SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

June 4, 2008

In the Matter of the Application of

XXXX XXXX XXXXXX

for Leave to Assume the Name of

XXXXXXXX XXXXXX XXXXXX

Broome County Clerk's Index No. 2007-2650

Motion to Review Pursuant to N.Y. C.P.L.R. § 5704
Decision and Order from Supreme Court of Broome County
(The Honorable Jeffrey A. Tait, Justice)

PETITIONER'S MEMORANDUM OF LAW

FRANKLIN H. ROMEO, ESQ.
SYLVIA RIVERA LAW PROJECT
322 8th Ave., 3rd Floor
New York, NY 10001
Ph. (212) 337-8550
Fax (212) 337-1972

Attorney for Petitioner

PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

QUESTION PRESENTED FOR REVIEW 2

STATEMENT OF FACTS 2

PROCEDURAL HISTORY 3

ARGUMENT 5

I. IN NEW YORK, THE RIGHT OF AN INDIVIDUAL TO CHANGE HER NAME DERIVES FROM THE COMMON LAW AND IS EXTREMELY BROAD. 6

II. GRANTING THE PETITION WOULD ONLY AFFECT PETITIONER'S NAME, NOT HER GENDER. 8

III. THE SUPREME COURT DECISION VIOLATES THE CONTROLLING STATUTE BECAUSE THERE IS NO BASIS TO REASONABLY OBJECT TO MS. XXXXXX'S PETITION 10

A. Potential Confusion Arising From Petitioner's Name Change Does Not Constitute a Reasonable Objection To Her Petition 11

B. The New York Civil Rights Law Does Not Require Any Evidence of a Petitioner's Gender in Order to Change One's Name 14

C. Every Other Appellate Court to Examine This Issue Has Ruled That Transgender Petitioners Are Entitled to Assume a Name of Their Choice Regardless of Medical Evidence of a Gender Transition 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Application of Lipschutz, 32 N.Y.S.2d 264, 178 Misc. 113 (Sup. Ct. Queens County 1941) 17

Craig v Boren, 429 U.S. 190, 97 S.Ct. 451 (1976) 18

Doe v. Bell, 754 N.Y.S.2d 846, 194 Misc. 2d 774 (Sup. Ct. N.Y. County 2003) 1

Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Ma. Super. Ct. Oct. 11, 2000) 2

Fountain v. Fountain, 83 A.D.2d 694, 442 N.Y.S.2d 604, aff'd 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596 19

Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973) 18

Hanna v. Turner, 2001 NY Slip Op 50098U; 2001 N.Y. Misc. LEXIS 842 (Sup. Ct. N.Y. County 2001) 1

In Re Alvarado, 166 A.D.2d 932, 560 N.Y.S.2d 586 (4th Dep't 1990) 7

In re Anonymous, 57 Misc.2d 813, 293 N.Y.S.2d 834 (Civ. Ct. N.Y. County 1968) 6

In re Anonymous, 64 Misc. 2d 309, 314 N.Y.S.2d 668 (Civ. Ct. N.Y. County 1970) 8

In Re Austin, 295 A.D.2d 721, 743 N.Y.S.2d 333 (3d Dep't 2002) 16

In re Eck, 584 A.2d 859, 245 N.J. Super. 220 (N.J. Super. Ct. App. Div. 1991) 20

In Re Guido, 1 Misc.3d 825, 771 N.Y.S.2d 789, (Civ. Ct. N.Y. County 2003) 8, 10

In re Halligan, 46 A.D.2d 170, 361 N.Y.S.2d 458 (4th Dep't 1974) 6

In re Halligan, 76 Misc.2d 190, 350 N.Y.S.2d 63 (N.Y. Sup. Ct. 1973) 11

In Re Linda Ann A., 126 Misc. 2d 43, 480 N.Y.S.2d 996 (Sup. Ct. Queens County 1984) 7

In Re Madison, 261 A.D.2d 738, 689 N.Y.S.2d 732 (3d Dep't 1999) 16

In re Maloney, 774 N.E.2d 239, 96 Ohio St.3d 307 (Ohio 2002) 12

In re Maloney, 96 Ohio St.3d 307, 774 N.E.2d 239 (Ohio 2002) 21

In re Maloney, No. CA2000-08-168, 2001 WL 908535, at *5 (Ohio Ct. App. 2001) 12, 13

In re McIntyre, 715 A.2d 400, 552 Pa. 324 (Pa. 1998) 21

In re Stempler, 110 Misc. 2d 174, 441 N.Y.S.2d 800 (Sup. Ct. Nassau County 1981) 16

In Re Washington, 216 A.D.2d 781, 628 N.Y.S.2d 837 (3d Dep't 1995) 4

In re Waters, 264 A.D.2d 910, 695 N.Y.S.2d 428 (3d Dep't 1999) 16

Matter of Eisenberg v. Strasser, 1 Misc.3d 299, 768 N.Y.S.2d 773 (Sup. Ct. Kings County 2003) 6

Matter of Joint Diseases North General Hosp., 148 A.D.2d 873, 539 N.Y.S.2d 511 (3d Dep't 1989) 5

Matter of Rivera, 165 Misc.2d 307 (Civ. Ct., Bronx County 1995).. 7

Morales v. County of Nassau, 724 N.E.2d 756, 94 N.Y.2d 218, 703 N.Y.S.2d 61 (1999).... 15

N.Y. Civ. Rights Law § 61(1) 21

Pajak v. Pajak, 437 N.E.2d 1138, 56 N.Y.2d 394, 452 N.Y.S.2d 381 (1982) 16

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989)................................... 19

