

IN THE SUPREME COURT OF OHIO

IN RE JENNIFER LANE : Case No. 01-609  
BICKNELL, *et al.* :  
 :  
 :  
 Appellants. : On Appeal From the Butler County  
 : Court of Appeals, Twelfth Appellate Dist.  
 : Case Nos. CA2000-07-140 and  
 : CA2000-07-141

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BRIEF *AMICUS CURIAE* OF AMERICAN FAMILY  
ASSOCIATION OF OHIO IN SUPPORT OF AFFIRMANCE OF  
THE DECISION OF THE BUTLER COUNTY COURT OF APPEALS

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## **INTEREST OF AMICUS CURIAE**

American Family Association of Ohio (“AFA of Ohio”) is a nonprofit corporation organized under the laws of the state of Ohio, with its principal place of business in Columbus, Ohio. The primary purpose of AFA of Ohio is to promote traditional family values that lie at the foundation of American culture. In particular, AFA of Ohio encourages and supports public officials in enacting, enforcing and interpreting Ohio law in such a manner as to preserve the institution of marriage as the building block of our society. As such, AFA of Ohio has a strong interest in the issues before the Court.

## **INTRODUCTION**

This is a case of first impression in this Court. With the exception of the Twelfth District Court of Appeals in this case and *In re Maloney* (Aug. 13, 2001), Butler App. No. CA2000-08-168, unreported, 2001 Ohio App. LEXIS 3550, discretionary appeal allowed, 94 Ohio St.3d 1409, 759 N.E.2d 786 (App. 1), and the Franklin County Probate Court in *In re Handley* (2000), 107 Ohio Misc.2d 24, 736 N.E.2d 125, no other court in Ohio, in a published decision, has squarely addressed the meaning of “reasonable and proper cause” in the context of an application for an adult name change pursuant to R.C. 2717.01(A). As it did in *In re Willhite* (1999), 85 Ohio St.3d 28, 690 N.E.2d 549 (addressing name changes on behalf of minors), the Court now has the opportunity to provide guidance to the probate courts in their consideration of adult name-change applications.

## STATEMENT OF FACTS

The facts in this case are largely undisputed. Appellants Jennifer Lane Bicknell and Belinda Lou Priddy are unmarried women who desire to legally change their respective last names to “Rylen.” (Supp. 3.) Appellants, who describe themselves as “long-term partner[s],” chose this name taking a few letters from each of their given surnames. (Supp. 4.) At the time of the application, Appellants had been cohabitating for nine years, and viewed themselves as being “married.” (Supp. 4, 6.)

Appellants offered identical reasons for seeking a change of name, as set forth in their respective name-change applications filed in the Probate Court:

Applicant desires to legally have the same last name as her long-term partner of nine (9) years. This name change will only add to the level of commitment they have for each other, as well as to that of their unborn child. Also so that this tender and new family will have a unified name in the eyes of the law.

(Supp. 3.)

The Butler County Probate Court denied Appellants’ applications for a name change, holding that to grant the applications would violate Ohio’s longstanding public policy favoring solemnized marriage and withholding official sanction from cohabitation. See OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW (“PROBATE COURT OPINION”), at 4. On appeal, the Twelfth District Court of Appeals affirmed the Probate Court’s decision denying the applications, and this Court thereafter agreed to hear the appeal.

## ARGUMENT

### Proposition of Law No. I:

**An inevitable byproduct of Ohio’s statutory name change procedure is that “the judicial imprimatur is placed upon the change of name lending it the aura of propriety and official sanction.” *In the Matter of Linda Ann A.* (1984), 126 Misc.2d 43, 44, 480 N.Y.S.2d 996.**

In Ohio, a person can change his name either by the common law method of simply adopting a new name, or by resorting to a judicial proceeding pursuant to statute. *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, 333, 528 N.E.2d 180. In *Pierce v. Brushart* (1950), 153 Ohio St. 372, 380, 41 Ohio Op. 398, 402, 92 N.E.2d 4, 8, this Court held that “[i]t is universally recognized that a person may adopt any name he may choose so long as such change is not made for fraudulent purposes.” See, also, *State v. Hashmall* (1954), 160 Ohio St. 565, 52 Ohio Op. 453, 117 N.E.2d 606.

The statutory name-change procedure was first enacted in 1953, and is now set forth in R.C. 2717.01. This section provides, in applicable part:

A person desiring a change of name may file an application in the probate court of the county in which the person resides. \*\*\* Upon proof that proper notice was given and that the facts set forth in the application show reasonable and proper cause for changing the name of the applicant, the court may order the change of name.<sup>1</sup>

The statutory name-change process is in addition to the common law, and does not abrogate it.

SLIP OP. at 4, citing *State ex rel. Robinson v. Clark* (1994), 91 Ohio App.3d 627, 632 N.E.2d

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<sup>1</sup> There are generally two categories of name-change statutes: (i) those that require the petitioner to make an affirmative showing of good and sufficient cause for the name change and allowing the court to determine in its discretion the sufficiency of the reasons offered; and (ii) those that permit the court to grant the petition unless the court determines that there is a good and sufficient reason to deny the change of name. Under the latter category, the burden of proof rests on either the court or interested third parties to prove that there exists a lawful objection which overrides the petitioner’s right to a name change. See Annotation, Circumstances Justifying Grant or Denial of Petition to Change Adult’s Name (2001), 79 A.L.R.3d 562, Section 2(a) (hereinafter referred to as “Annotation”). Ohio’s name-change statute falls into the former category, requiring the petitioner to affirmatively demonstrate “reasonable and proper cause.” See R.C. 2717.01.

1393 and *In re Paxson* (June 30, 1992), Scioto App. No. 91CA2008, unreported, 1992 Ohio App. LEXIS 3510 (App. 8).

There is a clear distinction between the common law and statutory name-change methods. The common law method is available to any person, including Appellants, without the imprimatur of the court, and thus without the necessity of satisfying any statutory requirements. See *Dennis v. Ford Motor Company* (1997), 121 Ohio App.3d 318, 699 N.E.2d 993 (“The language of the statute is permissive, not mandatory. Thus, an Ohio resident may change his name without following the statutory procedure so long as he does not do so for a fraudulent purpose and does not infringe the rights of others.”); *Paxson, supra*, at 9 (holding that applicant who was denied statutory name change for failure to satisfy procedural requirements “still has recourse to the more traditional method of affecting a name change and cannot be heard to complain that this additional statutory method is not as convenient as he might have wished.”). At common law, then, a person’s adoption and use of a new name will generally not be questioned until challenged by an interested party. In order to prohibit the use of the new name, the interested party would have the burden of filing a lawsuit and proving that the name was being used for a fraudulent purpose. See *Pierce, supra*.

The statutory process, however, requires the applicant to exceed the basic requirement that the name change not be for a fraudulent purpose, and to affirmatively show “reasonable and proper cause” for the requested name change. This is only logical, as an “inevitable byproduct of the statutory process is that the judicial imprimatur is placed upon the change of name lending it the aura of propriety and official sanction.” SLIP OP. at 6, quoting *Matter of Linda Ann A.* (1984), 126 Misc.2d 43, 44, 480 N.Y.S.2d 996, 997; see, also, *Lee v. Ventura County Superior Court* (1992), 9 Cal.App.4<sup>th</sup> 510, 513, 11 Cal.Rptr.2d 763, 764 (court in granting statutory name

change application is lending it “the Great Seal of the State of California”). In other words, before an Ohio court lends its official seal of approval to a name-change application, it must be certain that both the reasons offered for the name change, and the name itself, are not objectionable.

As a result of the official sanction of a name change granted pursuant to statute, the procedure “require[s], of necessity, court scrutiny of the application.” *In Matter of Anonymous* (1992), 153 Misc.2d 893, 894, 582 N.Y.S.2d 941; see, also, *In the Matter of Russell Burleigh Douglas, Jr.* (1969), 60 Misc.2d 1057, 1058-59, 304 N.Y.S.2d 558, 561 (“While a petitioner has the right to personally change his name, nevertheless the court cannot automatically rubber-stamp an approval on any petition for any name one chooses”); *In re Taminosian* (1915), 97 Neb. 514, 150 N.W. 824 (“At common law a man may change his name any time; but in this state, if he desires a judicial record thereof, he must adduce evidence to satisfy the court that there is sufficient and reasonable cause for the change.”). The scrutiny involved, particularly in states such as Ohio where the legislature has chosen to require the applicant to make an affirmative showing of reasonable and proper cause for the name change, must necessarily include additional considerations beyond the narrow standard urged by Appellants and their *amici*. These additional considerations are discussed below.

