Chapter 7: Domestic Relations and Persons

Monroe Inker
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§7.1. Divorce: Cruel and abusive treatment. Reed v. Reed is a significant case in the development of the concept of cruelty as employed in the Massachusetts statute enumerating the grounds for divorce. Cruelty was established as a ground for divorce in a period of social history when physical force was a recognized factor in maintaining connubial order. This notion of the subjection of one spouse to the other inevitably had its impact upon the judicial interpretation of the term "cruelty," which was accentuated by the strict interpretation characterizing the judicial approach. Thus, in order to establish "extreme cruelty," which was the term then used in the statute, it was imperative that there be evidence of physical violence. It was a considerable time before it became recognized that physical violence was not an essential element of cruelty in this context.

In the leading cases of Bailey v. Bailey and Cowles v. Cowles, it was settled that statutory cruelty was established if the conduct proven was such as to cause injury to life, limb, or health, or to create a danger of such injury or a reasonable apprehension of such injury. Implicit in these cases is the concept that acts detrimental to health come within the definition of bodily harm. Not until the case of W—v. W— did the Supreme Judicial Court explicitly decide that any unjustifiable conduct on the part of either spouse that so affected the mental state or so destroyed the peace of mind of the other as seriously to impair bodily health constituted cruelty within the statute, although no phys-

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2 G.L., c. 208, §1.
3 R.S., c. 76, §6 (1836), provided that a divorce from bed and board could be granted for "extreme cruelty." G.S., c. 107, §9 (1860), provided for divorce on grounds of either "extreme cruelty" or "cruel and abusive treatment." Acts of 1870, c. 404, §2, retained essentially the same language. Subsequently, "extreme cruelty" was omitted from the revisions. See Mass. G.L., c. 208, §1 (Ter. ed. 1932).
5 97 Mass. 373 (1867).
6 112 Mass. 296 (1873).
7 141 Mass. 495, 6 N.E. 541, 55 Am. Rep. 491 (1886).
ical violence was inflicted or even threatened. Recognition that impairment of health is a form of bodily harm and may be encompassed through the medium of emotional distress is, in effect, judicial recognition of mental cruelty as a ground for divorce.

This enlargement to include mental cruelty within the definition of cruelty as a ground for divorce has been held within strict limits by a line of cases that hold that conduct not involving physical violence must have been accompanied by malevolent intent to justify a decree on the ground of cruelty. Thus, in the leading case of *Armstrong v. Armstrong* the libelant sought a divorce on the ground of cruel and abusive treatment. The judge of probate found that there was no evidence of physical violence but that the libelant's health was actually impaired by the conduct of the libelee in consorting with another woman. He dismissed the libel and reported the case to the Supreme Judicial Court. The Court affirmed the order dismissing the libel, stating:

> Neither words nor acts which do not involve physical violence, inflicted on the other party, are sufficient to constitute cruel and abusive treatment within the meaning of the statute, unless it is shown that the language was uttered or these acts were committed with a malicious intent and for the purpose of injuring the libelant.

The basis of *Armstrong v. Armstrong* is rejected by the Court in *Reed v. Reed*. The Court adverts to *Bailey v. Bailey*, to the effect that cruelty is broad enough to include mere words, if they . . . tend to wound the feelings to such a degree as to affect the health of the party, or create a reasonable apprehension that it may be affected. . . . [D]eeply wounded sensibility and wretchedness of mind can hardly fail to affect health.

In the *Reed* case, the probate judge found that the libelee was keeping company with another man. The libelant requested the libelee to break this relationship and she refused. As a result, the health of the libelant was affected and he lost weight. The probate court granted a decree nisi for divorce and the libelee appealed.

The Court held that the libelant's injury was a natural consequence of the libelee's wrongful conduct and affirmed the decree. The result of the *Reed* case is that it is no longer necessary in order to maintain a libel for divorce grounded on cruelty to prove malevolence when

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9 229 Mass. 592, 118 N.E. 916, L.R.A. 1918D 426 (1918).
10 229 Mass. at 594, 118 N.E. at 917, L.R.A. 1918D at 427.
there is an absence of physical injury. Now the issue is whether the acts or words of the libellee had a physically injurious effect upon the libelant. Quoting an earlier case, the Court stated:

To establish cruel and abusive treatment it is not necessary to prove that the libellee had a malevolent intent to cause physical injury to the body or to the health of the libelant, it being sufficient to prove that such was the natural consequence of his conduct and that harm resulted or was reasonably likely to follow the acts of the libellee.¹²

The foregoing language indicates that it is within the range of possibility in a particular case that the trial judge may conceivably conclude on the evidence before him that the particular course of conduct shown to have occurred would not be likely to be the cause of physical harm to the complaining party. The libelant need not, of course, submit to conduct likely to impair his or her health, but if the conduct is of such a character, the injured party may terminate the relationship without being required to submit until actual physical harm ensues. This being the case, the question must be asked, how far in fact are the Massachusetts divorce courts from granting divorce on the ground of incompatibility? It may be done in a number of cases under the guise of cruel and abusive treatment, but that concept would seem now to have been extended by Reed v. Reed to its ultimate possible limit.