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004)... 19

Smith v. United States Casualty Co, 90 N.E. 947, 197 N.Y. 420 (1910) 6

Wheeler v. Commissioner of Social Services of City of New York, 233 A.D.2d 4, 662 N.Y.S.2d 550 (2d Dep't 1997) 18

Zhao v. State Univ. of N.Y., 472 F.Supp.2d 289 (E.D.N.Y. 2007)....................................... 19

STATUTES

N.Y. C.P.L.R. § 5704(a) 4

N.Y. Civ. Rights Law § 63 (McKinney 2007) 7, 8, 15

N.Y. Dom. Rel. Law § 240 (McKinney 2007)... 19

N.Y. Dom. Rel. Law § 70 (McKinney 2007)... 19

N.Y. Mental Hyg. Law § 33.13 (c) (McKinney 2007) 18

N.Y. Pub. Health Law § 18(6).. 18

N.Y. Pub. Health Law § 2805-g (3) (McKinney 2007).. 18

N.Y. Stat. Law § 240 (McKinney 2007)... 15

OTHER AUTHORITIES

21 Am. & Eng. Encyc. of Law 311 (2d ed. 1903).. 6

Gianna E. Israel and Donald E. Tarver II, M.D., Transgender Care 7 (1997)......................... 1

PRELIMINARY STATEMENT

Petitioner XXXX XXXX XXXXXX (hereinafter "Petitioner" or "Ms. XXXXXX"[1]) respectfully submits this motion to vacate or modify the Supreme Court of Broome County Decision and Order dated May 6, 2008 (the "Order") and grant her leave to assume the name XXXXXXXX XXXXXX XXXXXX, on the grounds that the Order violates the controlling statute and is not based on a reasonable objection to Ms. XXXXXX's Petition.

Ms. XXXXXX is a transgender woman residing in Broome County who petitioned for leave to assume the name XXXXXXXX XXXXXX XXXXXX. Ms. XXXXXX meets the statutory requirements to petition for leave to assume the name of her choice under Article Six of the New York Civil Rights Law. The Supreme Court denied her Petition, finding that Petitioner's adoption of her chosen name would be "fraught with possible confusion," in part because Ms. XXXXXX declined to submit supplemental evidence attesting to a permanent and irreversible gender transition. (Order 3-4, attached at Appendix 1.)

The Supreme Court Order contravenes New York's long-standing, liberal approach to name change petitions, exceeds its power of review, and violates the controlling name change statute. Ms. XXXXXX's legal gender is not at issue in this action. Her proposed name would not be misleading or unduly confusing to the public. Moreover, any requirement that Ms. XXXXXX produce medical or psychological affidavits relating to her gender would impose an undue burden on her and similarly situated petitioners, as the controlling statute plainly does not limit a person's choice of name based upon its gendered connotations or require

[1] Consistent with the Petitioner's identity and preference, counsel refers to her as "Ms. XXXXXX" and with feminine pronouns throughout this memo. This is consistent with common practice and the advice of medical and mental health professionals who work with transgender individuals. See Gianna E. Israel and Donald E. Tarver II, M.D., Transgender Care 7 (1997). Accord Doe v. Bell, 754 N.Y.S.2d 846, 847, 194 Misc. 2d 774, 775 n.1 (Sup. Ct. N.Y. County 2003); Hanna v. Turner, 2001 NY Slip Op 50098U; 2001 N.Y. Misc. LEXIS 842, at ** 20, nn.2-3 (Sup. Ct. N.Y. County 2001); Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1 n.4 (Ma.

petitioners to submit any evidence regarding gender, much less affidavits attesting to private medical information. Every appellate court in the nation to examine this issue has concluded such evidence is irrelevant to a name change proceeding. As such, no reasonable objection exists to her Petition. The Supreme Court's Order must be vacated and her petition must be granted.

QUESTION PRESENTED FOR REVIEW

1. Where Petitioner has satisfied the statutory requirements to petition for leave to assume a name and no third parties have objected to her petition, does a reasonable objection to her petition exist because she seeks leave to assume a name not traditionally associated with the gender she was assigned at birth?

The Supreme Court answered this question in the affirmative.

STATEMENT OF FACTS

Ms. XXXXXX is a transgender woman. She was assigned male at birth and now identifies and presents as a woman. Because of her female gender identity, she wishes to express her gender through using a traditionally feminine name rather than the traditionally masculine name she was given at birth. She has used the name XXXXXXXX for three years in her personal life and has been known as XXXXXXXX professionally for over a year. (Petition of XXXX XXXX XXXXXX ¶ 12 ("Petition" or "Pet."), attached at Appendix 2.) Accordingly, she filed a Petition for leave to assume the name of XXXXXXXX XXXXXX XXXXXX with the Supreme Court of Broome County on October 24, 2007.

Super. Ct. Oct. 11, 2000). However, as explained in Section II of this memorandum, Ms. XXXXXX makes no claim in this action regarding her legal gender.

Ms. XXXXXX is an adult resident of Broome County who meets the criteria for a change of name in New York State. Ms. XXXXXX has never been convicted of a crime, has no judgments or liens of record against her, and has no other actions pending in this or any other court. (Pet. ¶¶ 6, 8-9.) She is not responsible for spousal or child support obligations. (Pet. ¶¶ 10-11.) Ms. XXXXXX is married and her spouse supports her application to change her name. (Pet. ¶ 5, Affidavit of YYYYY XXXXXX, dated February 7, 2008, ¶ 2 ("YYYYY XXXXXX Aff."), attached at Appendix 3.) It is not Ms. XXXXXX's intent to evade creditors or other financial obligations.[2] No third parties have objected to her petition. She simply seeks to adopt through judicial order a name with which she identifies and which she has used for over three years.