## **Proposition of Law No. II:**

**An applicant for a name change under R.C. 2717.01 has not demonstrated “reasonable and proper cause” if the facts set forth in the application show that the name change is being sought in bad faith or for a fraudulent purpose, is likely to deceive others or is in violation of Ohio public policy.**

In order to ensure that the “Great Seal of the State of Ohio” is not improvidently lent to a requested name change, R.C. 2717.01 vests a considerable amount of discretion in the court in determining whether the petitioner has set forth facts showing “reasonable and proper cause” for the requested name change. See SLIP OP. at 5; see, also, Annotation, Section 3(a) (“[U]nder a statute providing that a change of name petition by an adult be granted where such petition is found to be based on good and sufficient cause for the change, the courts may, in the exercise of their discretion, decide what constitutes good and sufficient cause in each case, and are not subject to the whims of every petitioner”).<sup>2</sup> In making this determination, “the trial court should review all facts and circumstances surrounding the name change, including the reasons expressed by the petitioner for the change and the name to be approved.” *In re Maloney, supra*, at 6, citing *Handley*, 107 Ohio Misc.2d at 26, 736 N.E.2d at 126.

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<sup>2</sup> Although this Court has yet to decide the appropriate standard of review of a probate court’s decision granting or denying a name change application under R.C. 2717.01, the “abuse of discretion” standard of review is consistent with the substantive standard in the name-change statute, as the statute grants considerable discretion to the probate court to determine whether the applicant has shown “reasonable and proper cause” for the requested name change. Each of the lower appellate courts that has addressed the issue, including the Court of Appeals below, has applied the “abuse of discretion” standard. See SLIP OP. at 3, citing *In re Hall* (1999), 135 Ohio App.3d 1, 3, 732 N.E.2d 1004; *Maloney* at 7; *Jarrells v. Epperson* (1996), 115 Ohio App.3d 69, 71-72, 684 N.E.2d 718, 720 (name change on behalf of minor subject to abuse of discretion standard). An abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude. *Cedar Bay Constr. v. Fremont* (1990), 50 Ohio St.3d 19, 22, 552 N.E.2d 202, 205; see, also, *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748, 750-51 (“The appellate court is to determine only if the trial court has abused its discretion, *i.e.*, being not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.”). When applying the abuse of discretion standard of review, the reviewing court is not free to merely substitute its judgment for that of the trial court. *Id.* at 621, 614 N.E.2d at 751.

While appellants and their *amici* suggest a plethora of different tests for this Court to adopt, the standard adopted by the Franklin County Probate Court in *In re Handley, supra*, which was relied upon the Court of Appeals, contains all of the necessary factors that a probate court should consider before it lends “the aura of propriety and official sanction” to a requested name change under Ohio law. The applicant in *Handley*, an adult, filed an application to change his name to “Santa Claus.” The court, absent any guidance from this Court or the courts of appeals, properly looked to earlier decisions under the common law and to those of courts in other states with similar name change statutes in fashioning the following test:

The court has discretion in determining whether a name change, [*sic*] is "reasonable and proper" by reviewing all facts and circumstances surrounding the name change, including the reasons expressed by the petitioner for the change and the name to be approved. *In re Application of Sakaris* (1993), 160 Misc. 2d 657, 660-661, 610 N.Y.S.2d 1007, 1010. The primary reason for denying a requested name change application is the potential for fraud, particularly where it could lead to financial abuse or misrepresentations in society. *Id.* at 661-662, 610 N.Y.S.2d at 1011. See, also, *Marshall v. Florida* (Fla.App.1974), 301 So.2d 477, 477-478. A person may adopt any name he chooses, provided that it is done in good faith and not against public policy, nor for a fraudulent purpose. *Pierce v. Brushart* (1950), 153 Ohio St. 372, 380, 41 Ohio Op. 398, 402, 92 N.E.2d 4, 8. See, also, *State ex rel. Bucher v. Brower* (C.P.1941), 21 Ohio Op. 208, 1941 WL 3383. Courts have held that it would be reasonable and proper for an individual to change his name if the request is not intended to interfere with the rights of others, nor to confuse or mislead the public. See *Marshall v. Florida*, 301 So. 2d at 477-478. Furthermore, an application will be deemed reasonable and proper if the application does not violate any other overriding public policy considerations. *In re Application of Novogorodskaya* (1980), 104 Misc. 2d 1006, 1007, 429 N.Y.S.2d 387, 388.

*Id.* at 26-27, 736 N.E.2d at 126. The primary reason, then, for denying a name-change application is if it is sought for fraudulent purposes, such as to avoid creditors, deceive others or

confuse or mislead the public. *Id.* This is consistent with the common law standard. See *Pierce*, 153 Ohio St. at 380, 41 Ohio Op. at 402, 92 N.E.2d at 8.<sup>3</sup>

The other important factor the court considered was whether granting the name-change application would violate “overriding public policy considerations.” *Handley*, 107 Ohio Misc.2d at 27, 736 N.E.2d at 126.<sup>4</sup> In considering the public policy implications, the court recognized what appellants and their *amici* refuse to recognize, *i.e.*, because the statutory name-change process requires judicial approval, it must necessarily comport with Ohio’s public policy. Common law name changes, on the other hand, do not require the State’s approval and therefore are much more permissive, being improper only if intended for fraudulent purposes.

Appellants counter by arguing that the General Assembly did not intend to place further limitations on name changes than existed at common law when the statute was enacted. BRIEF ON THE MERITS OF APPELLANTS JENNIFER LANE BICKNELL AND BELINDA LOU PRIDDY (“APPELLANTS’ MERIT BRIEF”), at 4. This argument is baseless, however, as the General Assembly is presumed to have been aware of the common law (*i.e.*, *Pierce*) at the time the name change statute was enacted in 1953. See *Thomson v. Community Health Centers of Warren County, Inc.* (1994), 71 Ohio St. 3d 194, 195, 642 N.E.2d 1102, 1103. Thus, had the General Assembly intended to limit the discretion of the judiciary in reviewing name-change applications to the common law standard (*i.e.*, a person may adopt any name he chooses as long as it is not

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<sup>3</sup> One criticism of the test applied in *Handley* is that, in addition to considering whether the applicant is seeking a name change for a fraudulent *purpose* (*i.e.*, in bad faith), the probate court should also attempt to ascertain whether the requested name change is likely to have a fraudulent *effect*. In other words, even if the applicant’s subjective motive is pure, the name change may still be denied if it is likely to have the *effect*, for example, of deceiving a creditor or misleading the public. This objective standard is more consistent with the statute’s requirement that the name change be “reasonable.” See R.C. 2717.01.

<sup>4</sup> Although the court found “no fraudulent intent of the petitioner to take advantage of the economic value of the name [Santa Claus],” it nevertheless held that “it would be against public policy to grant the application of the petitioner.” *Id.*, 107 Ohio Misc.2d at 27, 736 N.E.2d at 127.

for fraudulent purposes), it would have done so. Instead, the General Assembly enacted a statute that is quite different than the common law standard, one that places an affirmative burden on the *applicant* to set forth facts demonstrating “reasonable and proper cause.”

Courts in other states with statutory name-change procedures have also recognized the need to consider the public policy implications of requested name changes. See, e.g., *Lee v. Ventura County Superior Court*, *supra*, 9 Cal.App.4<sup>th</sup> at 518, 11 Cal.Rptr.2d at 768 (denying petitioner’s request to change name to “Misteri [*sic*] Nigger” as against “the strong public policy in the State of California to prevent utterance of ‘fighting words’”); *In Matter of Anonymous*, 153 Misc.2d at 895 (court in considering name change must consider whether “granting the relief requested may be contrary to the public interest”)<sup>5</sup>; *In re Harris* (Pa. 1997), 707 A.2d 225, 227 (court must “comport with good sense, common decency and fairness to all concerned and to the public” in making decision on statutory name change application); *In re Application of Rosa Linda Ferner* (1996), 295 N.J. Super. 409, 416, 685 A.2d 78, 81 (“The court must consider whether the public interest overrides the applicant’s request.”)<sup>6</sup>.

