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LEGAL PROBLEMS AFFECTING SURNAMES IN MATRIMONIAL ACTIONS

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IN tracing the origin of names one encounters the period when names were entirely unknown and unheard of. Means of identification were not at all necessary to the simple ways of life then existing. The earliest known names takes us back to that part of history when other, more radical changes were taking place; changes formed a basis for the evolution of our present civilization.

Like any change affecting large numbers and wide geographical areas, the common usage of the name as a means of identification was a slow and gradual process. In the early days the names of individuals were predicated upon physical characteristics, type of business, moral or mental qualities, and the like. Originally one name was the common custom. This was true particularly in England where in early times the Christian name was considered the important name.

A peculiar situation developed in England because of the union of church and state. Baptism being required by the State, the given name was most important. Coke on Littleton aptly described the situation when he wrote that "A man cannot have two names in baptism as he may have divers surnames." It was the custom at that time for a man to adopt various surnames and his children would adopt several different ones of their own.

In the United States the question of a man's name is considered a personal one and the choice is left to each individual with the privilege of changing as many times and as often as he desires, subject however to several well defined limitations. One cannot, for example, assume a name which interferes with the rights of others, nor can one change his name to accomplish fraudulent or criminal purposes. This right to change a name and the limitations in doing so are well settled by the common law.[1] Most of the limitations imposed by common law and many new ones have been codified by statute in many states, as an additional protection and safeguard. Thus, physicians and attorneys have been held to strict observance by statute in the use of names.[2] The same restriction applies to men engaged in business or

[1] United States v. McKay, 2 F. (2d) 257 (D. C. Nev. 1924); In re McUlta, 189 Fed. 250, (D. C. Penn. 1911); Emery v. Kipp, 154 Cal. 83, 97 Pac. 17 (1918); Loser v. Plainfield Bank, 149 Iowa 672, 128 N.W. 1101 (1910); Clark v. Clark, 19 Kan. 522; Ingram v. Watson, 211 Ala. 410, 100 So. 557 (1924); Pease v. Pease, 35 Conn. 131; Lane v. Duchas, 73 Wis. 646, 41 N.W. 962 (1889).

[2] People v. Wilkes, 163 N.Y. Supp. 659 (1916); Appeal of Hanson, 330 Pa. 390, 198 Atl. 113 (1938).

owners of motor vehicles—so as to determine true ownership and to prevent fraud of creditors.[3]

The common law privilege of name changing, however, has never been taken away and except as legislatures have deemed it expedient to provide for protection to certain classes, it still prevails. Most states provide a specific method of changing one's name. These statutes have been held to be permissive only and not exclusive, merely furnishing an additional method of doing what the common law has always allowed.[4] As the statutory methods are matters of record perhaps they provide a better and more effectual method of accomplishing the purpose, but, as was said by Vann, J., in *Smith* v. *United States Casualty Co., supra*: "In one respect, 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,' citing 'Code Civ. Pro. Paragraph 2415, now Section 64, Civil Rights Law,' it may well be therefore that after a man has acquired a name by a judicial decree, he cannot acquire another without resorting to the Courts."

From the early times custom decreed that married women adopt the name of the husband. That custom still prevails in the United States, with the exception that she still retains her own Christian name.[5] Matrimonial actions affect the name of the wife in various ways. Separation either by decree or otherwise merely dissolves the obligations of the marriage, except as limited by order or agreement but does not otherwise affect the marital status. There is no permission therefore, in and of a separation itself, which would give the right to the resumption by the separated wife of her maiden name in the place of her husband's name. Of course, under the common law the wife may assume any name she pleases and is not necessarily confined to her maiden name, subject, however, to various limitations.

Divorce and annulment present different situations. The divorce decree provides for the dissolution of the bonds of matrimony, which puts the parties into the same situation that existed before the marriage, with the possible exception of the prohibition in some states of

[3] Crompton v. Williams, 216 Mass. 184, 103 N.E. 298 (1913); Cashin v. Pliter, 168 Mich. 386, 134 N.W. 482 (1912); Rowland v. Canuso, 329 Pa. 72, 196 Atl. 823 (1938); In re Rosa, 59 P. (2d) 439; Union Trust Co. v. Quigley, 145 Wash. 176, 259 Pac. 28 (1927).

