

In re McIntyre: A Victory for Pre-Operative Transgender Persons

Robert Henry McIntyre, a pre-operative transgender person, petitioned the Court of Common Pleas, Dauphin County, Pennsylvania to change his name to Katherine Marie McIntyre on August 25, 1995.¹ The court denied the petition on the grounds that it was both premature and deceptive because McIntyre had not yet undergone sex-reassignment surgery.² McIntyre appealed, and the Superior Court of Pennsylvania affirmed.³ On hearing McIntyre's appeal, the Supreme Court of Pennsylvania *held* that Mr. McIntyre fulfilled the statutory requirements in seeking a name change and granted the petition.⁴

There is no federal name change statute.⁵ Under the Tenth Amendment to the U.S. Constitution, the federal government reserves this issue for the several states.⁶ Pennsylvania has a name change statute.⁷ In part, it states that it is illegal to assume a false name unless the name is changed through the court of common pleas in the county where the person resides, and that a person can adopt any name if it is used exclusively and nonfraudulently.⁸ The statute itself does not specifically address the concerns of transgender persons in its language, nor do statutes in other states in which courts decided name change cases for transgender persons.⁹

The major cases regarding the interpretation of Pennsylvania's name change statute address the prohibition of fraud. In *In re Falcucci*, the Falcuccis changed their name to "Frame" because of

1. See *In re McIntyre*, 715 A.2d 400, 401 (Pa. 1998). The court initially denied this petition because the petitioner failed to submit proof that fulfilled the statutory requirement that he was free of judgments. See *id.* He therefore filed for reconsideration, submitting proof that he was free of judgments and was granted reconsideration. See *id.*

2. See *id.* at 401-02.

3. See *id.* at 402.

4. *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998).

5. See *Moskowitz v. Moskowitz*, 385 A.2d 120, 122 (N.H. 1978) (indicating that common law and state statutory provisions control name changes).

6. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

7. See 54 PA. CONS. STAT. ANN. §§ 701-05 (West 1998).

8. See *id.* §§ 701-02.

9. See *id.* §§ 701-05 (omitting any reference to transgender persons). See also N.J. STAT. ANN. §§ 2A:52-1-4 (West 1998) (same); N.Y. CIV. RIGHTS LAW §§ 60-65 (McKinney 1998) (same); OHIO REV. CODE ANN. § 2717.01 (West 1998) (same).

spelling and pronunciation difficulties.¹⁰ At issue was an appeal from a man whose last name was also “Frame.”¹¹ The court affirmed the Falcuccis’ name change, noting that the court has wide discretion in allowing or denying a name change.¹² The court observed that it would refuse to grant a name change in the case of fraud or where the wished-for name was bizarre, unnecessarily long, ridiculous or offensive.¹³

In *In re Grimes*, a mother changed her son’s last name to a hyphenization of his father’s and stepfather’s last names.¹⁴ His father appealed.¹⁵ The Supreme Court of Pennsylvania reversed the lower decision, reasoning that the change was not in the best interest of the child.¹⁶ Focusing on the statute, the court observed that “[t]he necessity for judicial involvement centers on governmental concerns that persons not alter their identity to avoid financial obligations.”¹⁷

More recently, in *Commonwealth v. Goodman*, a suspect in a criminal case gave a false name to the arresting officer, but later gave his actual name prior to being booked.¹⁸ Goodman was convicted of obstructing the administration of law for giving the arresting officer a false name.¹⁹ On appeal, the court focused on the role of the name change statute and the penalty for violating the statute.²⁰ The court concluded that penalty provision only applies to violations ““for the purpose of avoiding payment of taxes or other debts.””²¹

The early cases involving name changes for transgender persons involved individuals who previously underwent sex-reassignment surgery, rather than transgender persons who had yet to undergo sex-reassignment surgery. In New York, as early as 1968, the issue of a name change for a post-operative individual arose in *In re Anonymous*.²² The court decided to deal with this issue of first

10. 50 A.2d 200, 201 (Pa. 1947).

11. *See id.*

12. *See id.* at 202-03.

13. *See id.* at 202.

14. 609 A.2d 158, 159 (Pa. 1992).

15. *See id.* at 159.

16. *See id.* at 162.

