CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

----------x

In the Matter of the Application of

CHARLES MARSHALL KERR,
a/k/a CHARLES KERR,
a/k/a CHARLES M. KERR

for Leave to Assume the Name of

CHARLIE MARION KERR

----------x

Index No. NC-000503-14/NY

**MOTION TO MODIFY ORDER GRANTING LEAVE TO CHANGE NAME**

**Memorandum of Law in Support of Petitioner Charles Marshall Kerr's Motion to Modify Order Granting Leave to Change Name**

Petitioner Charles Marshall Kerr submits this memorandum of law in support of her Motion to Modify an Order pursuant to CPLR § 2221(a). Petitioner filed an application to change her name from Charles Marshall Kerr to Charlie Marion Kerr, which this Court granted on March 17, 2014. Petitioner is not seeking reconsideration of the Order Granting Leave to Change Name ("Order"). Rather, Petitioner merely requests that the Court strike a superfluous sentence in paragraph 3 of the Order in which the Court stated, "This name change does not constitute proof of change in gender." (the "Advisory")

Although Petitioner is transgender, the only issue before the Court was her application to change her name. Petitioner did not file a motion to change her gender. Name change orders are fundamentally different from gender change orders (which New York courts currently will not issue), and the inclusion of the Advisory serves no legitimate purpose. Further, the Court's extraneous reference to Ms. Kerr's gender is outside the Court's limited powers of review in a name change application. Finally, the inclusion of the Advisory violates notions of fairness and

implicates constitutional concerns. It creates the potential to violate Petitioner's privacy and lead to anti-transgender discrimination whenever she presents the Order to a third party to update her records.

Accordingly, Ms. Kerr asks the Court to strike the Sentence from the Order and refrain from commenting on Petitioner's gender in the Order.

## STATEMENT OF FACTS

Petitioner Charles Marshall Kerr is a 22-year-old transgender woman born in Baltimore, Maryland, and currently residing in Brooklyn, New York. (Pet. ¶¶ 3, 4) On March 7, 2014, Petitioner filed a petition for change of name to this Court pursuant to New York's name change statute. *See* N.Y. Civ. Rights Law §§ 60–65. Petitioner did not file a petition for gender change. Petitioner satisfied all statutory requirements for a name change application. The Court granted Ms. Kerr's petition on March 17, 2014. But in the Order Granting Leave to Change Name, the Court included the Advisory: "This name change does not constitute proof of change in gender." (Order ¶ 3) Ms. Kerr now brings this motion asking the Court to modify its Order to remove the Advisory.

## ARGUMENT

Ms. Kerr requests that this Court modify its Order granting her name change because the reference to Ms. Kerr's gender is contrary to both law and policy. Name change orders and gender change orders are legally different and should not be treated as the same or intertwined. Further, adding the Advisory to the Order exceeds the Court's limited role in granting name change petitions. Finally, referring to Ms. Kerr's gender creates the potential for stigma and discrimination on the basis of her sex and gender and implicates her rights to equal protection

and privacy. All of these factors support modification.

A. *Name Changes are Separate from Gender Changes, and the Inclusion of the Advisory Therefore Serves No Purpose.*

A name change order is distinct from a gender change order. The name change statute, Civil Rights Law section 61, provides only for name change orders, not for gender change orders. Indeed, the question of whether Ms. Kerr has changed gender for legal purposes is an entirely "separate issue" from whether her name change should be granted. *In re Winn-Ritzenberg*, 26 Misc. 3d 1, 2 (N.Y. App. Div. 2009); *see also In re Guido*, 1 Misc. 3d 825, 828 (N.Y. Civ. Ct. 2003) (reserving judgment in a name change petition on whether petitioner had changed her gender for legal purposes and noting that the questions were not "actually presented" in the petition); *cf. In re Powell*, 95 A.D. 3d 1631, 1632 (N.Y. App. Div. 2012) (finding that medical evidence was irrelevant where petitioner sought a name change rather than a declaration of change in gender).