PROCEDURAL HISTORY

Ms. XXXXXX submitted a Petition for leave to assume the name XXXXXXXX XXXXXX XXXXXX in the Supreme Court on or about October 24, 2007. After filing the Petition, Ms. XXXXXX received a letter from Supreme Court Chambers dated November 26, 2007, advising Ms. XXXXXX to submit a supplemental affidavit detailing how her petition meets the criteria of not confusing or misleading the general public or raising another reasonable objection to the change of name. (Letter from Lisa Smith, dated November 26, 2007, attached at Appendix 4.) This letter also advised that affidavits from physicians, therapists, or psychologists would be helpful. (Id.)

[2] Ms. XXXXXX was adjudicated bankrupt in 1996 while living in Virginia. (Pet. ¶ 7.) Upon request of this Court, she agrees to serve a copy of any name change Order issued by this Court upon the U.S. Bankruptcy Court for the Eastern District of Virginia, 600 Granby Street, Room 400, Norfolk, VA 23510, and any other parties this Court deems necessary.

After retaining counsel, Ms. XXXXXX submitted an affidavit explaining that she identifies and presents as a woman and therefore does not believe that assuming a name concordant with her gender identity and expression will confuse or mislead the public. (Affidavit of XXXX XXXX XXXXXX, dated January 10, 2008, ¶ 2-3 ("XXXXXX Aff."), attached at Appendix 5.) She further stated that she did not wish to submit further documentation regarding her gender, as she believes these documents to be personal and private. (Id. ¶ 4.) Ms. XXXXXX also submitted an affidavit from YYYYY XXXXXX, to whom the Petitioner has been married since 1980, stating that YYYYY XXXXXX is aware that Petitioner seeks to change her name and is supportive of her decision to do so. (YYYYY XXXXXX Aff. ¶ 1-2.)

On May 6, 2008, the Supreme Court issued its Order denying Ms. XXXXXX's Petition to change her name, holding that "the proposed change of name from a male to a female name is fraught with possible confusion and consequently there exists a reasonable objection to the name change." (Order 3.) The Supreme Court expressed particular concern that Ms. XXXXXX is married and did not provide documentation of an "irreversible or permanent" gender transition. (Order 3-4.)

Ms. XXXXXX now brings this motion pursuant to N.Y. C.P.L.R. § 5704(a) to modify the Supreme Court's Order and grant her leave to assume the name XXXXXXXX XXXXXX XXXXXX. While the C.P.L.R. does not provide appeal as of right for *ex parte* orders, this Court has previously recognized that it has jurisdiction to review name changes under C.P.L.R. § 5704, which provides that the appellate division "may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division." N.Y. C.P.L.R. § 5704(a) (McKinney 2007). See,

e.g., In Re Washington, 216 A.D.2d 781, 628 N.Y.S.2d 837 (3d Dep't 1995). Such review is proper, given that the C.P.L.R. does not provide any other procedural mechanism for litigants to appeal *ex parte* orders, even in actions in which no adverse party exists. See Matter of Joint Diseases North General Hosp., 148 A.D.2d 873, 875, 539 N.Y.S.2d 511, 513-14 (3d Dep't 1989) ("Given the uncertainty as to how a nonadversarial statutory application of this kind may be reviewed…[allowing review under §5704] not only has the virtue of departmental consistency, but also does not punish the present litigant for the Legislature's and the courts' failure to resolve this long-standing procedural dilemma.")

ARGUMENT

The Supreme Court's Order must be vacated or modified because it violates the New York Civil Rights Law. There is no basis to reasonably object to Ms. XXXXXX's Petition simply because she seeks to assume a traditionally feminine name in the place of a traditionally masculine name. Ms. XXXXXX's has a right to change her name to the name of her choosing because she is an adult whose Petition meets the statutory requirements for a change of name and no third parties have objected to it. Ms. XXXXXX is not seeking to evade creditors or otherwise perpetuate fraud; nor is she misrepresenting herself or affecting the rights of any third partites. Rather, she is seeking to honestly express her gender identity through the assumption of a traditionally feminine name.

Any concern the Court has regarding Ms. XXXXXX's assumption of a traditionally feminine name is misplaced. New York recognizes a broad right to change one's name; the courts' power to review and deny name change petitions is quite limited. (See Section I below.) Any Order for leave to assume the name XXXXXXXX XXXXXX XXXXXX issued

by this Court would have no legal effect on Ms. XXXXXX's gender. (See Section II below.) Most importantly, no reasonable objection to Ms. XXXXXX's Petition exists. Granting her Petition would not be misleading or unduly confusing to the public. (See Section III-A below.) Moreover, the Supreme Court was not justified under the controlling statute in requesting medical or psychological affidavits attesting to a permanent or irreversible gender transition. This information is not required under the Civil Rights Law and requiring such documentation would impose an undue burden on the petitioner. (See Section III-B below.) Every appellate court in the nation to examine this issue has determined that such medical evidence is irrelevant to a name change proceeding. (See Section III-C below.) Ms. XXXXXX's petition cannot justifiably be denied.