17. *Id.* at 160.

18. 676 A.2d 234 (Pa. 1996).

19. *See id.* at 233.

20. *See id.* at 235-36.

21. *Id.* at 236 (quoting 54 PA. CONS. STAT. ANN. § 705).

22. 293 N.Y.S.2d 834, 836 (N.Y. Civ. Ct. 1968); *see also* *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 323 (N.Y. Sup. Ct. 1966). In *Weiner*, a post-operative transsexual unsuccessfully petitioned for a change of sex on her birth certificate. *See id.* The court concluded that “[t]he present proceeding has not been instituted nor has it been considered by the court as an application for a change in name in compliance with Civil Rights Law, section 61.” *Id.*

impression instead of “sweep[ing] the problem under the proverbial rug.”²³ The court, while acknowledging that absent fraud or interference of others’ rights a person can assume any name, set out a test for determining gender.²⁴ Because the petitioner could not be distinguished from any other female, the court granted the name change and reasoned that it would be more probable that a fraud would exist if the petitioner were classified as a male rather than a female.²⁵ In addition, the court worried about a possible civil rights violation if the name change request was not granted.²⁶

Two years after this landmark decision, the same court, in a similar case, did not use its gender test because of the lack of a universally accepted test.²⁷ Instead, the court simply relied on the common law rule that absent fraud or prejudice to others, a person has the right to adopt or use any name.²⁸ The court granted the name change request but added that the name change “shall not be used or relied upon by petitioner as any evidence or judicial determination that the sex of the petitioner has in fact been changed.”²⁹

The New York courts continued to allow and recognize name changes for individuals who underwent sex-reassignment surgery, but drew the line at granting name changes to transgender persons in the absence of sex reassignment surgery.³⁰ In *In re Anonymous*, an individual did not undergo sex-reassignment surgery for financial

23. *In re Anonymous*, 293 N.Y.S.2d at 836.

24. *See id.* at 835, 837. The court observed that:

the application of a simple formula could and should be the test of gender, and that formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete.

25. *See id.* at 837.

26. *See id.*

27. *See In re Anonymous*, 314 N.Y.S.2d 668, 669 (N.Y. Civ. Ct. 1970).

28. *See id.* at 670.

29. *Id.*

30. *See, e.g., Hartin v. Director of Bureau of Records*, 347 N.Y.S.2d 515, 517-18 (N.Y. Sup. Ct. 1973) (involving the petition of a post-operative transgender person to place the present sex on the newly issued birth certificate); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712, 714-15 (N.Y. Sup. Ct. 1974) (involving a female to male individual who underwent a mastectomy and hysterectomy but did not have male sex organs); *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 100 (N.Y. Sup. Ct. 1977) (involving a petition to include on the newly issued birth certificate either the present sex or to show the change from the original sex to the present sex).

reasons before petitioning for a name change.³¹ The court denied petitioner's request.³² Although the court recognized that the New York name change statute was supplementary to and not in place of the common law, the court noted that an application for a judicial name change would be scrutinized.³³ The court's reasoning was that "[w]ithout a competent medical and psychiatric evaluation of the petitioner, granting the relief requested may be contrary to the public interest as well as harmful to petitioner's present mental status."³⁴ This reason for denying the name change, along with the court's admitted sensitivity to the needs of transgender persons, leads to the conclusion that the petitioner might have prevailed with additional documentation.³⁵ However, by requesting the presence of corroborating evidence in cases involving pre-operative individuals, the court retreated from simply relying on the common law requirement that there be no fraud or prejudice to others, which it followed in cases involving post-operative individuals.

This corroboration requirement was followed in *In re Anonymous*, in which the court denied a name change petition because the petitioner failed to submit any corroboration that he was even a transgender person.³⁶ After a few procedural and jurisdictional hurdles, the petitioner resubmitted.³⁷ In this resubmission, the petitioner provided corroboration in the form of medical and psychiatric affidavits along with other documentation that was lacking in the first petition.³⁸ The court granted his name change "solely upon the condition that petitioner may not use or rely upon this order as any evidence whatsoever or judicial determination that the sex of petitioner has in fact been changed anatomically."³⁹

Meanwhile, in 1986, an Ohio court took a more permissive position in a case involving a pre-operative individual's petition for a

31. 582 N.Y.S.2d 941, 941 (N.Y. Civ. Ct. 1992).