In this case, Ms. Kerr has not requested that the Court issue any order regarding her gender; she applied for only a name change order. Even if she had requested a gender change order, the Court would likely not grant her one. While New York courts regularly issue name change orders, they will not currently issue gender change orders. As the Supreme Court has stated, "New York State has no statute giving a party a right to petition a court to recognize a change of gender and there is no authorization from the legislature for the court to direct the amendment of a birth certificate as to a person's sex." *A.B.C. v. New York State Dep't of Health*, 35 Misc. 3d 565, 567 (N.Y. Sup. Ct. 2012); *see also In re Guido*, 1 Misc. 3d at 828 (stating that the Court has no authority to declare that the petitioner had changed her sex, particularly where, as here, she had not even requested such a declaration).

As a practical matter, no agency—state or federal—accepts a name change order alone as proof of change of gender. Although agencies have different requirements for changing gender markers, they all require more than simply a name change order. For example, the U.S. Department of State will issue a passport with a changed gender only after receiving a physician certificate stating whether the applicant's gender transition is in process or complete. The Department separately states that gender reassignment applicants must also submit "evidence of legal name change (if applicable)," which makes it clear that the State Department views evidence of name change and change of gender separately. *See Gender Reassignment Applicants*, U.S. Passports & International Travel, http://travel.state.gov/content/passports/english/passports/information/gender.html (last visited Apr. 15, 2014).

Similarly, the New York Department of Motor Vehicles requires a physician's letter stating that one gender predominates over the other before changing an individual's gender on her driver's license; a legal name change is not enough. *See* Memorandum from Patricia B. Adduci, Comm'r, N.Y. Dep't of Motor Vehicles, to All Issuing Officers (Apr. 29, 1987), *available at* http://rnytg.org/wp-content/uploads/2012/10/DMVGenderChangeMemo.pdf. The Social Security Administration has analogous requirements. *See RM 10212.200 Changing Numident Data for Reasons other than Name Change*, Soc. Sec. Admin, https://secure.ssa.gov/poms.nsf/lnx/0110212200 (last updated Sept. 30, 2013). In order to update her Maryland birth certificate, Ms. Kerr would need a court order "indicating the sex of an individual born in this State has been changed by surgical procedure *and* whether such individual's name has been changed." Maryland Code § 4-214(5) (emphasis added). These requirements demonstrate that name change orders and gender change orders are separate and distinct. As such, inclusion of the Advisory serves no purpose. This Court should therefore

avoid furthering any confusion between the two types of orders and remove the Advisory.

B. *Adding Extraneous Language to a Name Change Order Exceeds the Court's Narrow Directive.*

In the absence of fraud, misrepresentation, or interference with the rights of others, name change petitions should be granted freely. *In re Halligan*, 46 A.D. 2d 170, 171 (N.Y. App. Div. 1974); *see also In re Golden*, 56 A.D. 3d 1109, 1111 (N.Y. App. Div. 2008) (holding that a name change petition should be granted where fraud and misrepresentation are not present). The New York name change statute requires a petitioner to provide the Court with specific information, including, *inter alia*, her name, date of birth, place of birth, age, and residence. N.Y. Civ. Rights Law § 61. Notably, the statute does not require a petitioner to include her gender in the application. If the Court is satisfied that the petitioner's application is true, and there is no reasonable objection to the name change, the Court "shall make an order authorizing the petitioner to assume the name proposed." *Id.* § 63. The statute specifies that the order must include the petitioner's date and place of birth and direct publication at least once in a designated newspaper. The order must also direct that the petition and order be filed prior to publication in the appropriate court clerk's office. *Id.* The statute does not instruct the Court to make any reference as to why a petitioner sought the name change, nor should it, as individuals frequently change their names for personal reasons.

The case law confirms the Court's limited role as envisioned by the statute. In granting name change petitions to transgender individuals, courts have held that "there is no reason—and no legal basis—for courts to appoint themselves the guardians of orthodoxy in such matters." *In re Guido*, 1 Misc. 3d at 828; *see also In re Winn-Ritzenberg*, 26 Misc. at 3 (quoting *In re Guido* for the same proposition); *In re Daniels*, 2 Misc. 3d 413, 417 (N.Y. Civ. Ct. 2003) ("[A]n

application to change a name is not to be decided based on public policy grounds, but on a much narrower basis."). These cases direct the Court to avoid substituting its subjective judgment as to the propriety of a name change for an objective consideration of lawfulness. *See In re Winn-Ritzenberg*, 26 Misc. 3d at 2 ("There is no sound basis in law or policy to engraft upon the statutory provisions an additional requirement . . . for the desired name change."). By adding information outside the statutory requirements in the form of the Advisory to the name change order, the Court has inherently injected its subjective judgment into the consideration of lawfulness in a manner that exceeds the limited scope of its inquiry in a name change petition.[1]