I. IN NEW YORK, THE RIGHT OF AN INDIVIDUAL TO CHANGE HER NAME DERIVES FROM THE COMMON LAW AND IS EXTREMELY BROAD.

New York has long recognized a broad right to change one's name. At common law, a person could change his or her name at will, or acquire a name other than that originally borne by him or her by general usage or habit. 21 Am. & Eng. Encyc. of Law 311 (2d ed. 1903). The common law right to change one's name is limited only to the extent the name change is intended to defraud or mislead the general public. See In re Halligan, 46 A.D.2d 170, 171, 361 N.Y.S.2d 458, 459 (4th Dep't 1974) (under common law, a person may change his or her name at will so long as there is no fraud, misrepresentation or interference with the rights of others).

Article Six of the New York Civil Rights Law provides an alternative means of changing one's name by judicial proceeding.[3] The plain language of the statute indicates that

[3] As noted in the Decision, this statute does not limit a person's common law right to adopt a name of their own choosing. E.g., Smith v. United States Casualty Co, 197 N.Y. 420, 429, 90 N.E. 947, 950 (1910) ("[The name change statute] does not repeal the common law by implication or otherwise, but gives an additional method of

the legislature intended to preserve the broad right at common law to change one's name at will. Section sixty-three provides that if the court is satisfied that a petition is true and that there is "no reasonable objection to the change of name," it "shall make an order" granting the petition. N.Y. Civ. Rights Law § 63 (McKinney 2007) (emphasis added).

While the Supreme Court suggests that name change petitions filed pursuant to Article Six of the Civil Rights Law are subject to "close scrutiny" (Order 2, citing Matter of Rivera, 165 Misc.2d 307, 311 (Civ. Ct., Bronx County 1995)), the scope of review for a name change petition is actually quite limited. It is well settled that "courts ordinarily grant petitions by adults unless there is a demonstrable reason not to do so." In re Washington, 216 A.D.2d 781, 782, 628 N.Y.S.2d 837, 838 (3d Dep't 1995). See also, e.g., In Re Alvarado, 166 A.D.2d 932, 560 N.Y.S.2d 586 (4th Dep't 1990) (court's power in reviewing application for name change limited to whether change of name will be an instrumentality of fraud, misrepresentation, or interference with the rights of others); Halligan, 46 A.D.2d at 172, 361 N.Y.S.2d at 460 ("A court may properly assume that most petitions by adults should be granted until the contrary appears, particularly when the change is unopposed by interested third persons"); In Re Linda Ann A., 126 Misc. 2d 43, 480 N.Y.S.2d 996 (Sup. Ct. Queens County 1984) (court's power of review pursuant to N.Y. Civ. Rights Law § 63 is quite limited, and court should be chary of substituting its subjective judgment on the propriety or advisability of the name change for an objective consideration of its lawfulness.)

---

effecting a change of name."); Matter of Eisenberg v. Strasser, 1 Misc.3d 299, 303, 768 N.Y.S.2d 773, 777 (Sup. Ct. Kings County 2003) (statutory name change provisions neither diminish nor abrogate a person's common law right to effectuate a name change); In re Anonymous, 57 Misc.2d 813, 814, 293 N.Y.S.2d 834, 835 (Civ. Ct. N.Y. County 1968) ("That an individual may assume any name, absent fraud or an interference with the rights of others, is a right that existed at common law. This right is not restricted or impaired by Article Six of the Civil Rights Law.").

Ms. XXXXXX meets the statutory requirements for a name change pursuant to Article Six of the Civil Rights Law. Her proposed change of name would not perpetrate fraud or the evasion of debt or other responsibilities. No third parties have objected to her application; nor would granting the change of name affect the rights of any third parties. Therefore, given the broad right to change one's name and the limited scope of review under New York law, the Supreme Court's Order must be vacated and Ms. XXXXXX's Petition must be granted.

II. GRANTING THE PETITION WOULD ONLY AFFECT PETITIONER'S NAME, NOT HER GENDER.

An Order by this court granting Ms. XXXXXX leave to assume another name would have no bearing on Ms. XXXXXX's legal gender. See N.Y. Civ. Rights Law § 60 (McKinney 2007); In Re Guido, 1 Misc.3d 825, 828, 771 N.Y.S.2d 789, 791 (Civ. Ct. N.Y. County 2003) (finding that a transsexual woman's name change petition does not present the question of whether the applicant had "effected a legally cognizable change of sex" and that therefore the applicant's marriage was not a bar to obtaining a legal name change). See also Rivera, 165 Misc.2d at 312, 627 N.Y.S.2d at 244 (granting a transsexual woman a change of name upon the condition that the order not be used as a judicial determination that her sex had been changed); In re Anonymous, 64 Misc. 2d 309, 310, 314 N.Y.S.2d 668, 670 (Civ. Ct. N.Y. County 1970) (same). Therefore, the Court need not be concerned with Petitioner's marital status or whether she has undergone irreversible medical procedures related to her gender transition.

Names do not have any legally significant gender associated with them. Nowhere in New York law is there a list of designated "male" names and "female" names. While certain names are customarily assigned to people of a one gender, there is no legal significance to the gendered connotation of names. For example, parents are not limited in the choice of names

they can give an infant because of their child's gender. Likewise, the names of a couple do not determine whether or not they are considered a same-sex or different-sex couple for purposes of acquiring a marriage license. Thus, under the current New York law, even if a woman were named George, she would not be permitted to legally marry a woman named Linda; she would, however, be permitted to legally marry a man, whether his name was Robert or Julie. Similarly, women bearing traditionally masculine names are not required to register with the Selective Service, but men are, regardless as to whether they have a masculine, feminine, or androgynous first name.