32. *See id.* at 942.

33. *See id.* at 941.

34. *Id.* at 942.

35. *See id.* at 942.

36. 587 N.Y.S.2d 548, 549 (N.Y. Civ. Ct. 1992).

37. *See In re Rivera*, 627 N.Y.S.2d 241, 242-43 (N.Y. Civ. Ct. 1995) The petitioner reinstated his petition in a different borough of New York City two years later and it was denied on the ground that it was premature. *See id.* The petitioner once again resubmitted the petition to this same borough and the court took the position that this resubmission was in response to the court's original denial two years before in a different borough. *See id.* at 243.

38. *See id.* at 244.

39. *Id.* at 244.

change of name.⁴⁰ Although the petitioner told the court that he intended to undergo sex-reassignment surgery and was taking female hormones and undergoing psychotherapy, the court did not ask for corroborating documentation.⁴¹ The court held that “so long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, then the petition should be granted.”⁴²

New Jersey courts took a similar view of the issue of granting name changes to pre-operative individuals. In *In re Eck*, the Superior Court reversed a lower court decision denying a name change for a pre-operative individual.⁴³ The court took the position that it was not a matter of judicial concern why the applicant wanted to change his name to a feminine name.⁴⁴ The court followed the common law right to change one’s name, holding that:

Absent fraud or other improper purpose 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.⁴⁵

In Pennsylvania, the court tackled the issue in *In re Harris*.⁴⁶ In this case, a pre-operative individual appealed a lower court’s denial of his name change petition.⁴⁷ The Superior Court rejected the lower court’s bright-line test that “absent reassignment surgery it would not comport with common sense, common decency and fairness to all concerned, especially the public, to allow a change of name at this juncture.”⁴⁸ The court in this case took a position similar to that of New York. In rejecting the bright-line test and granting the name change, the court required that the petitioner show that he or she truly wanted to live permanently as a member of the opposite sex.⁴⁹ The court held that in such cases, the court will look at each petition individually to see whether a name change would be fair.⁵⁰

40. See *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (involving a post-operative transsexual who wished to marry and petitioned for a name change before the sex-reassignment surgery).

41. See *id.* at 829.

42. *Id.*

43. 584 A.2d 859, 860-61 (N.J. Super. Ct. App. Div. 1991).

44. See *id.* at 861.

45. *Id.* at 860-61.

46. 707 A.2d 225 (Pa. Super. Ct. 1997).

47. See *id.* at 226.

48. *Id.* at 227 (citations omitted).

49. See *id.* at 227.

50. See *id.*

In a concurring opinion, Judge Popovich agreed with the outcome but not the reasoning.⁵¹ Judge Popovich's views were much closer to his more liberal colleagues in Ohio and New Jersey, and looked simply to the legislative history and whether statutory requirements were met.⁵² Judge Popovich, quoting from *Commonwealth v. Goodman*, explained that "[t]he primary purpose of the Judicial Change of Name Statute . . . is to prohibit fraud by those trying to avoid financial obligations."⁵³ Judge Popovich found the court's reasoning in *In re Eck*, which followed the common law to be very persuasive, and rejected the test the court had just constructed for *Harris*.⁵⁴ Judge Popovich argued that the courts simply had to determine whether the petitioner met the statutory requirements and had to make sure that the petitioner did not want to change his name for fraudulent intent.⁵⁵ He concluded that the petitioner was not trying to evade financial obligations.⁵⁶ Judge Popovich then emphasized the statute's language and the legislative intent, urging that the petitioner's name should be changed "without probing into appellant's sex or his desire to express himself in the manner of his choosing."⁵⁷

In the noted case, the Supreme Court of Pennsylvania did not follow the reasoning of the majority in *In re Harris*.⁵⁸ The court instead adopted the reasoning articulated in Judge Popovich's concurrence.⁵⁹ The court held that Mr. McIntyre satisfied the statutory requirements and therefore granted the name change.⁶⁰ The court mentioned *Harris* as a recent case addressing the issue but looked at other cases in its reasoning.⁶¹ Referring to *In re Falcucci*, the majority determined that the lower court had "wide discretion" in deciding to grant a name change and that it should make sure its decision is fair, decent, and exercises good taste.⁶² The court also

51. See *id.* at 229 (Popovich, J., concurring).

52. See *id.* (Popovich, J., concurring).

53. *Id.* (Popovich, J., concurring) (quoting *Commonwealth v. Goodman*, 676 A.2d 234 (Pa. 1996) (alteration in original)).

