Petitioner's] common law right to use the [ ]name has not been abrogated ., none of his First Amendment rights have been prejudiced." 11 Cal.Rptr.2d at 768.

{8} For the reasons stated herein and in the notice of proposed disposition, the denial of the petition for name change is affirmed.

{9} IT IS SO ORDERED.

FRY, Judge.

WE CONCUR: JONATHAN B. SUTIN, Chief Judge and RODERICK T. KENNEDY, Judge.

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22 CFR 51.25 - Name of applicant to be used in passport.

§ 51.25 Name of applicant to be used in passport.

(a) The passport shall be issued in the full name of the applicant, generally the name recorded in the evidence of nationality and identity.

(b) The applicant must explain any material discrepancies between the name on the application and the name recorded in the evidence of nationality and identity. The name provided by the applicant on the application may be used if the applicant submits the documentary evidence prescribed by the Department.

(c) A name change will be recognized for purposes of issuing a passport if the name change occurs in one of the following ways.

(1)*Court order or decree.* An applicant whose name has been changed by court order or decree must submit with his or her application a copy of the order or decree.

Acceptable types of court orders and decrees include but are not limited to:

(i) A name change order;

(ii) A divorce decree specifically declaring the return to a former name;

(2) Certificate of naturalization issued in a new name.

(3)*Marriage.* An applicant who has adopted a new name following marriage must present a copy of the marriage certificate.

(4)*Operation of state law.* An applicant must present operative government-issued legal documentation declaring the name change or issued in the new name.

(5)*Customary usage.* An applicant who has adopted a new name other than as prescribed in paragraphs (c)(1) through (4) of this section must submit evidence of public and exclusive use of the adopted name for a long period of time, in general five years, as prescribed in guidance issued by the Department. The evidence must include three or more public documents, including one government-issued identification with photograph and other acceptable public documents prescribed by the Department.