The facts in *Lee* are particularly reflective of the importance of affording the probate court discretion to consider the public policy implications of a proposed name change. The applicant in *Lee*, an African-American, sought to change his name to “Misteri Nigger.”

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<sup>5</sup> For other New York cases applying a public policy standard, see *In re Sakaris* (1993), 160 Misc.2d 657, 664, 610 N.Y.S.2d 1007, 1012-13 (denying petitioner’s name change petition as “against the public policy of th[e] State”); *In re Linda Ann A.*, *supra*, 126 Misc. 2d at 45 (dismissing the petitioner’s requested name-change application on “public policy” grounds); *In re Application of Novogorodskyaya* (1980), 104 Misc.2d 1006, 1007, 429 N.Y.S.2d 387, 388 (any person “should be allowed to change his name in good faith as he desires, provided such change would not violate any statutory provision or overriding public policy”).

<sup>6</sup> See, also, *In re Application of Pirlamarla* (1985), 208 N.J. Super. 112, 117, 504 A.2d 1238, 1241, quoting *In re Application of Jackson* (1981), 177 N.J. Super. 591, 593, 427 A.2d 139, 140 (“Any individual \*\*\* should be allowed to adopt a new name ‘except for fraudulent or criminal purposes,’ or unless there is an overriding social policy which militates against the change.”); but, see, *In re Bacharach* (2001), 344 N.J. Super. 126, 134, 780 A.2d 579, 584 (holding “public policy judgments as essentially irrelevant to [an] application for [a] name change”).

California's name change statute, which is nearly identical to Ohio's, provides that the trial court "may make an order changing the name, or dismissing the application, as to the court may seem *right and proper*." (Emphasis added.) Cal.C.C.P. 1278. The trial court denied the request, and the California Court of Appeals affirmed, holding:

Appellant has a common law right to change his name to "Misteri Nigger" without the necessity of any legal proceeding. \*\*\* However, no person has a statutory right to officially change his or her name to a name universally recognized as being offensive. \*\*\* Were we to give our imprimatur to appellant's request, such might be construed as encouraging or sanctioning a racial epithet, translating to "state action" promoting racial disharmony.

*Lee*, 9 Cal.App.4<sup>th</sup> at 514, 11 Cal.Rptr.2d at 765. The following commentary by the court is particularly applicable to Appellants' name change applications:

The judiciary should not lend the Great Seal of the State of California to aid appellant in his social experiment. \*\*\* Appellant has the common law right to use whatever name he chooses. He may conduct whatever social experiment he chooses. However, he has no statutory right to require the State of California to participate therein.

*Id.* at 513, 11 Cal.Rptr.2d at 764.

The court did not question the applicant's sincerity in requesting the name change. See *id.* at 516, 11 Cal.Rptr.2d at 766. Thus, had it been confined to considering only if the applicant intended to defraud a creditor or was acting in bad faith, the court would have had no choice but to allow the applicant to change his name, thereby lending the "Great Seal of the State of California" to the surname "Nigger." Fortunately, however, the court was not so confined, and also was able to consider the applicant's request in light of California's strong public policy against the use of derogatory racial slurs.

Conceivably, an Ohio applicant could make a similar sincere request to use a name that offends most, but not necessarily all, people.<sup>7</sup> This was exactly the case in *Lee*. Despite the sincerity of the applicant, the court in its discretion determined that the applicant’s “quest for social justice should not be viewed in a vacuum.” *Id.* at 516, 11 Cal.Rptr.2d at 766. Ohio courts must have the same discretion and cannot be limited to inquiring only whether the applicant is acting with fraudulent purpose or in bad faith.

In a case of similar import in New York, an applicant requested to change his name for religious reasons from “Russell Burleigh Douglas, Jr.” to the single name “Arindam.” *Douglas, supra*, 60 Misc.2d 1057, 304 N.Y.S.2d 558. The court held that, despite the applicant’s “altruistic purposes and endeavors,” it did not see a “compelling need to set a precedent by judicially sanctioning the use of a single name.” *Id.* at 1058, 304 N.Y.S.2d at 560. Like *Lee*, this case is particularly instructive, as New York’s law is nearly identical to Ohio’s in relation to a person’s common law right to change his name. The court discussed this common law right in light of the applicant’s request:

Petitioner is privileged to change his name merely by using it, without violating the law, if it is not done to deceive or to perpetrate a fraud or to avoid a just obligation. Irrespective of the name he chooses, it cannot impair his freedom to worship as he sees fit, if that be his real purpose in seeking to change his name.

*Id.* The court went on, however, to clearly distinguish between the standard to be applied for a common-law name change and that to be applied for a statutory name change:

When one comes to the court to effect the change judicially, the court may determine, in its discretion, whether the change requested is warranted under all the circumstances. *While a petitioner has the right to personally change his*

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<sup>7</sup> Modesty prohibits counsel from engaging in a parade of horrors as to the many vile names that an applicant in today’s “MTV” influenced culture might desire as their official, state-recognized name. As in *Lee*, such requests conceivably could be made without fraudulent intent and in good faith, reiterating the importance of the court having considerable discretion to discern whether the request is in the public interest.

*name, nevertheless the court cannot automatically rubber-stamp an approval on any petition for any name one chooses \*\*\*.*

(Emphasis added.) *Id.* at 1058-59, 304 N.Y.S.2d at 560-61. Although the name “Arindam,” or the religious justifications offered in support of the name, may not have violated New York’s public policy, the decision reveals the importance of allowing the court a considerable amount of discretion in deciding statutory name-change applications -- discretion that must necessarily include the freedom to consider the public policy implications of the requested name change.<sup>8</sup>

Appellants, apparently recognizing that the standard they have been advocating throughout this litigation is much too narrow and would force courts to grant name change applications similar to those in *Lee* and *Douglas*, have conveniently softened their position to include an exception for a name that is “in and of itself patently ridiculous or offensive.”

APPELLANTS’ MERIT BRIEF at 3, 12, fn.1. There are numerous concerns with this suggested standard. First, it would essentially allow courts “to apply their personal predilections” in deciding name change applications, which is exactly what Appellants argue they should not be able to do. See APPELLANTS’ MERIT BRIEF at 4. Absent any objective boundaries guiding the court in its determination of whether a name is “patently ridiculous or offensive,” a name such as

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<sup>8</sup> Absent a standard that considers more than just whether the application is for a fraudulent purpose or is brought in bad faith, there is no mechanism to prohibit someone from changing his name to a single name, such as “Arindam.” Under this narrow standard, an individual could change his name to “X,” or perhaps to a number or series of numbers, such as “666.” Better yet, an individual could change his or her name to a symbol, like the rock musician “Prince” did several years ago. Use of the symbol created havoc, so the media, having no “name” by which to refer to him, gave him the name “the Artist Formerly Known as Prince.” Obviously these examples are somewhat extreme; however, they exemplify the slippery slope upon which Appellants’ interpretations would cast us to slide uncontrollably. Fortunately, the majority of courts that have been presented with such requests have had the flexibility to be able to reject them. See, e.g., *In re Ritchie* (1984), 159 Cal.App.3d 1070, 206 Cal.Rptr. 239 (application to change name to "III" denied); *Petition of Dengler* (N.D.1979), 246 N.W.2d 758 (denying application to change name to "1069"); *Application of Dengler* (1979), 310 Minn. 480, 287 N.W.2d 637 (denying same applicant's request to change name to "1069").

“Misteri Nigger” could just as easily be granted as it could be denied. Ultimately, the decision would hinge entirely on the subjective views of the particular judge reviewing the application.<sup>9</sup>

However, by applying a standard that asks whether the name and the reasons offered in support of the name are consistent with an *objective* public policy, the concern that a court will apply its “personal predilections” is negated. Although the trial court under this standard is given a considerable amount of discretion, the discretion is not unlimited as the court is ultimately accountable to a higher court applying the objective abuse of discretion standard. In other words, the court is not free to impose its personal views of what the public policy in Ohio is or should be, but is limited to the actual public policy of the State as established by the General Assembly and acknowledged by this Court.