The required procedures to change one's gender designation on legal documents bear no relationship to a legal change of name. For example, to change one's gender designation with the New York Department of Motor Vehicles, one must bring a physician's letter stating that one gender predominates over the other. Memorandum from Patricia B. Adduci, Commissioner, State of New York Department of Motor Vehicles to all issuing offices (Apr. 29, 1987) (attached at Appendix 6). To change one's gender designation with the Social Security Administration, one needs documentation of sex reassignment surgery. Social Security Administration's Program Operations Manual System, RM 00203.215 (b), available at http:/policy.ssa.gov/poms.nsf/links/0100203215 (last visited June 2, 2008). The State of New York will also amend the gender on a person's birth certificate upon proof that a person has undergone sex reassignment surgery. Letter from Peter M. Carucci, Director, Bureau of Production Systems Management (May 3, 2005) (attached at Appendix 7). A name change order is not even relevant evidence in these and other administrative procedures to change the gender designation on legal documents.

If Ms. XXXXXX wishes to change her gender on any of these documents, she would need to follow the appropriate procedures. Should she choose to do so, she would need to also consider the potential consequences upon her marriage. However, these and other legal questions regarding her gender transition are not matters raised by her name change Petition. Indeed, the Civil Court of New York County recently held that because a legal determination of a gender change is beyond the scope of a name change petition, the gender of a person's given or chosen name is irrelevant in deciding whether a name change should be granted. Guido, 1 Misc.3d at 828, 771 N.Y.S.2d at 791. The court wrote:

> In its previous denials, the Court required evidence of sex-reassignment surgery (which Petitioner has apparently not had) and expressed concern about the legal conundrum presented by Petitioner's prospective change of sex from male to female while still married to a woman…however, the Court has concluded that its concern with both issues was misplaced, as they anticipate questions that simply are not raised by this application.
>
> Petition has not asked this Court to declare his sex changed from male to female, nor is such a declaration within the scope of this Court's powers. This Court is asked only to sanction legally Petitioner's desire for a change of name…

Id. Accord In re Anonymous, 57 Misc.2d at 813-14, 293 N.Y.S.2d at 835 (refusing to hear merits of petition to change gender that appears on birth certificate because the civil court lacked jurisdiction).

Because Ms. XXXXXX's name change Petition does not raise the issue of her legal gender, the Court need not be concerned with whether her gender transition is irreversible or permanent, or with the effect of her transition upon her marriage. Thus, the Supreme Court's Decision denying Ms. XXXXXX's name change on this basis should be vacated and her Petition should be granted.

III. The Supreme Court Decision Violates the Controlling Statute Because There Is No Basis to Reasonably Object to Ms. XXXXXX's Petition.

As Ms. XXXXXX's gender is not at issue in this action, no reasonable objection to her Petition exists. In denying Ms. XXXXXX's Petition, the Supreme Court relies on two cases in which the Queens County Civil Court denied transgender petitioners' name changes absent documentation of sex reassignment surgery. However, these cases are misguided for two reasons. First, because a name change order has no bearing on a person's legal gender (see Section II above), any confusion arising from Petitioner's change of name is no greater than the incidental confusion that arises from numerous other names and name changes. Second, the Supreme Court's request for medical and psychological affidavits and subsequent denial of Ms. XXXXXX's Petition exceeds the court's power of review, violates the controlling name change statute, and imposes an undue burden upon Ms. XXXXXX and other similarly situated petitioners. Every appellate court in the nation to address this issue has concluded that such medical evidence is irrelevant to a name change proceeding.

A. Potential Confusion Arising From Petitioner's Name Change Does Not Constitute a Reasonable Objection To Her Petition

The Supreme Court erred in denying Ms. XXXXXX's Petition simply because assuming a traditionally female name may be confusing to people unfamiliar with transgender individuals. Ms. XXXXXX's name change will not cause significantly greater confusion than other name changes. Nor will confusion be avoided by denying her a statutory name change order.

1. Petitioner's Name Change Petition Will Not Cause Undue Confusion

The potential for incidental or occasional confusion arising from a change from a traditionally male to a traditionally female name is not significantly greater than the potential

confusion that accompanies many other name changes. In Halligan, the Supreme Court denied the name change petition of a married woman, citing the confusion that would ensue if a husband and wife were known by different names. In re Halligan, 76 Misc.2d 190, 350 N.Y.S.2d 63 (N.Y. Sup. Ct. 1973). The Fourth Department reversed, dismissing the lower court's concern over public confusion: "While we appreciate the court's apprehension over the confusion which may result, confusion is a normal concomitant of any name change…" Halligan, 46 A.D.2d at 172, 361 N.Y.S. at 460.

Petitioner's change of name will also not cause greater confusion than the incidental or occasional confusion caused when people are given names at birth that do not immediately identify their gender. Many people bear names not associated with either gender (e.g., Avery, Cassidy, Jordan, Leigh, Lynn, and Taylor), or traditionally differentiated only through subtle differences in spelling (e.g., Sidney or Sydney). The gendered connotations of other names have changed over time (e.g., Ashley and Beverly, which used to be considered men's names but are now more often borne by women). Furthermore, some people have names not commonly associated with their gender (e.g., actresses Cameron Diaz and Glenn Close).