C. *Reference to Ms. Kerr's Gender Offends Notions of Fairness and Implicates Constitutional Concerns.*

The Advisory needlessly stigmatizes Ms. Kerr on the basis of her sex and gender identity. Statements about change of gender in name change orders are likely found exclusively in orders granting the petitions of transgender individuals. Even a nontransgender individual changing her name to a gender neutral—or even opposite gender name—likely would not find such language in the order granting her petition. Singling out transgender individuals in this fashion suggests that courts are making subjective judgments about whether a particular name is appropriate for an individual's sex designation. Not only are such determinations outside the Court's purview, *see In re Guido*, 1 Misc. 3d at 828 ("The law does not distinguish between masculine and feminine names, which are a matter of social tradition."), they also raise concerns about sex

[1] Although courts have included such language in previous petitions, *e.g.*, *In re Golden*, 56 A.D. 3d at 1111; *In re Guido*, 1 Misc. 3d at 828; *In re Rivera*, 165 Misc. 2d 307, 312 (N.Y. Civ. Ct. 1995), these opinions were based on a misapprehension of the distinction between a legal name change and a legal change of gender. As explained above, name change orders have no bearing on an individual's legal gender. In addition, subsequent cases have not required name change orders to state that the order may not be used as proof of change in gender. *See, e.g.*, *In re Powell*, 95 A.D. 3d at 1632-33 (granting name change petition without requiring mention of gender in order); *In re Winn-Ritzenberg*, 26 Misc. at 2 (making no mention of including a statement regarding change of gender in the name change order). As such, the Court is not bound to include any language regarding Ms. Kerr's gender in the order and should not do so.

discrimination and stereotyping. *Cf. Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that sex stereotyping based on behavior that does not conform to gender stereotypes constitutes impermissible sex discrimination); *Wilson v. Phoenix House*, 42 Misc. 3d 677, 765-66 (N.Y. Sup. Ct. 2013) ("[D]iscrimination based on gender identity is impermissible gender discrimination under the New York City Human Rights Law.").

Such unlawful sex discrimination also undermines the fundamental equal protection principles set forth in both the United States and New York Constitutions. U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 11. Distinctions made between individuals on the basis of sex are unconstitutional unless supported by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 524 (1996). No name change order can be used as proof of a gender change. Yet only transgender people are being subjected to having this stigmatizing language in their orders. This irrational, sex-based classification cannot withstand scrutiny under equal protection. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.").

The Order also violates Ms. Kerr's right to privacy by effectively disclosing that she is a transgender woman. As noted above, individuals frequently change their names for personal reasons, and in no other context are those reasons disclosed in name change orders. The United States Supreme Court has recognized that the Constitution grants individuals a right to privacy that protects "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). An individual's transgender status is precisely the kind of "personal matter" that the right to privacy reaches, and it may not be disclosed by state actors. *See Powell*

*v. Shriver*, 175 F.3d 107, 111 (2d Cir. 1999) (holding that the constitutional right to privacy extends to "the right to maintain the confidentiality of one's transsexualism"). The inclusion of the Advisory in the Order discloses Ms. Kerr's status without her consent and in so doing, violates her constitutional right to privacy. To remedy this violation, the Court should strike the Advisory from the Order.

## CONCLUSION

For the reasons given above, Ms. Kerr respectfully requests that the Court modify its Order Granting Petition for Name Change by striking the Advisory from the Order and refrain from commenting on Petitioner's gender from the Order.

Dated: New York, New York
April 16, 2014

SHEARMAN & STERLING LLP

By: Beau Buffier

Beau Buffier
Heather Kafele, pro hac vice pending
Elan DiMaio
Jackson Murley
599 Lexington Avenue
New York, NY 10022-6069
Telephone: 212.848.4000
Facsimile: 212.848.7179

Attorneys for Petitioner