The second concern with the “patently ridiculous or offensive” standard is that it is contrary to the plain meaning of the name-change statute. The statute affords the court discretion to determine whether “the facts set forth in the application show reasonable and proper cause for changing the name of the applicant.” R.C. 2717.01. Appellants’ test would eliminate this discretion by only allowing the court to consider whether the *name itself* is objectionable, rather than affording it the additional discretion necessary to determine whether the facts offered in *support of the name* are objectionable. Furthermore, not only is the standard suggested by Appellants inconsistent with the plain meaning of the statute, but it is also internally inconsistent. The first part of Appellants’ standard asks whether the purpose of the name is fraudulent, a test that necessarily requires the court to examine the facts offered in support of the name change application, rather than the name itself. Obviously, a name *in and of itself* cannot be fraudulent. It is either (i) the intended *use* of the name, or (ii) the *effect* of the name that is or has the

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<sup>9</sup> For example, a judge might be sympathetic to a petitioner’s sincere desire to “steal the stinging degradation \*\*\* from the word nigger,” *Lee*, 9 Cal.App.4<sup>th</sup> at 513, 11 Cal.Rptr.2d at 764, and thus find that the name is not “patently offensive.”

potential to be fraudulent. This standard, of course, is consistent with the plain meaning of the statute, which requires the court to consider “the facts set forth in the application.” The second part of Appellants’ suggested standard, however, focuses only on the name itself, eliminating any inquiry into the propriety of the facts offered in support of the name change. Not only does this contradict the plain meaning of R.C. 2717.01(A), but it is inconsistent with the first part of the standard.

The third and final concern with Appellants’ suggested standard is that it is inconsistent with Appellants’ other arguments. In their first proposition of law, Appellants urge the Court to interpret R.C. 2717.01 to provide that an application for an adult name change “should be granted unless the purpose is fraudulent or the name in and of itself is patently ridiculous or offensive.” APPELLANTS’ MERIT BRIEF at 3. Yet, on the very next page of their brief, Appellants chastise the Court of Appeals for (allegedly) failing to follow its earlier decision in *State ex rel. Robinson v. Clark* (1994), 91 Ohio App.3d 627, 629, 632 N.E.2d 1393, 1394, wherein the court alluded, albeit in *dicta*, that “[t]he purpose behind the name change statute is to protect the public from fraudulent name changes.” In further contradiction of their suggested standard, Appellants also argue that the Court of Appeals’ decision is in conflict with the Fourth District’s decision in *In re Hall* (1999), 135 Ohio App.3d 1, 732 N.E.2d 1004.<sup>10</sup> In *Hall* (which, like *Robinson*, did not turn on an interpretation of the substantive meaning of R.C. 2717.01), the

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<sup>10</sup> The Court of Appeals below denied this very same argument in Appellants’ motion to certify a conflict, holding:

The proper standard to apply in consideration of a name change petition was not a contested issue before the court in *Hall*. \*\*\* In *dicta*, the Fourth District counseled the probate court that so long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, a name change petition should be granted. Because the holdings of the subject case and *Hall* are not in conflict, and the alleged inconsistent statement was *dicta* not essential to the Fourth District’s decision, appellants’ motion to certify is hereby denied.

ENTRY DENYING MOTION FOR CERTIFICATION at 2-3.

court opined, in *dicta*, that “[s]o long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, then [a name change] petition should be granted.” *Id.*, 135 Ohio App.3d at 6, 732 N.E.2d at 1007, quoting *In re Ladrach* (P.C.1987), 32 Ohio Misc. 2d 6, 513 N.E.2d 828. Ironically, neither of the “standards” mentioned in either case includes the additional “patently ridiculous or offensive” language advocated by Appellants. Thus, in one breath, Appellants argue that the Court of Appeals erred by not strictly following the *dicta* in *Robinson* and *Hall*, while in the next breath, they argue for a standard that includes additional considerations. To quote the overused cliché, it seems that Appellants want to “have their cake and eat it, too.”<sup>11</sup>

This case offers the Court an opportunity to provide guidance to the lower courts in determining whether an applicant for an adult name change has set forth facts demonstrating “reasonable and proper cause” for the name change. As the foregoing arguments demonstrate, the standard suggested by Appellants is unworkable. By attempting to create a standard that guarantees a particular conclusion (approval of their name-change applications), while at the same time attempting to ensure that it does not have the unintended consequence of forcing approval of, for example, a name like that sought in *Lee*, Appellants have neglected a critical factor that the probate courts must consider before lending “the aura of propriety and official sanction” to a name change, *i.e.*, whether the facts offered in support of the name change, and the name itself, are consistent with Ohio public policy. In the interest of promoting a consistent and

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<sup>11</sup> Appellants also argue that the Court of Appeals’ decision is in conflict with *In re Newcomb* (1984), 15 Ohio App.3d 107, 472 N.E.2d 1142, which involved a name change application on behalf of a minor. Appellants misinterpret the holding in *Newcomb*, which was criticized by this Court, claiming it held that a “mature child may have his name changed so long as the change is the child’s desire and not for fraudulent purposes.” APPELLANTS’ MERIT BRIEF at 4-5. However, this clearly was not the holding in *Newcomb*. Rather, the Tenth District held that, in determining whether to grant a name change on behalf of a minor under R.C. 2717.01(B), it is error on the part of the trial court not to consider the best interests of the child. See *Newcomb, supra*. Contrary to Appellants’ assertion, nowhere in the opinion does the court discuss or otherwise mention the fraudulent purpose standard. See *id.*

uniform application of Ohio’s name-change statute as it applies to adult name-change applications, *Amicus* respectfully asks this Court to adopt the sound reasoning of the Franklin County Probate Court in *Handley*, as the Court of Appeals did below.

**Proposition of Law No. III:**

**In deciding whether to grant a name-change application for an adult pursuant to R.C. 2717.01, the “best interests of the child” test is not applicable.**

Appellants and their *amici* argue that the courts below erred by not applying “the best interests of the child” test in deciding their name-change applications. In support of this argument, Appellants rely on this Court’s decision in *In re Willhite* (1999), 85 Ohio St.3d 28, 690 N.E.2d 549. While not entirely inapposite, because Appellants’ name-change applications are seeking a name change on behalf of an adult rather than a minor, *Willhite* has limited application to this case.

In *Willhite*, this Court held that in the context of an application for a name change brought on behalf of a minor pursuant to R.C. 2717.01(B), a “trial court must consider the best interests of the child in determining whether reasonable and proper cause has been established.” *Id.* at paragraph one of the syllabus. Appellants contend that because they have asserted a desire to share a common surname in order to raise a child (of which only one of them can be the legal parent), the Court should apply the “best interests of the child” test in determining whether they have shown “reasonable and proper cause” to change their names. The Court of Appeals rejected this argument, holding that “there was no best interest of a named child to be considered by this court.” SLIP OP. at 7. Implicit in this Court’s decision in *Willhite* is that the requirements for a name change on behalf of a minor and a name change for an adult are clearly distinct. Because Appellants’ applications clearly fall into the latter category, the “best interests of the child” test enunciated in *Willhite* is simply not applicable to Appellants’ name-change

applications, regardless of whether the name change might have implications for a future minor child of one of the Appellants.<sup>12</sup>

**Proposition of Law No. IV:**

**Ohio has a longstanding public policy favoring and encouraging traditional, solemnized marriage and withholding official sanction from non-marital cohabitation.**

In denying Appellants' name change applications, the Probate Court held:

[a]pproval of the application of a person that desires to have the same last name as the person that they describe as their 'long term partner,' to whom they are not married, would undermine the considerations of public policy which underlie the abolition of common law marriages in this state. . . . *To answer otherwise would undermine the public policy of this state which promotes legal marriages and withholds official sanction from non-marital cohabitation.*

(Emphasis added.) PROBATE COURT OPINION at 2-3.<sup>13</sup> The Court of Appeals agreed with the Probate Court's ascertainment of Ohio public policy on the issue of marriage and cohabitation in Ohio, holding: "a review of Ohio law reveals that there is both a legislative and judicial public policy promoting solemnized marriage." SLIP OP. at 7-8.

