

In the Matter of the Application of

Michael David Puglisi

For Leave to Assume the Name of

Mikell Davianna Puglisi

Justice Assigned:  
Hon. Ralph A. Boniello, III

**Index No. 151766**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RENEW AND REARGUE  
APPLICATION TO PROCEED AS POOR PERSON**

Petitioner, through her attorneys at Nixon Peabody, hereby submits this memorandum of law in support of her Motion for Leave to Renew and Reargue pursuant to CPLR 2221 the denial of her Application for poor person status pursuant to N.Y. CPLR 1011. Petitioner sought poor person status in connection with her application to change her name to Mikell Davianna Puglisi from Michael David Puglisi. She is changing her name because she is a transgender woman and needs a legal name that matches her true identity. She meets the qualifications to be granted poor person status and submits this motion to apprise the court of the relevant law on the issue and to submit new evidence. In short, Petitioner sought access to the courts to commence a proceeding for a name change as required by New York law. The proceeding required payment of a filing fee, the same as any other action. Petitioner's petition for a name change is meritorious and Petitioner is unable to pay the fees.

**STATEMENT OF FACTS**

Petitioner is a 44-year-old transgender woman living in Youngstown, NY in Niagara County. Petitioner is seeking to change the traditionally male name she was given at birth, Michael David Puglisi, to her female name, Mikell Davianna Puglisi.

Petitioner is unable to afford the \$210 Index Number fee needed to file her name change petition. In addition, she will have to pay to publish notice of the name change in a local newspaper, which will likely cost \$25 to \$30. She receives public assistance [REDACTED]

[REDACTED] Petitioner has health problems and is unable to work. Puglisi Affidavit ¶10.

On December 6, 2013 in Niagara County Supreme Court, Petitioner filed her name change petition and Affidavit in Support of Application to Proceed as a Poor Person and to Waive Court Fees Pursuant to CPLR § 1101(d). Her poor person affidavit stated, "I have a good and meritorious cause of action in that I wish to change my name for the reasons described in my petition. I am changing my gender and currently live as a woman and do not want to cause any confusion or embarrassment on my part or others." Exhibit B to the Affirmation of Lynnette Nogueras-Trummer, dated January 24, 2014 ("Nogueras-Trummer Affirmation"). Her name change petition stated the grounds for her name change as: "I have been living as a woman for 1 year and 2 months and I am changing my gender within 1 year, I feel that I do not want any confusion with doctors, police or any others." Exhibit B to Nogueras-Trummer Affirmation. In addition to her affidavit, the Application to Proceed as a poor person was also supported by Petitioners welfare statement as proof of income. Puglisi Affidavit ¶4.

On or about December 17, 2013, she received a letter dated December 10, 2013 from Brian D. Seaman, Assistant Niagara County Attorney stating: "Please be advised that I cannot consent to your application to Proceed as a Poor Person. Your proceeding does not fall under CPLR 1101 as it does not constitute the purview of a 'triable action.' Therefore, applicant does not have meritorious claim for his [sic] desired goal." Puglisi Affidavit ¶5.

On December 18, 2013, this Court issued an order denying the poor person application stating, “[u]pon review of the Affidavit in Support of Application for Waiver of Filing and Service Fees and Costs and to Proceed as a Poor Person, and it appearing that the Plaintiff is not entitled to proceed as a Poor Person” the motion was denied. Petitioner was ordered to pay the fee within 120 days or her action would be dismissed. The order was sent to Petitioner by letter dated December 20, 2013. Exhibit C to Nogueras-Trummer Affirmation.

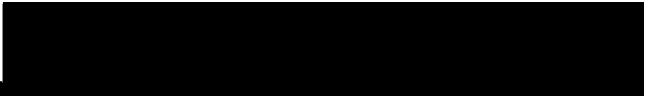
Petitioner has experienced problems because of being a woman who has a male name. For example, she was pulled over while driving because the tail light on her car was not working. When she showed the officer her license, he said, “no, I need your license, not your husband’s.” Puglisi Affidavit ¶17. She explained that she was transgender. Twenty minutes later, two more patrol cars arrived; they started laughing and came up and shined a light in the car on her wife and child. The traffic stop took almost one hour. Similarly, she has had to explain her transgender status at the Public Assistance office, where the office worker was confused because Petitioner’s male birth name did not match my female license picture and appearance and initially refused to give her New York State Benefit Identification Card. Puglisi Affidavit ¶15.

