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Equity--Injunction--Property Right in Use of Marital Name (Niver v. Niver, 200 Misc. 993 (Sup. Ct. 1951))

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make it mandatory on the court to give custody of the child *only* to those of the same religion.[25] The dissenting opinion points out that since the pertinent Massachusetts and New York statutes regarding the religious consideration are nearly identical, and since the Massachusetts statute was patterned after that of New York, it should be given the same interpretation as in New York—namely, that the religion of the child be considered with as much, if not more, emphasis than its material welfare.[26]

The majority opinion is not sound. The court is the protector of the child, and its primary concern is the child's welfare. It is inconceivable, therefore, that a judge may jeopardize the religion of a helpless child by permitting its adoption into a family of different religious affiliations. As evidenced by the instant decision, the court is in effect claiming that it has the same prerogative of uninhibited discretion *now,* as it had *before* the new statute was added.[27] Does the law exist for naught? Yes, if the judge may disregard the mandate and freely pursue his own course.

As the dissent implied, the spiritual benefit of retaining one's own religion is of a higher nature, and greater value to a child, whether or not he now realizes it, than the material benefits he may reap by adoption into a wealthy family of different religious beliefs.[28] Although that family may sincerely offer him the best in life, the fact remains that the child's religion may be torn from him. The universal standard in adoption proceedings, "the welfare of the child," should therefore be construed to include its *spiritual* as well as its material welfare. The legislature apparently felt that no man, or body of men, has the right to expose a child to the possible loss of its original faith, by allowing its adoption into a family of different religious affiliations: the child is to be reared in the faith into which it was born.

EQUITY—INJUNCTION—PROPERTY RIGHT IN USE OF MARITAL NAME.—Defendant-husband obtained an *ex parte* Mexican divorce,[1]

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those of a different religious belief, was responsible for petitioners' failure to obtain the necessary report.

[25] See Note, 23 A. L. R. 2d 701 (1952), and cases collected therein.

[26] *See* Petition of Gally, 107 N. E. 2d 21, 29, 30 (Mass. 1952).

[27] The statutory use of the phrase, "when practicable," may have induced the court to assume that it should exercise its discretion according to the attendant facts and circumstances, and decree accordingly. *Id.,* 107 N. E. 2d at 25.

[28] *See id.,* 107 N. E. 2d at 28.

[1] Following principles of comity, the court determined the plaintiff's marital status by holding this decree void, inasmuch as it was procured by a New York resident on a twenty-four hour visit.

remarried, and is now living with a second woman who uses the title of and claims to be his wife. Plaintiff, the defendant's first wife, alleges that unfavorable public doubt has thus been cast upon her marital status. Ancillary to this action for declaratory judgment, an injunction was granted restraining the second "wife" from using the defendant's name and holding herself out as his wife. *Held,* the plaintiff has a property right in her marital status and the protection of her good name. *Niver v. Niver,* 200 Misc. 993, 111 N. Y. S. 2d 889 (Sup. Ct. 1951).

When equity was first developing as a system of jurisprudence, property rights were of paramount importance, and the jurisdiction of the Chancellor was limited to their protection.[2] Consequently, in 1818, Lord Eldon dispelled any remaining doubt as to whether or not equity would expand its jurisdiction beyond the protection of property rights, by reaffirming the rule that equity will not act where mere personal rights are involved.[3]

In England, it has been held that there is no exclusive right in a name justifying injunctive relief to restrain its unauthorized use by another.[4] A man might therefore freely assume any name;[5] except that if the adoption of the new name would expose another to pecuniary loss,[6] an injunction would be granted, especially if there was a business involved.[7]

Recognizing that some personal rights may be infringed upon with impunity, some authorities have suggested that the jurisdiction of equity be extended for their protection, rather than be limited solely to cases affecting some proprietary interest.[8] Accordingly, as American law developed, various means were devised for the protection of non-property rights,[9] by a broader interpretation of a

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[2] DE FUNIAK, HANDBOOK OF MODERN EQUITY §§ 3, 53 (1950).