In support of their holdings, the Probate Court and the Court of Appeals rely upon legislative and judicial pronouncements supporting traditional, solemnized marriage and withholding official sanction from non-marital cohabitation. Most notably, R.C. 3101.01, Ohio's marriage statute, limits marriage in Ohio to one man (18 years of age and older) and one woman

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<sup>12</sup> Further, because her child was not born at the time of application, four of the seven factors used in determining the child's best interests would not have been applicable to Ms. Priddy's unborn child. Thus, Appellants essentially are asking this Court to create a new and distinct test to be applied to Ms. Priddy's given set of circumstances. This Court should refrain, however, from legislating a special test to serve the needs of two particular litigants simply because they have indicated a desire to raise children together sometime in the future.

<sup>13</sup> Moreover, although the Probate Court did not state this as one of its reasons for denying the application, it also would have been justified in refusing the name-change request on the basis that it would mislead the public as to the true relationship between Appellants. See *Matter of Linda Ann A.*, 126 Misc.2d at 44-45, 480 N.Y.S.2d at 997 (holding that "to allow petitioner to [change her name and] hold herself out as [her married lover's] wife would tend to mislead and confuse those dealing with the couple who might be unaware of the true relationship").

(16 years of age and older), no closer in relation than second cousins. Thus, at least by implication, marriages between persons that are underage, first cousins or of the same sex are prohibited by statute in Ohio. *Id.*; see, also, *In re Adoption of Jane Doe* (1998), 130 Ohio App.3d 288, 719 N.E.2d 1071 (Wise, J., concurring) (“Inherent but unspoken in this case is the legal reality that two individuals of the same sex cannot marry under existing Ohio law and therefore, both cannot be spouses.”); *Gajovski v. Gajovski* (1990), 81 Ohio App.3d 11, 610 N.E.2d 431 (“Ohio is likewise without a mechanism by which to recognize homosexual marriage. In fact, Ohio law permits marriage only between members of the opposite sex.”); *Liston v. Pyles* (Aug. 12, 1997), Franklin App. No. 97APF01-137, unreported, 1997 Ohio App. LEXIS 3627, at 5 (App. 12)(“Ohio law does not recognize the [same-sex] relationship between appellant and appellee as having any legal status.”); *Irwin v. Lupardus* (June 26, 1980), Cuyahoga App. No. 41379, unreported, 1980 Ohio App. LEXIS 12106 (App. 23)(Ohio law does not recognize same-sex marriages).

In *In re Estate of Stiles* (1979), 59 Ohio St.2d 73, 13 Ohio Op.3d 62, 391 N.E.2d 1026, this Court acknowledged Ohio’s longstanding public policy favoring marriage (as defined and limited by R.C. 3101.01) and disfavoring various types of incestuous and other deviant sexual relationships, including non-marital cohabitation. In *Stiles*, the issue before the Court was whether a common-law marriage between an uncle and his niece is void or voidable. 59 Ohio St.2d at 74, 391 N.E.2d at 1026. Because a marriage between two such persons is only impliedly prohibited by R.C. 3101.01, and not specifically declared void by Ohio law, the Court sought to determine whether a sexual relationship between an uncle and his niece was against Ohio’s public policy.

Relying on the former R.C. 2905.07, which criminalized fornication or adultery between persons “being nearer of kin, by consanguinity or affinity, than cousins,” the Court concluded:

We hold that the marriage of an uncle to his niece is incestuous and void *ab initio*. To hold otherwise would be a mockery of the statute and emasculate the purpose of marriage laws. Such incestuous marriages “are shocking to good morals [and are] unalterably opposed to *a well defined public policy* \*\*\*.” They are meretricious in their conception and can never ripen into anything better. \*\*\* The state has an interest in all marriages and is virtually a party to them. The state’s interest can only be protected properly by treating such meretricious relationships as void *ab initio*.

(Emphasis added.)(Internal citations omitted.) *Id.*, 59 Ohio St.2d at 75, 391 N.E.2d at 1027, quoting *Mazzolini v. Mazzolini* (1958), 168 Ohio St. 357, 358, 7 Ohio Op.2d 123, 155 N.E.2d 206, 208. In response to the appellee’s argument that the repeal of R.C. 2905.07 (making sexual intercourse between an uncle and his niece no longer criminally punishable) evidenced “a new expression of the [General Assembly’s] public policy,” the Court held:

One of the purposes of the new Criminal Code (H.B. No. 511) was to decriminalize certain unlawful sexual behavior and leave the parties to whatever chastisement society would impose without making them criminally liable. It was supposedly an enlightened approach to “social crimes.” *We do not believe that the General Assembly intended to change the state’s public policy so as to [now] favor fornication, adultery, rape of one spouse by the other, sodomy, fellatio, homosexuality and some forms of incest.*

(Emphasis added.) *Stiles*, 59 Ohio St.2d at 75-76, 391 N.E.2d at 1027. In other words, despite the repeal of R.C. 2905.07 (and other statutes punishing certain sexually deviant behaviors, such as former R.C. 2905.44, prohibiting homosexual sodomy), it is still the public policy of the General Assembly to disfavor “fornication” and “homosexuality.”<sup>14</sup> See, also, *State ex rel. Grant v. Brown* (1974), 39 Ohio St.2d 112, 113-14, 68 Ohio Op.2d 65, 313 N.E.2d 847, 848 (“Although homosexual acts between consenting adults are no longer statutory offenses since the

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<sup>14</sup> Black’s Law Dictionary defines “fornication” as “[s]exual intercourse other than between married persons.”

new Criminal Code came into effect, \*\*\* the promotion of homosexuality as a valid life style is contrary to the public policy of the state.”)

One of the defining characteristics of “cohabitation,” of course, is a sexual relationship. See, e.g., *State v. Williams* (1997), 79 Ohio St.3d 459, 683 N.E.2d 1126, at paragraph two of the syllabus (listing consortium as a necessary element of cohabitation). Thus, because Appellants--self-described “long-term partners”--are the same sex, unmarried, and cohabitating (*i.e.*, they live together and have a sexual relationship), they are necessarily engaging in fornication and homosexuality, both of which are against Ohio public policy. As *Stiles* reflects, just because the General Assembly chose not to criminalize fornication and homosexuality any longer does not by implication mean that Ohio now favors or is neutral toward them. Further, and more important, it does not mean that Ohio no longer has a public policy *against* fornication and homosexuality and is thereby free to lend “the Great Seal of the State of Ohio” to a relationship that is necessarily defined by their commission.

Since 1979 (when *Stiles* was decided), no enactment by the General Assembly and no decision by this Court evidence even the slightest departure from the public policy acknowledged by the Court in *Stiles*. To the contrary, the General Assembly has only *reinforced* Ohio’s public policy in favor of solemnized marriage and against cohabitation. In 1991, the General Assembly prohibited the recognition of common law marriages by Ohio courts. See R.C. 3105.12 (“[O]n or after the effective date of this amendment \*\*\* common law marriages are prohibited in this state, and the marriage of a man and woman may occur in this state only if the marriage is solemnized.”). Pursuant to this statute, courts may no longer recognize common law marriages that occurred in Ohio after 1991.

Guided by the General Assembly and this Court, Ohio's appellate and trial courts (including the courts below) have further solidified Ohio's public policy favoring solemnized marriage and condemning cohabitation. In *Hempy v. Green* (May 31, 1990), Franklin App. No. 89AP-1369, unreported, 1990 Ohio LEXIS 2223 (App. 26), the Tenth District Court of Appeals eloquently summarizes not only Ohio's public policy, but essentially that of society in general, regarding marriage:

While in recent years courts have been less inclined to speak of the sanctity of marriage, it remains "\* \* \* a basic social institution of the highest type and importance, in which society at large has a vital interest." *Holloway v. Holloway* (1935), 130 Ohio St. 214, 216. The notion that constraints on marriage, of whatever kind, should be declared void appeared as early as the civil law of Rome and reflected a desire to maintain a young and growing population in order to provide recruits for an expanding military. In England, as well as in this country, the idea of judicial support for marriage was continued as an institution for the preservation of morals. See *Winters v. Miller* (1970), 23 Ohio Misc. 73. In modern times, marriage has come to mean more than continued procreation or moral integrity between spouses but has become a foundation for the education of our children in order to secure a productive, competitive, and socially responsible adult population. *Our independent review has failed to find any case that has reversed the long standing policy of this state in favor of the preservation of the marriage bonds.* Both appellant and appellee's conduct was directly contrary to this well-established public policy and thus, a court of equity should refuse to provide a forum for relief when both parties have willfully acted in derogation of this important public policy.