[4] Reinkin v. Reinkin, 351 Ill. 409, 184 N.E. 639 (1933); Smith v. United States Casualty Co., 197 N.Y. 420, 90 N.E. 947 (1910); Leflin v. Rand Co. v. Stetler, 146 Pa. 434, 83 Atl. 215 (1912); State v. Librizzi, 14 N.J. Misc. 904, 188 Atl. 511 (1936).

[5] Uihlein v. Gladieux, 74 Ohio St. 232, 78 N.E. 363 (1906); State v. Richards, 42 N.J.L. 69.

the remarriage of the defendant until the expiration of a definite period of time, or until further order of the Court. The decree, however, by its mandate of dissolution, in and of itself, and without the necessity of inference or implication, grants to the wife the privilege of resuming her maiden name.[6]

Similarly, annulment proceedings provide the same privilege. The marriage being declared a nullity the discontinuance of all marital obligations and the resumption of the pre-marital status including the maiden name of the wife take place by operation of law.

However, it often happens that a wife continues the use of her former husband's name after divorce or annulment. Her reasons are varied and she is perhaps acting in good faith in the majority of cases. She has been known by her husband's name for such a length of time that she still wishes to consider it her name for all practical purposes, either to avoid embarassment or for convenience. She has a right to make use of her former husband's name under the privileges granted by common law as mentioned before, and also because the decree of divorce or annulment in and of itself, and without more, does not operate as a prohibitive order preventing her continuance of that name. The order is permissive and not mandatory and a compliance therewith, in that regard could not be enforced. Nor could a refusal to comply be punished for contempt. It is well settled in this country that punishment by contempt proceedings will not lie where the language of the order is permissive only. There must be a direct and unequivocal order permitting of no exception.[7] The majority view is well stated in *Jones* v. *Rettig*,[8] where the Court said: "Proceedings of this nature are drastic in their character, and may, and often do result in the imprisonment of the defendant. I do not think that a contempt should be predicated upon anything except a violation of a specific direction of a Judge or Referee delivered personally to the defendant."

Under the common law, therefore, and by reason of the presence of permissive and the lack of prohibitive language in the decree of divorce or annulment, a wife may either resume her maiden name, continue her husband's or adopt some new one entirely.

It may appear, however, that the former husband wishes to prevent his divorced wife from continuing the use of his name. While this question may seem academic, such a situation, often arises, and

[6] Rienkin v. Rienkin, supra; Day v. Day, supra; Rich v. Mayer, supra; Blanc v. Blanc, 21 N.Y. Misc. 268, 47 N.Y. Supp. 694 (1897).

[7] National Labor Relation Board v. Bell Oil and Gas Co., 98 F. (2d) 405; Federal Trade Commission v. Fairyfoot Product Co., 94 F. 2d 844 (1938); Jones v. Rettig, 98 N.Y. Misc. 487, 164 N.Y. Supp. 730 (1917).

[8] 98 N.Y. Misc. 487, 164 N.Y. Supp. 730 (1917).

the husband may have a substantial reason for his request. In addition to many other perhaps equally important reasons, the type of proof required in many states as a prerequisite to divorce is of such a nature that the defendant wife after the submission of proof and entry of decree is branded as guilty of anti-social acts by both the findings of fact and conclusions of law and by every inference created thereby. It often happens that after such a decree is entered and the parties separate, the divorced wife continues her misconduct. She thereby creates a justification for the husband in his demands that she cease using his name. This becomes more important if the husband remarries. The second wife knowing the reputation of the first and fearing mistaken identity made possible by the same name, demands that something be done about it, and the equity between the second wife and the first wife seems balanced in the former's favor.

Where a specific prohibition is contained in the decree, there is some authority both for the legality of the injunctive order and the right to relief. This is illustrated by the *Blanc* v. *Blanc*[9]—where the decree ordered and adjudged that "the defendant be prohibited from using the name of 'Blanc' or 'Frederic N. Blanc,' as her name, or any portion of her name." The plaintiff's husband sought to punish defendant for contempt and also to enjoin her from the further use of that name. However, as she had been known on the stage as "Baroness Blanc," it was contended that the court in its decree exceeded its jurisdiction in prohibiting her use of the name. But the appeal court in upholding the decree stated that while the courts have no common law jurisdiction over divorces, and powers are by express grant conferred by statute, nevertheless such incidental powers are given as are necessary to the full exercise of the proper relief. And further, it was held that the question of the prohibition in the original decree was *res adjudicata,* although it was regarded in its opinion as being proper. Although the court held defendant in contempt, it refused to grant injunctive relief, on the ground that the original decree was injunctive and needed no further order.