[3] *See* Gee v. Pritchard, 2 Swans. 402, 426, 36 Eng. Rep. 670, 678 (1818).

[4] Cowley v. Cowley, [1901] A. C. 450; *see* DuBoulay v. DuBoulay, 6 Moo. P. C. N. S. 32, 47, 16 Eng. Rep. 638, 644 (1869) (". . . [T]he mere assumption of a name . . . by a Stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress.").

[5] See note 4 *supra;* 23 HALSBURY'S LAWS OF ENGLAND 555 (2d ed. 1936).

[6] Routh v. Webster, 10 Beav. 561, 50 Eng. Rep. 698 (1847) (plaintiff falsely named as trustee of a business enterprise).

[7] Walter v. Ashton, [1902] 2 Ch. 282 (name of plaintiff's business appropriated by defendant for sale of cycles).

[8] Berrien v. Pollitzer, 165 F. 2d 21 (D. C. Cir. 1947) (exclusion of plaintiff from National Woman's Party headquarters); Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P. 2d 321 (1947) (ejection of plaintiff from race track premises); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905), *aff'd,* 117 La. 708, 42 So. 228 (1906) (inspector of police prevented from placing plaintiff's photograph in rogue's gallery); see Pound, *Equitable Relief Against Defamation And Injuries To Personalty,* 29 HARV. L. REV. 640 (1916); Chaffee, *The Progress Of The Law, 1919-1920, Equitable Relief Against Torts,* 34 HARV. L. REV. 388, 407 (1921).

[9] "In recent years, personal rights have assumed a more important and rec-

jurisdictional statute,[10] and open assertions of jurisdiction by the courts.[11] The use of another's name has been enjoined in a few cases without a judicial explanation of the nature of the right involved, or of the extent of equity's jurisdiction.[12] Some courts, while ostensibly adhering to the general rule, have protected rights substantially personal in nature, *e.g.*, the right to security from molestation,[13] or to protection from the use of plaintiff's name by a third party's child.[14] The apparent anomaly resulted from a judicial attempt to find some sort of property right that would support the injunction.

An early New York decision[15] denied injunctive relief to prevent the unauthorized use of the plaintiff's name, on the sole ground that no property right was affected.[16] The specific question of whether equity's jurisdiction should be extended to protect personal rights was later raised in *Baumann v. Baumann*,[17] the facts of which closely resembled those in the instant case. The court, however, left this question unanswered, for in denying the injunction, it rested its decision on the absence of a legal wrong—injury to feelings not being considered such—rather than on the specific ground that equity has no jurisdiction to protect these rights.[18] Although the decision

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ognized place in the field of law. Civil rights statutes, rights of privacy, the larger recognition of a right to damages for injuries to the feelings or mental suffering,—those all indicate the growth of personal as distinguished from strictly property rights." Note, 14 A. L. R. 295 (1921).

[10] TEX. CIV. STAT. tit. 76, art. 4642 (Vernon, 1948), Hawks v. Yancey, 265 S. W. 233 (Tex. Civ. App. 1924) (article 4643 referred to in this case is presently article 4642).

[11] See note 7 *supra*.

[12] Gale v. Gale, 49 Cal. App. 2d 301, 121 P. 2d 778 (1942) (marital name); Burns v. Stevens, 236 Mich. 443, 210 N. W. 482 (1926) (marital name); State v. Hinkle, 131 Wash. 86, 229 Pac. 317 (1924) (unauthorized use of plaintiff's name in connection with a political party).

[13] Reed v. Carter, 268 Ky. 1, 103 S. W. 2d 663 (1937); Stark v. Hamilton, 149 Ga. 227, 99 S. E. 861 (1919).

[14] Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97 (Ct. Err. & App. 1907).

[15] Hodecker v. Strickler, 39 N. Y. Supp. 515 (Sup. Ct. 1896), *aff'd*, 20 App. Div. 245, 46 N. Y. Supp. 808 (4th Dep't 1897) (Defendant, who was living with the plaintiff's husband, was using his surname.).