(Emphasis added.) *Id.* at 7-9. A few years later in *Jordan v. Jordan* (1996), 117 Ohio App.3d 47, 50, 689 N.E.2d 1005, 1007, the Fourth District Court of Appeals offered similar sentiments:

The union of two people in marriage has been the ultimate expression of commitment and love throughout this nation's history and has been the bedrock upon which our society was and continues to build upon. Accordingly, public policy looks unfavorably on restraints to marriage. \*\*\*

Citing *King v. King* (1900), 63 Ohio St. 363, 59 N.E. 111, and *Zablocki v. Redhail* (1978), 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618. The court continued:

Notwithstanding our public policy in favor of marriage, *we cannot find that cohabitation equates to marriage.* \*\*\* [C]ommon law marriages, which

recognized two as husband and wife without a solemnized ceremony when the two cohabited and held themselves out as married, were abolished in Ohio in 1991.

(Emphasis added.) *Id.*

In his dissenting opinion, Judge Valen suggests that the reason the General Assembly did away with common law marriages was not because of a public policy against cohabitation, but instead due to the evidentiary difficulties often associated with attempting to prove a common law marriage. SLIP OP. at 14. While the sparse legislative history reveals little of the General Assembly's actual intent in abolishing common law marriage, it does not negate the fact that, even prior to the statutory abolition of common law marriages in 1991, Ohio courts consistently disapproved of cohabitation and rejected the notion of "common law" marriage. See, e.g., *In re Estate of Redman* (1939), 135 Ohio St. 554, 558, 14 Ohio Op. 426, 21 N.E.2d 659 ("So-called common law marriage contravenes public policy and should not be accorded any favor; *indeed, it is quite generally condemned.*" (Emphasis added)); *Beck v. Beatti* (Dec. 29, 1998), Hocking App. No. 98CA07, unreported, 1998 Ohio App. LEXIS 6354, discretionary appeal denied, 85 Ohio St.3d 1468, 709 N.E.2d 173 (App. 29)(same); *State v. Depew* (June 29, 1987), Butler App. No. CA85-07-075, unreported, 1987 Ohio App. LEXIS 7724, at 23 (App. 32)("[C]ommon law marriages are not favored in Ohio \*\*\* as [they] contravene public policy."); see, also, *State ex rel. Baker v. Stevenson* (1962), 189 N.E.2d 181, 27 Ohio Op.2d 223 ("It is indeed the policy of the law [in Ohio] to look with favor upon marriage and to seek in all lawful ways to uphold this most vital social institution; every intendment being in favor of matrimony.").

Judge Valen also claims that the majority's holding is inconsistent with Ohio's "policy" of allowing unmarried, cohabitating persons to adopt or obtain custody of children, and affording

them the protections of the domestic violence and rape statutes. SLIP OP. at 16-18.<sup>15</sup> Appellants, likewise, argue that the majority's holding is inconsistent with Ohio law, reciting a litany of statutes outlining "legal relationships" into which unmarried persons are permitted to enter. For example, according to Appellants, because the General Assembly allows unmarried "couples" to appoint each other to make medical decisions or to act as the other's executor,<sup>16</sup> *a priori*, Ohio does not have a public policy against cohabitation. In other words, Appellants and the dissent have essentially taken the indefensible position that, unless the General Assembly removes every legal right or benefit from an individual who cohabitates with his or her boyfriend or girlfriend, or prohibits cohabitation altogether, Ohio does not have a public policy favoring marriage and withholding official sanction from cohabitation.<sup>17</sup>

This is, very simply, poor logic. It is perfectly consistent for Ohio to have a public policy favoring marriage and withholding official sanction from cohabitation, while at the same time allowing persons in non-marital cohabitating relationships--despite the disfavor of such

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<sup>15</sup> It is important to note that the domestic violence statute does not necessarily protect *all* cohabitating persons, as the dissent suggests. The statute prohibits a person from causing physical harm to a "family or household member." "Family or household member" is defined in the statute to include, among others, "a person \*\*\* who is otherwise cohabitating with the offender." R.C. 2919.25. However, in *State v. Williams* (1997), 79 Ohio St.3d 459, 683 N.E.2d 1126, this Court held that the essential elements of cohabitation, for purposes of the domestic violence statute, are "(1) sharing of familial or financial responsibilities and (2) consortium." *Id.* at paragraph two of the syllabus. According to the holding in *Williams*, mere cohabitation, and nothing more, may not be sufficient to trigger the domestic violence statute. In fact, it is quite possible that two unmarried people living together in a purely sexual relationship, both of whom have no dependence on the other except for sexual gratification, would not be considered "cohabitating" for purposes of proving an offense under the domestic violence statute. Thus, because Ohio's domestic violence statute protects some, but not necessarily all, cohabitating persons, the dissent's attempt to derail the majority's public policy argument must fail.

<sup>16</sup> See R.C. 1337.01, *et seq.* (durable power of attorney for health care); and R.C. 2113.05 (appointment of executor).

<sup>17</sup> The numerous "legal relationships" Appellants describe are relationships that are just as commonly entered into between a lawyer and client or a father and son, as they are between two cohabitating "long-term partners," as Appellants describe themselves. The fact that Ohio allows all persons, without regard to their gender, marital status or living arrangements, to appoint another to make his or her medical decisions, or to act as his or her executor, is of no relevance whatsoever to Appellants' name change application or to Ohio's public policy concerning marriage and cohabitation.

relationships--to enjoy the same benefits and protections that are available to all persons, regardless of their marital status or living arrangements. Stated differently, simply because the General Assembly has chosen to allow, for example, a single adult to adopt a child, does not, by implication, mean that it approves of non-marital cohabitation. While any single adult is eligible to adopt a child in Ohio, see R.C. 3107.03(B), contrary to the dissent's implication, Ohio law does not allow *two* unmarried, cohabitating persons to adopt a child. See R.C. 3107.15(A)(1); see, also, *Adoption of Jane Doe, supra*, 130 Ohio App.3d at 292, 719 N.E.2d at 1073 (proposed adoption by same-sex partner of child's biological mother would terminate mother's parental rights). Thus, properly understood, Judge Valen's adoption example actually reinforces Ohio's public policy favoring marriage and opposing non-marital cohabitation.

In furtherance of their efforts to undermine Ohio's public policy against cohabitation, Appellants and the dissent rely on this Court's decision *In re Adoption of Charles B.* (1990), 50 Ohio St.3d 88, 552 N.E.2d 884. According to Appellants' interpretation of the holding in *Charles B.*, there can be "no public policy in Ohio punishing cohabitating couples who live together and raise children." APPELLANTS' MERIT BRIEF at 16. However, a proper understanding of the holding in *Charles B.* prohibits such an illogical conclusion.

*Charles B.* involved a petition for adoption by a homosexual man. The trial court granted the petition for adoption, but the court of appeals reversed, holding that homosexuals were prohibited from adopting children as a matter of law. On appeal, this Court properly interpreted the applicable adoption statutes to reject a *per se* rule prohibiting homosexuals from adopting children, in favor of a case-by-case determination wherein all of the facts are considered in attempting to ascertain "the best interests of the child." *Charles B.*, 50 Ohio St.3d at 90, 552

N.E.2d at 886. To say, as Appellants have, that the Court's holding absolutely negates any public policy in Ohio against cohabitation is to entirely miss the point.

The prevailing public policy in cases involving minor children is always the same--the "best interests of the child" is the paramount consideration. While it may not be the perfect standard, it acknowledges the reality that disputes involving the adoption and custody of minor children often force courts to choose between the "lesser of two evils." As such, "*per se*" rules like the one adopted by the Fifth District in *Charles B.* are counterproductive to the goal of ascertaining the best interests of the child on a case-by-case basis.

For example, in a custody dispute, if the choice is between an alcoholic father who is verbally abusive, a mother in a lesbian relationship with another woman or the local children's services agency, deciding which of the three is in the best interests of the child is not necessarily an easy decision. Yet, it is certainly conceivable that awarding custody to the mother may be in the best interests of the child, particularly if the lesbian mother is discreet about her homosexual relationship. If, however, there is a *per se* rule prohibiting homosexuals from being awarded custody, it could potentially negate the prevailing public policy of protecting the best interests of the child.