Each of these scenarios presents the possibility of confusion regarding a person's gender. Nonetheless, people are regularly permitted to name their children and to change their names to gender ambiguous or other potentially confusing names. As Judge Valen wrote in a dissenting opinion in an Ohio Court of Appeals case later reversed by the Ohio Supreme Court:

> Consider such names such as Chris, Jamie, Kim, Kelly, Leslie, Max, Pat, Robin, and so on, which can be used for either gender. Consider original names that seem to have no gender associated with them by the general public…Should the courts not allow individuals to adopt these names because they might confuse the public?...

> Even if we were to assume that everyone agrees that "Susan," the name appellant has requested to make his own, is essentially a feminine name, nothing in the law prohibits a biological male from having the name Susan. It would be perfectly legal for parents to name their infant son "Susan." Although this could arguably mislead the public as to the sexual identity of the infant child, such an action would not be unlawful in any way.

In re Maloney, No. CA2000-08-168, 2001 WL 908535, at *5 (Ohio Ct. App. 2001) (Valen, J., dissenting), rev'd, 96 Ohio St.3d 307, 774 N.E.2d 239 (Ohio 2002).

The Supreme Court's concern regarding confusion over the gendered connotation of Ms. XXXXXX's chosen name also raises issues of consistency and fairness in courts' limited review of name change petitions. Under the reasoning employed by the Supreme Court, it is unclear whether the Court would request affidavits attesting to an irreversible gender transition from a transgender woman changing her name from Steven to Robin, or be concerned with confusion if a non-transgender man applied to change his name from Brian to Beverly. As Judge Valen further observed, "there is not a designated list of female names and male names…Because there is no such designation, it would be impossible to consistently follow this conclusion of law [proposing that it was not reasonable for a man to assume a woman's name.]" Id.

2. *Denying Petitioner's Name Change Will Result in More Confusion, Not Less, Regarding Her Legal Name*

Confusion will not be avoided by denying Ms. XXXXXX the right to change her name by judicial order. Ms. XXXXXX identifies and presents herself as a woman in both her personal and professional life. (Pet. ¶ 12.) Thus, her current, traditionally male name certainly causes as much confusion as would her assumption of a traditionally feminine name through judicial order. Moreover, denying her Petition will not preclude Ms. XXXXXX from using a traditionally feminine name. Indeed, the Supreme Court specifically stated that its Decision

did not bar Ms. XXXXXX from adopting the name XXXXXXXX through common usage. (Order 4.)

Common law name changes, however, are frequently accompanied by a great deal of confusion because of the lengthy period of time in which a person is likely to have identity documents and other records bearing two different names. This is particularly true in our modern age, because administrative agencies such as the Department of Motor Vehicles and the Social Security Administration require statutory name change orders to amend their records,[4] making it nearly impossible for a person to effectively establish consistent identity documents pursuant to a common law name change. See, e.g., Matter of Eisenberg, 1 Misc. 3d 299, 768 N.Y.S.2d 773 (Sup. Ct. 2003) (holding petitioner's common law name change ineffective because he lacked documentation bearing the name by which he was known in his community).

Statutory name changes significantly reduce the confusion associated with common law name changes, and thereby offer a significant advantage over common law name changes. As the Fourth Department noted in confirming the broad right to change one's name under Article Six of the Civil Rights Law, "in most instances denial of the application will accomplish little except delay the change and add to the confusion of records until a new name is established by usage." Halligan, 46 A.D.2d at 171-72, 361 N.Y.S. at 460.

---

[4] For example, to change one's name on a driver's license or state identification card issued by the Department of Motor Vehicles, a person must provide a marriage certificate, divorce document, or other court papers issued in the United States proving their new name, or show proof of identity displaying their new name sufficient to establish identity under the point system used for all new applicants seeking a driver's license or identification card. See New York State Department of Motor Vehicles Frequently Asked Questions, http://www.nydmv.state.ny.us/dmvfaqs.htm (last visited June 2, 2008). To change one's name with the Social Security Administration, a person must provide a legal name change order. See Social Security Administration, Social Security Online Questions: Find an Answer to Your Question, http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faqid=315 (last visited June 2, 2008).

It is simply nonsensical to suggest that Petitioner has a common law right to adopt the name XXXXXXXXX but that the Court cannot sanction her change of name because doing so would be "fraught with possible confusion." (Order 3.) Any potential confusion arising from Ms. XXXXXX's name change does not constitute a reasonable objection to her Petition.

B. The New York Civil Rights Law Does Not Require Any Evidence of a Petitioner's Gender in Order to Change One's Name

The Supreme Court's Order further violates the controlling name change statute insofar as it holds that Ms. XXXXXX's Petition was inadequate because she declined to submit supplemental medical and psychological affidavits regarding her transition from male to female. To require such affidavits would exceed the Court's power of review under Article Six of the Civil Rights Law and impose an undue burden on Ms. XXXXXX. Petitioner has a legitimate interest in the privacy of her medical and psychological information and should not be subjected to requirements beyond those delineated by the controlling statute simply because she seeks to adopt a name not traditionally associated with the gender she was assigned at birth. Similarly situated petitioners would likewise be burdened by such requirements.

1. The Plain Text of Article Six Does Not Require Any Information Regarding Gender

The New York Civil Rights Law is quite specific as to what must be pleaded in order to satisfy the statutory requirements for a change of name. It requires biographical information such as name; age; place and date of birth; residence; and disclosure of prior bankruptcies, judgments and liens of record, spousal or child support obligations, and criminal history. See N.Y. Civil Rights Law § 61(1) (McKinney 2007). The only document required by the statute is the submission of a birth certificate if the petitioner was born in New York. Id.