[16] "The possibility that others may be misled by the assumed relation . . . does not concern the plaintiff, unless by that means some of her property rights or interests may be brought in question; and until then she has no legal cause of complaint . . . ." Hodecker v. Strickler, 39 N. Y. Supp. 515, 517 (Sup. Ct. 1896).

[17] 132 Misc. 217, 228 N. Y. Supp. 539 (Sup. Ct.), *aff'd mem.*, 224 App. Div. 719 (1st Dep't 1928), *rev'd in part*, 250 N. Y. 382, 165 N. E. 819 (1929).

[18] "We do not find it necessary to discuss the question of the jurisdiction of equity to grant injunctive relief in cases where there are no property rights involved. It is sufficient for the decision in this case that there exists no legal wrong which gives rise to a correlative legal right." *Id.* at 389, 165 N. E. at 822.

in the *Baumann* case has been severely criticized,[19] subsequent New York decisions have recognized it as precedent,[20] refusing to enjoin the unauthorized use of a plaintiff's name unless it interfered with a property right.[21]

To support the injunction granted in the instant case, the court recognized a property right in a name. In so doing, however, it merely stated that a wife has ". . . a property right in the . . . protection of her good name . . . ," without giving any interpretation of, or authority for, that phrase.[22]

Although it would be difficult to predict the outcome of a future case on the same facts, this present decision follows an apparent tendency of modern equity to protect personal rights by liberalizing the traditionally rigid concept of property rights.

PRACTICE AND PLEADING — STATUTE OF LIMITATIONS — MALPRACTICE.—Defendant-physician performed two unauthorized operations on plaintiff, on January 14, 1949, but plaintiff was not informed of these until January 28, 1949. This malpractice[1] suit was commenced on January 20, 1951. The defendant's motion to dismiss was granted on the ground that the action was barred by the two year personal injury statute of limitations.[2] The Georgia Court of

[19] *See* Baumann v. Baumann, *supra* note 18 at 390-5, 165 N. E. at 822-4 (dissenting opinions); see Note, 4 ST. JOHN'S L. REV. 100 (1929).

[20] See Lowe v. Lowe, 241 App. Div. 711, 269 N. Y. Supp. 994 (1st Dep't), *rev'd*, 265 N. Y. 197, 192 N. E. 291 (1934); Somberg v. Somberg, 238 App. Div. 723, 265 N. Y. Supp. 223 (1st Dep't 1933), *rev'd*, 263 N. Y. 1, 188 N. E. 137 (1934); Metlis v. Metlis, 104 N. Y. S. 2d 407 (Sup. Ct. 1951); Marquis v. Marquis, 178 Misc. 702, 35 N. Y. S. 2d 675 (Sup. Ct. 1942); *cf.* Spitzer v. Spitzer, 191 Misc. 343, 77 N. Y. S. 2d 279 (Sup. Ct. 1947); Fondiller v. Fondiller, 182 Misc. 628, 50 N. Y. S. 2d 393 (Sup. Ct. 1944); Kiebler v. Kiebler, 170 Misc. 81, 9 N. Y. S. 2d 909 (Sup. Ct. 1939).

[21] Kranz v. Kranz, 169 Misc. 658, 7 N. Y. S. 2d 830 (Sup. Ct. 1938) (confusion of names deprived plaintiff of opportunities to obtain gainful employment).

[22] Niver v. Niver, 200 Misc. 993, 995, 111 N. Y. S. 2d 889, 891 (Sup. Ct. 1951).

[1] "Malpractice . . . means bad or unskillful practice, resulting in injury to the patient, and comprises all acts and omissions of a physician or surgeon as such to a patient as such, which may make the physician or surgeon either civilly or criminally liable." HERZOG, MEDICAL JURISPRUDENCE 153, § 180 (1931). It has been stated that an unauthorized operation, while an assault and battery, is also malpractice, even though no negligence is charged. Physicians' and Dentists' Bureau v. Dray, 8 Wash. 2d 38, 111 P. 2d 568 (1941); *see* Bakewell v. Kahle, 232 P. 2d 127, 129 (Mont. 1951).

[2] The remedy for malpractice in some jurisdictions, including Georgia, lies