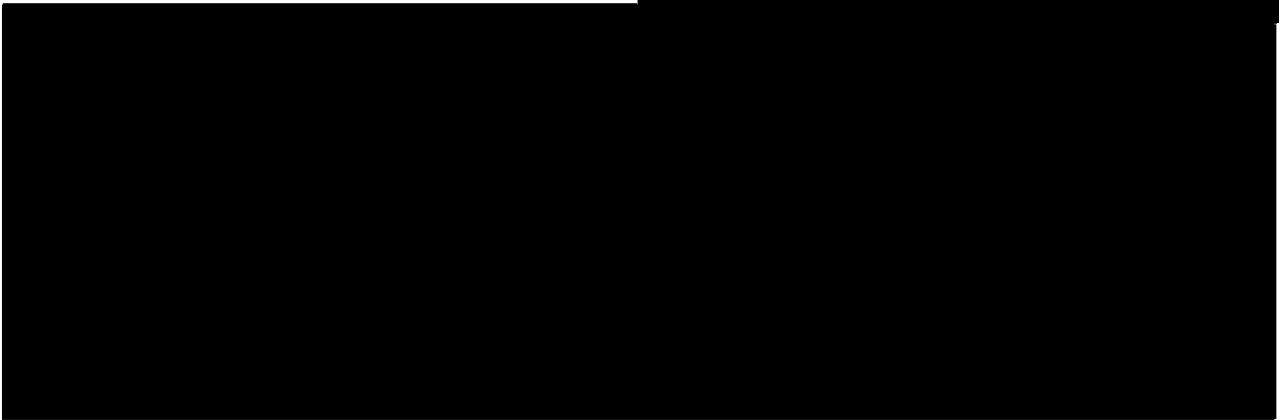
### **ARGUMENT**

It is respectfully set forth that the Court misapprehended the law and facts in denying Petitioner’s motion. Eligibility to proceed as a Poor Person is contingent upon two main factors: 1) being unable to pay the necessary costs to proceed and 2) having a meritorious cause of action. *See* N.Y. CPLR 1101(a) (requiring applications to state that the applicant is unable to pay the costs as well as “the nature of the action; sufficient facts so that the merit of the contentions can be ascertained”). Petitioner meets these requirements.

*A. Petitioner is Unable to Afford the Cost of the Name Change*

The fact that Petitioner receives public assistance likely means she qualifies for poor person status. Courts have recognized receipt of public assistance as prima facie evidence of ability to proceed as a poor person. *Emerson v. Emerson*, 33 A.D.2d 1022 (App. Div. 2d Dep't. 1970) (granting poor person status in a divorce proceeding and noting that receiving public assistance was prima facie evidence that petitioner was unable to pay the fees necessary to proceed); *Marine Midland Bank v. Labour*, 107 Misc.2d 180, 181 (N.Y. Sup. Ct. Delaware County 1980) (citing *Emerson*); *Medina v. Medina*, 109 A.D.2d 691, 487 (App. Div. 1st Dep't. 1985) (finding poor person status "clearly established" where applicant's only source of income was public assistance and she had not assets, savings or real or personal property).

Petitioner's Application to proceed as a poor person and proof submitted established that she is financially eligible for poor person status. 



*B. Gender-Related Name Changes are a Meritorious Cause of Action*

Petitioner has a meritorious cause of action in that she needs a court-ordered name change so that her name may match her true identity. As her poor person affidavit describes, she is seeking the name change because she is transgender and wants to avoid the problems associated with having a name that does not match who she is. She had amended her affidavit to

more fully set forth these situations and her financial condition. These reasons more than meet the basic requirement under CPLR 1101 to describe the nature of the action and explain the merits of her contention. The name change petition will almost certainly be granted. In addition, Ms. Puglisi has submitted an affidavit with ample explanation for her need for a name change, reasons that go beyond meritorious and extend into issues of civil rights, harassment, health care and livelihood. Puglisi Affidavit ¶¶14-17. She was ridiculed by police and a routine traffic stop turned into a one hour ordeal for herself, her ex-wife and her young son. *Id.* at ¶¶16-17.