54. See *id.* at 229 (Popovich, J., concurring).

55. See *id.* (Popovich, J., concurring).

56. See *id.* (Popovich, J., concurring).

57. *Id.* (Popovich, J., concurring).

58. Compare *In re Harris*, 707 A.2d 225 (Pa. Super. Ct. 1997) with *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998).

59. See *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998).

60. See *id.* at 403.

61. See *id.* at 402 n.5.

62. See *id.* at 402.

stated that if there is a lawful objection or fraudulent intent, a court may deny a name change petition.⁶³

In addition, the court heeded *Commonwealth v. Goodman* and *In re Grimes*, which both took the position that the name change statute's main purpose was "to prohibit fraud by those attempting to avoid financial obligations."⁶⁴ The court determined that McIntyre was judgment free and was not trying to commit fraud or avoid financial obligations.⁶⁵ The fact that he was a transgender person had no bearing on the matter.⁶⁶

The court next cited *In re Eck* and determined that it is not a matter of governmental concern when a person wants to change a traditionally male name to a traditionally female name.⁶⁷ The court felt that because there was no fraud or other improper purpose involved the name change should be granted.⁶⁸ The court also found "that there is no public interest being protected by the denial of Appellant's name change petition. The details surrounding Appellant's quest for sex-reassignment surgery are not a matter of governmental concern," and granted the petition.⁶⁹

In concurrence, Justice Nigro agreed with the decision of the majority, but was wary of the focus on financial fraud as being the only type of fraud prevented by the statute.⁷⁰ Although he agreed that this was the primary purpose of the Judicial Change of Name Statute, he observed that other types of fraud, such as fraud for the purposes of preference in employment or university admission, were additional purposes for the name change statute and should be noted.⁷¹

The court in the noted case did not explicitly endorse the *Harris* concurrence, but through reliance on other cases, the court effectively adopted the same rationale. The court mentioned *Harris* in a footnote, and found justification elsewhere.⁷² It therefore was able to work its way around to the back door in order to get to the holding it wanted without disparaging the court in *In re Harris*. With its holding, the Supreme Court of Pennsylvania put Pennsylvania on par

63. See *id.* (citing *In re Falcucci*, 50 A.2d 200 (Pa. 1947)).

64. *Id.* at 402 (citing *Commonwealth v. Goodman*, 676 A.2d 234 (Pa. 1996) and *In re Grimes*, 609 A.2d 158 (Pa. 1992)).

65. See *id.* at 402.

66. See *id.* at 402-03.

67. See *id.* at 403.

68. See *id.*

69. *Id.* at 403.

70. See *id.* at 403 (Nigro, J., concurring).

71. See *id.* (Nigro, J., concurring).

72. See *id.* at 402 n.5.

with Ohio and New Jersey in its liberal name-change policy for pre-operative individuals, and firmly rejected the stricter and intrusive standards of New York. This ruling essentially places the rights of pre-operative transgender individuals equal to those of other persons seeking a name change in Pennsylvania.

Sex-reassignment surgeries were performed as early as the late 1800s.⁷³ There has been progress in medicine, the law and society for transgender persons ever since, with perhaps the most recent international success being Dana International's victory at the 1998 Eurovision Song Contest.⁷⁴ For the transgender people of Pennsylvania, though, an even larger victory may be the court's decision in *In re McIntyre*.

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73. See Jennifer L. Nye, *The Gender Box*, 13 BERKELEY WOMEN'S L.J. 226, 233 (citing Gordene O. MacKenzie, TRANSGENDER NATION 14, 58 (1994)).

74. See James Bennett, *Clever Girl*, TIMES (London), June 13, 1998, at 6, available in 1998 WL 4839725 (Dana International, a transgender music artist, won the Eurovision Song Contest with her song entitled "Diva.").