Understood in this light, this Court's rejection of a *per se* rule prohibiting homosexuals from adopting a child in *Charles B.* cannot be interpreted to express or imply a public policy that favors non-marital cohabitation (whether heterosexual or homosexual) or one that is even neutral toward it. Instead, it is merely reflective of the fact that, in domestic matters where children are involved, often one public policy (protecting the best interests of the child) must necessarily prevail over another public policy (favoring marriage and disfavoring cohabitation). While this hierarchy within the ranks of Ohio's various public policies may create some tension or

confusion in specific instances, it certainly does not negate altogether the applicability of the lesser public policy in other, unrelated instances, such as in the case *sub judice*.<sup>18</sup>

In further support of their attempt to derail the Court of Appeals' decision, Appellants point to *In re Bacharach* (2001), 344 N.J. Super. 126, 780 A.2d 579.<sup>19</sup> In *Bacharach*, the applicant sought to change her surname to include the surname of her same-sex partner. The trial court denied the application, for substantially similar reasons as those given by the Probate Court here. The Appellate Division reversed the trial court's decision, taking particular aim at the standard applied by the court. *Id.*, 344 N.J. Super. at 134, 780 A.2d at 584 (deeming "public policy judgments as essentially irrelevant to [an] application for [a] name change."). In rejecting arguments comparing the case to *Bicknell*, the court specifically distinguished the New Jersey name change statute from Ohio's statute:

It [*Bicknell*] is also distinguishable since the Ohio statute places a "reasonable and proper cause" burden on the name change applicant[,] whereas N.J.S.A. 2A:52-1 requires only a sworn statement that a change of name is not sought "for purposes of avoiding creditors or perpetrating a criminal or civil fraud." Despite the argument of *amicus curiae*, strict statutory construction restrains us from reading this additional requirement into the statute.

*Id.* at 133, 780 A.2d at 583-84.

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<sup>18</sup> The same is true concerning this Court's decision in *In re Burrell* (1979), 58 Ohio St.2d 37, 12 Ohio Op.3d 43, 388 N.E.2d 738, which is also relied upon by Appellants. See APPELLANTS' MERIT BRIEF at 16. In *Burrell*, the mother of two children who was living in an adulterous relationship with a married man was charged with neglect. Although the mother's adulterous relationship was certainly an "adverse" factor, because it was not having a significant detrimental effect on the children, the Court held that it did not warrant the children's removal from their mother by the state. *Burrell*, 58 Ohio St.2d at 39, 388 N.E.2d at 739. Like *Charles B.*, this holding does not negate Ohio's public policy against adultery; rather, it reflects the paramount importance of protecting the best interests of the child, even if it means keeping them in a less than ideal environment.

<sup>19</sup> As Appellants correctly point out, *Amicus* cited to the trial court decision in *Bacharach*, which has since been overturned by the Appellate Division. Although *Amicus* utilized the trial court's decision in *Bacharach* for a limited purpose, *i.e.*, as an additional example of a state that denied a name change on the basis of a public policy against cohabitation), in retrospect, *Amicus* now realizes that the two cases are very different, a point aptly made by the Appellate Division in flatly rejecting *amicus*' arguments urging the court to rely on *Bicknell*.

Unlike Ohio’s statute, which places an affirmative burden on the applicant to set forth facts showing “reasonable and proper cause,” New Jersey’s name change statute falls into the second category of name change statutes directing the court to approve the name change unless the court finds, based on its own objection or that of an interested third party, that the applicant is seeking the name change for one of only two specified reasons: (i) “for purposes of avoiding creditors,” or (ii) for “perpetrating a criminal or civil fraud.” N.J.S.A. 2A:52-1. Thus, the court in *Bacharach* properly deferred to the intent of the New Jersey legislature, refusing to read into the statute a factor that is not present (*i.e.*, the public policy implications of the requested name change).

Courts in states without such specific statutory limitations, however, have denied name-change requests for public policy reasons similar to those relied upon by the Probate Court. For example, in *Matter of Linda Ann A.*, *supra*, the applicant sought to change her surname to that of her married lover. The court denied the application, holding that it would “not take an action which can only be construed as approving and facilitating an adulterous relationship.” *Id.*, 126 Misc.2d at 44, 480 N.Y.S.2d at 997. In a similar case in New York, the petitioner sought to change her last name to that of the married man with whom she was living in an adulterous relationship. *In the Matter of the Application of Carol B.* (1975), 81 Misc.2d 284, 366 N.Y.S.2d 98. The court denied the petition, commenting: “[i]ndirectly, it appears that the petitioner is asking the court not only to approve a new name, *but to approve of her new relationship.*” (Emphasis added.) *Id.* at 286, 366 N.Y.S.2d at 99. The court concluded: “[i]f an order [approving the name change] were to be made, the court would not only be fostering a misrepresentation that the petitioner is in fact and in law ‘Carol D,’ but the order would also in

effect constitute a condonation of a class B misdemeanor [adultery].” *Id.* at 286, 366 N.Y.S.2d at 100.

The decisions in both *Linda Ann A.* and *Application of B.* provide considerable support for the Court of Appeals’ decision, particularly when viewed in conjunction with this Court’s holding in *Stiles*. Similar to the case here, both cases involved petitions asking the court to approve of a relationship that was clearly in derogation of an overriding state public policy. And again, similar to this case, both courts properly refused to lend “the aura of propriety and official sanction” to such meretricious relationships.

Appellants, however, argue that *Application of B.* is “inapposite,” “stand[ing only] for the proposition that non-fraudulent name changes should be allowed.” APPELLANTS’ MERIT BRIEF at 6. Appellants clearly misinterpret the court’s holding in *Application of B.* While it is true that one of the reasons the court refused to grant the petition is because it would “foster[] a misrepresentation” that the petitioner is married to the man whose last name she sought to assume, the crux of the court’s decision was its refusal to approve of the petitioner’s adulterous relationship. *Id.*, 81 Misc.2d at 286, 366 N.Y.S.2d at 100. Thus, in light of the similar reasons offered by the Probate Court in denying Appellants’ name-change applications, *Application of B.* is particularly applicable to this case.

In a case with different facts but similar applicability, the Virginia Supreme Court struck down an ordinance providing “domestic partner” benefits to unmarried couples. See *Arlington County v. White* (2000), 259 Va. 708, 528 S.E.2d 706. In *White*, a group of taxpayers challenged Arlington County, Virginia’s extension of insurance benefits to the unmarried “domestic partners” of its employees. The Court held that Arlington County acted beyond the scope of its authority in providing such benefits. While the sharply divided Court disagreed about the

fundamental issue it was deciding, the Court was unanimous in its opinion that the domestic partnership benefits bestowed “a governmental benefit on certain relationships that contravene Virginia’s public policy concerning marriage.” *Id.*, 259 Va. at 715, 528 S.E.2d at 710 (Kinser, J., concurring); see, also, *id.* at 720, 528 S.E.2d at 713 (Hassell, J., dissenting)(“The County’s expanded definition of eligible dependents is nothing more than a disguised effort to confer health benefits upon persons who are involved in either common law marriages or ‘same-sex unions,’ which are not recognized in this Commonwealth and are violative of the public policy of this Commonwealth.”).

The legislative and judicial pronouncements discussed above convincingly demonstrate an overriding public policy in Ohio favoring traditional, solemnized marriage and withholding official sanction from cohabitation. As the Court of Appeals affirmed, the Probate Court did not abuse its discretion in relying on this public policy in denying Appellants’ name-change applications.

**Proposition of Law No. V:**

**R.C. 2717.01, as applied by the Court of Appeals to deny Appellants’ application for a name change, does not violate Appellants’ equal protection or due process rights under the Fourteenth Amendment.**

Appellants and *amicus* ACLU of Ohio argue that the denial of Appellants’ name-change applications violates Appellants’ equal protection rights under the Fourteenth Amendment because it bears no rational relationship to any legitimate governmental purpose. Under rational basis analysis, a law or state action will pass constitutional muster unless the “varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [state’s] actions were irrational.” *Vance v. Bradley* (1979), 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171.