New York Civil Court as well as various New York Supreme Courts routinely grant poor person status to transgender and non-transgender name change petitioners. For those who need it, the court-approved self-help forms for New York Civil Court generate a poor person application along with the name change petition. *See*, Exhibit D to Noguerras-Trummer Affirmation, Printout from of New York City Civil Court, Adult Name Change Petition Program, court-approved self-help forms introduction. The attorney affirmations of three attorneys serving the transgender community in New York City confirm that courts routinely waive fees and grant poor person status for petitioners filing name change petitions. *See* Affirmation of Noah Lewis, dated January 23, 2014; Affirmation of Megan Stuart, dated January 22, 2014; Affirmation of Elana Redfield, dated January 22, 2014.

*C. Triable Action Refers to the Proper Place to File the Application and Does not Create a Separate Requirement*

The letter from Assistant Niagara County Attorney Brian Seaman stated the claim did not “fall under CPLR 1101 as it does not constitute the purview of a ‘triable action.’ Therefore, applicant does not have meritorious claim for his [sic] desired goal.” This letter conflated a jurisdictional issue with the requirement that a poor person have a meritorious cause of action.

CPLR 1101 designates which court has authority to hear the poor person motion, namely the court where the underlying action is being brought. CPLR 1101(a) (“the court in which an action is triable, or to which an appeal has been or will be taken, may grant permission to proceed as a poor person.”). The language of CPLR 1101 does not create a literal requirement that an action be “triable,” but simply directs the person where to file the poor person application, namely in the same court where they are bringing their case as opposed to a different one. Such a literal interpretation would preclude instances where there are no “triable issues of fact, like CPLR 409(b) (allowing a court to make a summary determination in a special proceeding) or a motion for Summary Judgment in lieu of complaint (CPLR 3213), where the party seeks judgment without a trial based on a document for payment of money. With respect to the actual case being brought, CPLR 1101 simply provides (in a separate sentence to the jurisdictional requirement) that application must explain “the nature of the action; sufficient facts so that the merit of the contentions can be ascertained,” not that the action be “triable.” CPLR 1101(a). The statute further provides that “the court may require the moving party to file with the affidavit a certificate of an attorney stating that the attorney has examined the action and believes there is merit to the moving party's contentions” Nowhere does the certification require the attorney to set forth that the action is triable. The County Attorney incorrectly conflated these two distinct parts of the statute, namely the jurisdictional requirement and the merits of the contentions.

The issue of where the Application to proceed as a poor person must be filed for a name change is resolved by the New York Civil Rights Law. N.Y. Civ. Rights. Law §60 (“A petition for leave to assume another name may be made by a resident of the state to the county court of

the county or the supreme court in the county in which he resides...”). That jurisdictional part of CPLR 1101 is thus, satisfied by reference to the Civil Rights Law.

Name change petitions qualify as “actions” under CPLR 1101. The name change statute requires that the individual file a petition, “signed by the petitioner and verified in like manner as a pleading in a court of record”, (N.Y. Civ. Rights Law §§ 60, 61) making it a special proceeding. *See* CPLR 401 (“[t]he party commencing a special proceeding shall be styled the petitioner”). Name change petitions require a review of the facts presented by a judge, a judicial determination, and an order. N.Y. Civ. Rights Law § 63 (“If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed,... the court shall make an order authorizing the petitioner to assume the name proposed.”). CPLR 105(b) defines the word “action” to include a special proceeding. Similarly, CPLR 103(b) specifically states that “the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings.” When CPLR refers to “actions” it includes name change petitions. *Application of Whyte*, 72 Misc. 2d 116, 118 (N.Y. Civ. Ct. 1972) (finding that name change petitions fall under CPLR 1101 stating “any quibble as to terminology is put at rest by CPLR 103 and 105 (subd. [b]), which eliminate all distinctions between actions and special proceedings.”).