To require further documentation in the form of affidavits from physicians or therapists violate the important maxim of *espressio unius est exclusio alterius*, which holds that "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." N.Y. Stat. Law § 240 (McKinney 2007).

It is well established in New York that, under this maxim, if a statute makes reference to a list, the statute should be interpreted to require only the elements listed. See, e.g., Morales v. County of Nassau, 724 N.E.2d 756, 759, 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61, 64 (1999) (holding that public policy against domestic violence does not override the delineated exemption for limited joint tortfeasor's liability under the maxim *expressio unius est exclusio alterius*); Pajak v. Pajak, 437 N.E.2d 1138, 1139, 56 N.Y.2d 394, 397, 452 N.Y.S.2d 381, 382 (1982) ("The failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design. Any other construction of the statute would amount to judicial legislation.").

Accordingly, New York appellate courts have reversed decisions denying name change petitions where the lower courts imposed requirements not expressly stated in the statute. For example, this Court reversed a County Court decision holding that a felony conviction precluded the petitioner from applying for a statutory change of name. Washington, 216 A.D.2d at 781, 628 N.Y.S.2d at 837-38. See also In Re Austin, 295 A.D.2d 721, 743 N.Y.S.2d 333 (3d Dep't 2002) (holding that the recordkeeping difficulties posed by an incarcerated petitioner's name change did not constitute grounds for the petition to be denied); In Re Madison, 261 A.D.2d 738, 689 N.Y.S.2d 732 (3d Dep't 1999) (same); In re

Waters, 264 A.D.2d 910, 695 N.Y.S.2d 428 (3d Dep't 1999) (same). Similarly, the Fourth Department struck down a requirement that a married woman show "a compelling reason" for changing her surname from that of her husband, finding that this improperly imposed a burden of persuasion beyond that required by statute. Halligan, 46 A.D.2d at 171-172, 361 N.Y.S.2d at 460.

Numerous lower courts have also recognized that it is improper to hold name change petitioners to requirements plainly not set forth in the statute. See, e.g., In re Stempler, 110 Misc. 2d 174, 441 N.Y.S.2d 800 (Sup. Ct. Nassau County 1981) (holding that it is impermissible to bar a name change based solely upon a prior adjudication of bankruptcy); Application of Lipschutz, 32 N.Y.S.2d 264, 178 Misc. 113 (Sup. Ct. Queens County 1941) (holding that alien status did not constitute grounds for denial of a name change, as citizenship is not a statutory requirement). Furthermore, in Halligan, the Fourth Department sharply criticized instances in which judges made personal judgments on the propriety of name changes, such as questioning whether a petitioner's proposed name was concordant with the petitioner's ethnic identity or country of citizenship, referring to such decisions as improper instances of "judicial caprice." Halligan, 46 A.D.2d at 171, 361 N.Y.S. at 460.

Following these decisions, it is clear the Supreme Court erred in requesting documentation regarding Ms. XXXXXX's gender that goes beyond the plain text of the statute and subsequently denying her Petition because she declined to submit it. If the Legislature had wished to limit a person's choice of name based upon gender or require the submission of medical or psychological affidavits, it would have done so in the statute. Because it did not, it was improper for the Supreme Court to request such documentation.

2. *Requiring Supplemental Affidavits Regarding Petitioner's Gender Would Impose an Undue Burden on Petitioner and Similarly Situated Petitioners*

Requiring transgender petitioners to submit additional evidence regarding their gender would impose an undue burden on Ms. XXXXXX and similarly situated petitioners. The affidavits requested by the Supreme Court involve sensitive medical and psychological information; such evidence would become part of the public record. Quite reasonably, Ms. XXXXXX declined to submit additional evidence because she has a legitimate interest in keeping this information private. (XXXXXX Aff. ¶ 2-3.) Moreover, the Supreme Court's request is based only on a stereotypical notion of gender-appropriate names. Therefore, it would impose an undue burden on Ms. XXXXXX and similarly situated petitioners.

New York has long recognized that people have a strong privacy interest in protecting their medical information, particularly information going to a person's mental health. See Wheeler v. Commissioner of Social Services of City of New York, 233 A.D.2d 4, 8-9, 662 N.Y.S.2d 550, 554 (2d Dep't 1997) ("Having pioneered the use of statutes to protect the confidentiality of medical records, New York has been zealous in safeguarding those privacy concerns."). For example, New York was the first state to codify physician-client privilege, see id., and has since enacted numerous statutes protecting medical and mental health information. See, e.g., N.Y. Pub. Health Law § 18(6) (McKinney 2007) (exempting disclosure of medical records under FOIL requests); N.Y. Pub. Health Law § 2805-g (3) (McKinney 2007) (mandating confidentiality of hospital records); Mental Hyg. Law § 33.13 (c) (McKinney 2007) (mandating confidentiality of clinical records). As evidenced by this history, public policy strongly dictates against requiring the disclosure of medical information absent a legitimate and compelling reason to do so and appropriate safeguards protecting privacy.