The decision appears sound and logical in its reasoning, and probably will be followed by the courts in New York and elsewhere, should similar situations arise. In discussing the relative merits of the husband's claim in the case the court said: "Courts have a right to regard her use of the name as a serious consequence to the innocent husband. There are higher rights flowing out of the marriage than the pecuniary part, as affecting either of the persons concerned. The unoffending party ought certainly to have the privilege of preventing the claim directly made, or so urged upon the public as to deceive it, that the other is

[9] 21 N.Y. Misc. 268, 47 N.Y. Supp. 694 (1897).

still the lawful spouse and still has the right to bear the name of that spouse. Such a husband may be affected in a pecuniary way. Out of the marital obligation comes the duty to provide the necessaries for the wife; and while after a decree of divorce, he may not be legally liable to persons from whom she purchases on his credit, yet others may be deceived and they may be the losers, and he be subjected to annoying and vexatious litigations. And, if such unoffending party desires to remarry, the use by the former wife of his name might be a serious impediment in gaining the consent of some worthy woman who might not want to be one of two women bearing the name of the husband."

Inasmuch as a situation as occurred in the *Blanc* case is hardly anticipated, the direct and specific prohibition of the decree, which it is necessary to enforce against a party by contempt proceedings or otherwise, is sometimes omitted. The attorney of record, if the client is unreasonable, is confronted with a situation that he himself is accused of creating by this omission, and he is thus given the burdensome task of finding some similar situation upon which to predicate relief for the case at hand.

If only a short clause had been put into the decree prohibiting the defendant "from using the name of the plaintiff or any part thereof," all that would be necessary to obtain injunctive relief would be the personal service of the order or a certified copy, and if this was not done in the first instance it could be done at any time thereafter, thus laying the foundation for punishment for refusal to comply and ultimate relief. The problem is a delicate one requiring a speedy and efficient result in order to accomplish the end required. Of course, the common law action always presents itself as a possible solution. It requires however that sufficient proof be adduced at the trial or inquest to satisfy the Court that the use of the name by the defendant creates an unequitable situation and is unjust and an interference with the rights of the plaintiff. Like most other actions demanding injunctive relief, the final determination thereof requires the most convincing proof and permits of the expiration of a considerable time to say nothing of the expense. A client under those circumstances would probably be dissatisfied regardless of the ultimate outcome.

The simplest and perhaps speediest way of obtaining relief is to provide for what should have been done in the first instance, i.e. inserting the prohibition into the decree itself. All states now recognize that errors of omissions and other types are frequently made in many proceedings. Courts are lenient in permitting corrections by amendment or by the doing of that which should have been done in the first

instance.[10] The Civil Practice Act of New York (and those of other states are similarly worded) provides: ((Section 105): "At any stage of any action, special proceeding or appeal, a mistake, omission, irregularity or defect may be corrected or supplied, as the case may be, in the discretion of the Court, with or without terms, or, if a substantial right of any party shall not be thereby prejudiced, such mistake, omission, irregularity or defect must be disregarded."

Therefore, a motion to amend the decree by inserting therein the prohibition in the use of name, made upon notice, requires only the use of affidavits and a convincing argument to the Court to accomplish the purpose. This not only eliminates the lapse of valuable time but proves an easy and as equally effective a method as any, at a considerable saving to the client.

Therefore, a clause in a decree of divorce (or annulment, for similar situations may occur in these cases also), directing the defendant "not to use the name of the plaintiff or any part thereof," should always be included. It can never do any harm, for if a plaintiff wishes his name continued or is indifferent thereto, the decree containing the order need not be served personally, in which event it has no injunctive effect. However, if situations do subsequently arise requiring its use, the order can easily be ressurected by the attorney of record or by any other attorney and speedy and efficient relief afforded according to the intendment of justice.

[10] United States v. Mayer, 235 U.S. 55, 35 S. Ct. 16, 59 L.Ed. 129; Fuller v. Blanc, 77 P. 2d 440 (1938); Acost v. Realty Trust Co., 111 S.W. 2d 777 (1937); Weaver v. Humphrey, 114 S.W. 2d 609 (1938).