Further there is the actual substance of a name change petition and the importance of access to the court where such access is mandated by statute. “[W]here a court action is a *sine qua non* for a species of relief, a poor person must receive freedom of the courts to the same extent as if he had money.” *Whyte*, 72 Misc. 2d at 117. (“In particular, the courts -- which are the citadel of democracy, and where nearly everyone, at one time or another, has to turn for some

kind of relief -- have become the centerpiece for definitive confirmation that the poor person has almost literally a constitutional right to be afforded unhampered access to our legal system”). As New York law requires court intervention for a name change application, this “obviously falls within the spirit of [CPLR 1101].” *Whyte*, 72 Misc. 2d at 119.

*D. The Relief Provided by Name Change Petition is Vastly Important*

The court need not address whether name change petitioners have a constitutional right to access the courts in order to grant poor person relief. But the fact that constitutional issues are even in play indicates the gravity of Petitioner’s name change, giving rise to a meritorious cause of action. Especially for a transgender individual, the right to a name change is of substantial magnitude. As exemplified by Ms. Puglisi, the mismatch between her legal name and her appearance subjects her to ridicule, harassment and invasions of privacy.

The moment a person seeks employment, attempts to rent an apartment, registers to vote, open a bank account, or wishes to do anything else that requires proof of identity, she must use her legal name and forgo using the desired name that represents and matches her gender expression. In 1974, the Fourth Department, while acknowledging the validity of common law name changes, recognized the unique value of statutory name changes in that they increase the “speed and certainty of the change.” *Application of Halligan*, 46 A.D.2d 170, 171 (App. Div. 4th Dep’t. 1974). If the importance of a legal name change was recognized back then; post-9/11, a judicial name change is essentially required to get any identity documents issued in a person’s preferred name. Now, basic transactions require presentation of identity documents. These include applying for public benefits such as Supplemental Nutrition Assistance Program (food



stamps),<sup>1</sup> Social Security retirement benefits,<sup>2</sup> Medicare,<sup>3</sup> Social Security Disability Benefits,<sup>4</sup> Medicaid,<sup>5</sup> or public housing.<sup>6</sup> Getting a job can require professional certifications, background checks, and all employees must fill out the US Citizenship and Immigration I-9 form.<sup>7</sup> Other situations include registering for school,<sup>8</sup> obtaining a photo ID or driver's license,<sup>9</sup> passport<sup>10</sup> or gun permit,<sup>11</sup> and getting married.<sup>12</sup> Many of these rights, including the right to marry and the right to bear arms, have constitutional implications.

The Social Security Administration ("SSA") will not honor a common law name change. The SSA's Program Operations Manual System ("POMS") provides a list of events that are the basis for a name change. RM 10212.010 Evidence of a Name Change on the SSN, 2010, *available at* <http://policy.ssa.gov/poms.nsf/lnx/0110212010>. The manual lists "US court order for a name change," but not common law name change. It specifically notes that even where through a common law name change someone's state identity card lists their preferred name, the request cannot be processed without a name change document showing that the person has

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<sup>1</sup> Social Security Administration, Supplemental Nutrition Assistance Program Facts, <http://www.ssa.gov/pubs/10101.html#howapply> (requiring " Identification such as a driver's license, state ID, birth certificate or alien card" to apply)

<sup>2</sup> Social Security Administration, Information You Need To Apply For Retirement Benefits Or Medicare, <http://www.ssa.gov/online/ssa-1.html> (may need to provide a birth certificate)

<sup>3</sup> May ask for birth certificate. <http://www.ssa.gov/online/ssa-1.html>

<sup>4</sup> Disability Benefits, <http://www.ssa.gov/pubs/10029.html#part4>

<sup>5</sup> New York State Department of Health, Documents Needed When You Apply for Health Insurance, <http://www.health.state.ny.us/forms/doh-4220b.pdf>