No such compelling need for such sensitive information exists in this action. The Supreme Court's concern that it is misleading or confusing for Petitioner to choose to adopt a feminine name is based upon a stereotype that all people with male anatomy bear, or should bear, a masculine name. Such stereotypes are increasingly disfavored under the law. For example, the Equal Protection Clause of the U.S. Constitution disallows laws based upon stereotypes of how men and women act. See, e.g., Craig v Boren, 429 U.S. 190, 209, 97 S.Ct. 451, 463 (1976) (striking down a state statute restricting the sale of alcohol to women over 18 and men over 21 because it was based on "loose-fitting generalities concerning the drinking tendencies of aggregate groups"); Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764 (1973) (invalidating a federal statute that classified servicemen's spouses as dependents but refusing to similarly classify the spouses of servicewomen). Federal and state law prohibit employers from discriminating against workers who do not comport with gender stereotypes. Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989); (holding that sex stereotyping constitutes sex discrimination in violation of Title VII); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (finding that Title VII's proscription against sex stereotyping prohibits discrimination against transgender individuals); Zhao v. State Univ. of N.Y., 472 F.Supp.2d 289 (E.D.N.Y. 2007) (allowing claims of sex stereotyping under both Title VII and the New York State Human Rights Law). Similarly, New York law recognizes that neither parent is inherently more suited to have custody of a child. See N.Y. Dom. Rel. Law §§ 70, 240 (McKinney 2007); Fountain v. Fountain, 83 A.D.2d 694, 694, 442 N.Y.S.2d 604, 604 (3d Dep't 1981), aff'd 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596 (1982) ("A presumption of 'maternal superiority' is now considered to be outdated.").

In each of these instances, legislatures and courts have recognized that arbitrary distinctions based upon gender are without merit. In this action, the Legislature has clXXXXy stated the pleading requirements for a statutory name change and made no mention of gender. Therefore, given that nowhere in New York law is a person's choice of name limited by conventions of gender, the Supreme Court erred in requesting affidavits attesting to sensitive medical information and subsequently denying Ms. XXXXXX's Petition when she declined to submit such evidence, simply because her choice of name does not conform to gendered stereotypes.

C. Every Other Appellate Court to Examine This Issue Has Ruled That Transgender Petitioners Are Entitled to Assume a Name of Their Choice Regardless of Medical Evidence of a Gender Transition

Although this State's appellate branches have yet to examine this issue, every other appellate court in the country to contemplate the right of a transgender person to assume a name concordant with their gender identity has concluded that there is no fraud, deception, or infringement on the rights of others in assuming a name traditionally associated with a gender different than that which the applicant was assigned at birth, and that no medical evidence need be presented in order to do so.

For instance, the Superior Court of New Jersey reversed a lower court's finding that it is inherently fraudulent for a transgender woman born male to assume a female name. In re Eck, 584 A.2d 859, 245 N.J. Super. 220 (N.J. Super. Ct. App. Div. 1991). The Superior Court found no fraudulent purpose in the petitioner's application and held that that the petitioner's assumption of a female identity is irrelevant to a name change application. Id. at 861, 245 N.J. Super. at 223. Moreover, the court specifically noted that inquiries into the petitioner's transgender status or medical history was improper:

> [A] person has a right to a name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditional "male" first name to one traditionally "female," or vice versa…and judges should be chary about interfering with a person's choice of a first name.

Id. at 860-861, 245 N.J. Super. at 223.

Likewise, the Supreme Court of Pennsylvania reversed as arbitrary and capricious a trial court's refusal to grant a transgender woman's name change application until she underwent sex reassignment surgery.[5] In re McIntyre, 715 A.2d 400, 402, 552 Pa. 324, 326 (Pa. 1998). The court reasoned that the primary purpose of the fraud exception for granting a judicial name change is to prohibit those attempting to avoid financial obligations, stating "[h]ere, it was undisputed that Appellant was judgment free and was not seeking a name change to avoid financial obligations or commit fraud. The fact that he is a transsexual seeking a feminine name should not affect the disposition of his request." Id. at 402-03, 552 Pa. at 328-29. The Ohio Supreme Court also reversed a lower court's denial of a name application to a transgender woman who had not had surgery. In re Maloney, 96 Ohio St.3d 307, 774 N.E.2d 239 (Ohio 2002).

Consistent with these authorities and Article Six of the Civil Rights Law, the New York Civil Court has granted numerous transgender applicants' petitions to change their name. See, e.g., Guido, 1 Misc.3d 825, 771 N.Y.S.2d 789 (granting name change of transsexual woman); Rivera, 165 Misc.2d 307, 627 N.Y.S.2d 241 (same); Anonymous, 64 Misc. 2d 309, 314 N.Y.S.2d 668 (same).

[5] The New York Court of Appeals has previously looked to Pennsylvania precedent for guidance in name change cases, see Smith, 197 N.Y. at 428, 90 N.E. at 950 (discussing at length and following Pennsylvania cases regarding the right to a common law name change and its relationship to the statutory name change process).

Nothing appears in the Civil Rights Law that limits the common law right to a name change in such a way as to restrict a transgender person from choosing a name that is not traditionally associated with the sex they were assigned at birth. Ms. XXXXXX has satisfied the statutory requirements set forth in N.Y. Civ. Rights Law § 61(1) and therefore is entitled to a name change. She is not attempting to evade creditors or law enforcement, or to assume another individual's identity to unjustly enrich herself, economically or otherwise. She is simply petitioning to assume a name that she prefers over the one she was given, like any other petitioner for a name change. Therefore, her Petition cannot justifiably be denied.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court vacate or modify the Supreme Court Order and grant her leave to assume the name XXXXXXXX XXXXXX XXXXXX, or in the alternative, for leave to appeal this Court's decision, together with any other and further relief as this Court deems just and proper.

Dated: June 4, 2008
New York, New York

Respectfully submitted,

____

Franklin H. Romeo, Esq.
Sylvia Rivera Law Project
322 8th Avenue, 3rd Floor
New York, New York 10001

Attorney for Plaintiff