The Court of Appeals held that the Probate Court’s decision drawing a distinction between married and unmarried couples on the basis of Ohio’s public policy in favor of marriage “bears a rational basis for treating the two groups in different manners in order to promote a legitimate governmental interest.” SLIP OP. at 11. This decision is in accord with numerous cases upholding state and federal laws affording benefits to married persons that are not afforded to unmarried persons. Most notably, insurance and other benefits for government employees are extended to the spouses of those employees but not to the “domestic partners” of similarly situated government employees. Claims that such policies violate the Equal Protection Clause, however, have been categorically rejected. See, e.g., *Bailey v. City of Austin* (Tex.Ct.App.1998), 972 S.W.2d 180 (charter amendment denying employee benefits to unmarried domestic partners of city employees does not violate equal protection rights).<sup>20</sup>

In *Bailey*, the plaintiffs challenged a city charter amendment, Proposition 22, which had the effect of repealing the City’s provision of employee benefits to unmarried “domestic partners.” Several City employees and their same-sex domestic partners challenged the charter amendment as, *inter alia*, discriminating against unmarried couples in violation of the equal

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<sup>20</sup> See, also, *Rutgers Council of AAU Chapters v. Rutgers, The State University* (1997), 298 N.J.Super. 442, 689 A.2d 828 (denying health benefits to unmarried domestic partners of Rutgers University employees does not violate equal protection rights); *Hinman v. Department of Personnel Administration* (1985), 167 Cal. App.3d 516, 213 Cal. Rptr. 410 (denial of dental benefits to unmarried partners of homosexual state employees is rationally related to legitimate state interest in promoting marriage); *Adams v. Howerton* (C.A.9 1982), 673 F.2d 1036, certiorari denied (1982), 458 U.S. 1111, 102 S. Ct. 3494, 73 L.Ed.2d 1373 (“Congress’s decision to confer spousal status under section [of Immigration and Nationality Act] only upon parties to heterosexual marriages has rational basis”); *Ross v. Denver Dept. of Health and Hospitals* (Colo.Ct.App.1994), 883 P.2d 516 (denial of sick leave benefits to unmarried partner seeking classification as “immediate family” under City of Denver’s Career Service Authority Rules does not violate equal protection); *Koppelman v. O’Keefe* (1988), 140 Misc.2d 828, 535 N.Y.S.2d 871 (denial of succession rights to unmarried “gay life partner” of deceased statutory tenant of record of New York City rent-controlled apartment does not violate equal protection rights); *Matter of Cooper* (1993), 187 A.D.2d 128, 592 N.Y.S.2d 797, appeal dismissed, 82 N.Y.2d 801, 604 N.Y.S.2d 558, 624 N.E.2d 696 (defining term “surviving spouse” as excluding unmarried same-sex partners does not violate equal protection clause of New York Constitution); *Phillips v. Wisconsin Personnel Commission* (1992), 167 Wis.2d 205, 482 N.W.2d 121 (denial of health insurance benefits to unmarried same-sex partner of state employee does not violate equal protection rights).

protection guarantees of the Texas Constitution.<sup>21</sup> Applying the rational basis test, the court held that “*the government has a legitimate interest in recognizing and favoring legally cognizable family relationships including the legal relationship of marriage.*” (Emphasis added.) *Id.*, 972 S.W.2d at 189, citing *Roe II v. Butterworth* (S.D.Fla.1997), 958 F. Supp. 1569, 1582, affirmed (C.A.11 1997), 129 F.3d 1221, certiorari denied (1998), 523 U.S. 1024, 118 S. Ct. 1309, 140 L.Ed.2d 473. The court concluded:

Because Proposition 22 allows the City to provide benefits to an employee’s legal spouse and other persons in a cognizable family relationship with an employee, it advances the government’s legitimate interest in recognizing and favoring such relationships. The classifications drawn by Proposition 22 are substantially related to a legitimate goal and not so attenuated as to render the distinctions arbitrary or irrational.

*Id.* at 189. Thus, although the trial court may have treated Appellants differently because they are unmarried, it clearly had a rational basis to do so.

Moreover, *amicus* ACLU of Ohio’s reliance on *Romer v. Evans* (1996), 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855, and its progeny is misplaced. In *Bailey*, the court rejected the very same argument, stating:

The amendment in *Romer* targeted a specific group--homosexuals--and prohibited all legislative, executive or judicial action at any level of state or local government from protecting that class. \*\*\* Similar circumstances do not exist here. \*\*\* The proposition does not target a group identifiable by a single trait, such as sexual orientation, *but rather targets all who choose domestic partners without the benefit of marriage.* \*\*\* Proposition 22 furthers the City’s interest in recognizing legal relationships including marriage; therefore, we hold it is rationally related to a legitimate purpose.

(Emphasis added.)(Internal citations omitted.) *Bailey*, 972 S.W.2d at 190.

As in *Bailey*, the Probate Court did not deny Appellants’ request for a name change because of their sexual orientation or any other recognizable classification. Rather, as noted by

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<sup>21</sup> The Texas Constitution provides equal or greater protection than that mandated by the federal constitution. *Davenport v. Gargia* (Tex.1992), 834 S.W.2d 4, 15.

the Court of Appeals, the Probate Court specifically denied the request on the basis that it contravened Ohio's public policy against cohabitation, stating:

The fact that these applications involve two women, instead of a woman and a man, does not change the principle involved in cases such as these. \*\*\* If the monogamous couple were a man and a woman[,] the answer would be no.

PROBATE COURT OPINION at 3.

It is axiomatic that, in order to bring a claim for violation of the Equal Protection Clause, Appellants must be able to demonstrate that they are part of a recognizable class of persons, and that the Probate Court discriminated against them on the basis of their being part of such a class. Because it did not take into account Appellants' sexual orientation, or any other recognizable classification in denying their name change applications, the Probate Court's decision does not even implicate, let alone violate, Appellants' equal protection rights.

Appellants and *amicus* ACLU of Ohio also argue that the denial of Appellants' name change applications violates Appellants' substantive due process right to make decisions concerning the care, custody and control of their children. As the Court of Appeals noted, however, this case is not about Appellants' parenting rights. SLIP OP. at 10. Even assuming *arguendo* that it is, Appellants arguments are still without merit. First, any analysis of Appellants' "parental rights" must be made independently. In other words, because both Appellants are unable to be parents of the same child, their rights in regards to the upbringing of their respective children must be analyzed separately. See R.C. 3107.15(A)(1); *Adoption of Jane Doe*, 130 Ohio App. 3d at 292; 719 N.E.2d at 1073 (proposed adoption by same-sex partner of child's biological mother would terminate mother's parental rights).

The record reflects that Appellant Belinda Lou Priddy was pregnant (by artificial insemination) at the time her application was heard. Ms. Priddy's counsel later represented to

the Court of Appeals that Ms. Priddy unfortunately lost that child, but according to representations made to this Court, apparently she was artificially inseminated again and has now given birth to a child. While the record is certainly “sketchy” on this issue, it is abundantly clear that the record is void of any evidence that Ms. Priddy’s rights to make decisions concerning the care, custody and control of her child have been infringed, even as it pertains to the child’s name. As a matter of law, Ms. Priddy is free to give her child (and future children) any name she desires, including the surname “Rylen.” The fact that she may voluntarily choose to give the child a different last name than her own is just that--a choice--and does not infringe on her due process rights to make decisions concerning the care, custody and control of her child. Even if her due process rights are somehow implicated by the denial of her statutory name change application, she is still free at common law--subject only to the constraints set forth in *Pierce*--to adopt any name she wants, including the surname “Rylen.” Thus, even when viewed in a light most favorable to her, Ms. Priddy’s due process arguments simply have no merit.

The same applies to Ms. Bicknell. While there is no evidence in the record of her being pregnant at the time her application was heard, she has apparently indicated a desire to have children of her own in the future. Until she does, of course, the entire argument is moot, as she is not a parent and therefore does not have any parental rights to be denied. See SLIP OP. at 10.

**CONCLUSION**

Based on the foregoing, *Amicus* American Family Association of Ohio respectfully requests that this Court affirm the decision of the Butler County Court of Appeals.

Respectfully submitted,

/s/ David R. Langdon

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing was served upon the following counsel by regular U.S. Mail, postage prepaid, this 8<sup>th</sup> day of February, 2002:

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