<sup>6</sup> NYC Housing Authority, Applying for Public Housing, [http://www.nyc.gov/html/nycha/html/assistance/app\\_for\\_pubhsg.shtml#eligible](http://www.nyc.gov/html/nycha/html/assistance/app_for_pubhsg.shtml#eligible) (name must match name on Social Security card)

<sup>7</sup> USCIS, Form I-9, Employment Verification, <http://www.uscis.gov/files/form/i-9.pdf>

<sup>8</sup> NYC Department of Education, Registration for New Public School Students, <http://schools.nyc.gov/ChoicesEnrollment/NewStudents/default.htm> (must bring a birth certificate)

<sup>9</sup> Proofs of Identity for Learner Permit, Driver License, and Non-Driver ID Card, <http://www.nydmv.state.ny.us/forms/id44.pdf>.

<sup>10</sup> [http://travel.state.gov/passport/get/first/first\\_830.html](http://travel.state.gov/passport/get/first/first_830.html)

<sup>11</sup> Police Department of the City of New York, Instructions to Handgun License Applicants <http://home2.nyc.gov/html/nypd/downloads/pdf/permits/HandGunLicenseApplicationFormsComplete.pdf>

<sup>12</sup> Getting Married in New York State, [http://www.health.state.ny.us/vital\\_records/married.htm](http://www.health.state.ny.us/vital_records/married.htm)

legally changed their name. SSA, POMS, RM 10212.165 Examples of Name Changes and Corrections that SSA Cannot Process 2013, *available at* <http://policy.ssa.gov/poms.nsf/lnx/0110212165>.

To change the name on a New York State ID or driver's license, New York State requires a court order or six "points" worth of identification in the new name. NYS Department of Motor Vehicles, Change Your Address or Your Name, <<http://www.dmv.ny.gov/addr-name.htm>>. However, most of the possible points of identification would themselves require a court-ordered name change to update, making it impossible to amass six points without a court-ordered name change. *See* New York State Department of Motor Vehicles, Proofs of Identity for Learner Permit, Driver License, and Non-Driver ID Card form ID-44, 2013, *available at* <http://www.dmv.ny.gov/forms/id44.pdf>.

As explained by Petitioner the mis-match between her gender identity and her male birth name has subjected her to ridicule and difficulties in governmental offices and with the police. Puglisi Affidavit ¶17. The mismatch almost precluded her from obtaining the benefits identification card, which she needed to buy food for herself and her son.

The right to be known the name of one's own choosing is well established and can rise to the level of requiring constitutionally-protected access to the courts regardless of ability to pay.

*E. Denial of Poor Person Status in the Case of a Transgender Name Change Denies Constitutionally Protected Rights to Freedom of Speech and Gender Expression*

Relief should be granted under CPLR 1101 because a denial raises constitutional concerns about access to the courts to secure fundamental rights. It is well established that "where a court action is a Sine qua non for a species of relief, a poor person must receive freedom of the courts to the same extent as if he had money." *Whyte*, 72 Misc. 2d at 117. In

*Whyte*, the name change sought was to conform with the petitioner's religious and cultural identity. Similarly, a name change for a transgender person, who is otherwise forced to use an inappropriately gendered name that subjects her to harassment, discrimination, and accusations of fraud, to conform her name with her gender identity is of the utmost importance. The only relief fashioned for such a name change requires filing a petition, which necessitates access to the courts, and the costs associated therewith.

Additionally, given the absence of a viable common law right to change one's name, name change denials result in an abridgment of free expression and compelled speech in violation of the First Amendment. The rights at issue – rights such as privacy and liberty, the right to vote, and the freedom to travel – are rights that have been deemed fundamental by the U.S. Supreme Court. If the poor person application is denied and Petitioner is prevented from adopting a female legal name, she will be denied the ability to exercise her fundamental rights.

### CONCLUSION

Petitioners established that she is entitled to poor person status pursuant to CPLR 1101(d) and respectfully request that the court reconsider its decision and grant her poor person status, and for such other relief and the court might deem just and proper.

Dated: January 24, 2014  
Buffalo, New York

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