§7.2. Change of name: Petition in Probate Court. Rusconi, Petitioner,¹ was a petition in the Probate Court for Bristol County for a change of name brought by Joseph Paul Rusconi and his wife in behalf of themselves and their children for the purpose of having their surnames changed from Rusconi to Bryan.² The parents and a brother and sister of the male petitioner appeared in opposition to the petition. The probate judge, after hearing, entered a decree dismissing the petition and the petitioners appealed. The report of material facts filed by the judge of probate was summarized by the Supreme Judicial Court as follows:

The Rusconi family is well known and respected in the community, and is prominent in Italian circles. As a result of the present proceedings “injuries to the feelings and sensibilities of the members of the Rusconi family have resulted”; they have been “held up to ridicule and embarrassment, in this predominantly Italian community.” The objecting members of the family are “proud of

¹² 340 Mass. at 323, 163 N.E.2d at 920. This language was quoted from the Court’s opinion in Rudnick v. Rudnick, 288 Mass. 256, 257, 192 N.E. 501 (1934).

² G.L., c. 210, §12, provides: “A petition for the change of name of a person may be heard by the probate court in the county where the petitioner resides. No change of name of a person, except upon the adoption of a child under this chapter or upon the marriage or divorce of a woman, shall be lawful unless made by said court for a sufficient reason consistent with public interests.”
the name Rusconi, and feel that this petition is a slur to the Italian race." . . . There "exists no confusion or inconvenience over the use of the name, Rusconi." The "nature and purpose of the request for the change of name in this instance [is] an affront to those bearing the name of Rusconi in particular and the Italian race in general." 3

The Supreme Judicial Court, speaking through Mr. Justice Spalding, held that it was not within the discretionary power of the probate judge to deny a petition brought under the statute because he felt that the desired change was un-American and an affront to persons of a particular race or origin. The final decree was reversed and a decree allowing the petition was ordered by the Court.

Appreciation of the meaning of the Rusconi decision requires a brief glance at the background of cases and statutes that preceded it. The common law of Massachusetts permitted a man to change his name and assume any other name without resort to legal proceedings provided the change was not motivated by a fraudulent or dishonest intent. 4 In 1851, the first statute allowing a change of name by judicial decree was enacted in the Commonwealth. 5 It provided that no change of name should be made without sufficient reason consonant with the public interest and satisfactory to the court. In its present form in the General Laws 6 the provision that the proposed change of name must be satisfactory to the court has been omitted and the only limitation upon granting a petition for a change of name is that it must be "for a sufficient reason consistent with public interests."

While the statute appears to vest discretion in the probate judge before whom a change of name petition is heard, no criteria are set forth whereby the judge's exercise of discretion may be measured. In Merolevitz, Petitioner, 7 and Buyarsky, Petitioner, 8 the Supreme Judicial Court discussed the principles that govern a change of name both at common law and under the statute. Both opinions were cited with approval in the Rusconi case and both emphasize that the Massachusetts statute does not abrogate the common law right to change of name.

Although Buyarsky and Merolevitz can be said to be limited by their special facts, the two opinions clearly indicate that the right of one to change his name by judicial decree under the statute is a very broad one. Neither case, however, attempts to interpret the meaning of "sufficient reason" for a decree under the statute. Nor does the Rusconi decision attempt to give the practicing attorney any guideposts for determining the extent of the statutory limitation.

5 Acts of 1851, c. 256, §1.
6 G.L., c. 210, §12, quoted in note 2 supra.
8 322 Mass. 335, 77 N.E.2d 216 (1948).
On the facts of the *Rusconi* case it is not a "sufficient reason consistent with public policy" to deny a petition under G.L., c. 210, §12, merely because the desired change will offend a particular ethnic or national group. However, when the *Rusconi* decision is read in the light of the *Buyarsky* and *Merolevitz* opinions, it would appear that the Supreme Judicial Court is by implication establishing the common law rule for change of name as the criterion for a change of name under the statutory procedure. As stated by the Court: "It is not open to the court to inquire into the motives that prompt one to change one's name, provided, of course, they are not for dishonest or unlawful ends." ⁹

This interpretation of the statute would seem to render the statutory right to change one's name co-extensive with the right at common law, by making the right turn upon whether the change can be shown to be contrary to public interest rather than upon the ability of the petitioner to come forward affirmatively with adequate reasons why he should be permitted to change his name. Thus, the Probate Court cannot deny a petition brought under the statute if the petitioner is acting honestly. As yet, however, the Supreme Judicial Court has not found it necessary to decide this point specifically. It remains for future decisions to determine whether this is a correct analysis of the existing state of the law.