
January 1968

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Recommended Citation

Beverly A. Neblett, Note, *Family Law - Change of Name Proceedings - Failure to Appoint Guardian Ad Litem for Minor Not Fundamental Error*, 22 Sw L.J. 649 (1968)
<https://scholar.smu.edu/smulr/vol22/iss4/7>

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NOTES

Family Law — Change of Name Proceedings — Failure To Appoint Guardian Ad Litem for Minor Not Fundamental Error

In a suit for divorce Mrs. King was awarded custody of her two-year-old son, William C. King, III. After her subsequent marriage to Mr. Newman, two additional children were born, and a very close relationship developed among the Newmans and the three children. Because the couple wanted to sever all ties between the boy and his father, the child was baptized and enrolled in school under the name of John Tracey Newman. However, Mr. King continued to utilize his visitation rights and to make support payments. When asked to consent to the adoption of the boy by Mr. Newman, Mr. King refused and contacted church and school authorities to have records corrected. Mrs. Newman then brought suit on behalf of the boy to change his name. The trial court, finding that the change would be in the child's best interest, granted the application against the wishes of Mr. King, who had intervened to contest the change. The court of civil appeals reversed because the trial court had failed to appoint a guardian *ad litem* to represent the interests of the child.¹ This failure had not been assigned as error by either of the parties. *Held, reversed*: The failure of a trial court to appoint a guardian *ad litem* to represent a minor in a change of name proceeding is not fundamental error, and a court of civil appeals may not reverse a trial court where such failure is not assigned as error. *Newman v. King*, 11 Tex. Sup. Ct. J. 408 (May 11, 1968).

I. FUNDAMENTAL ERROR IN TEXAS: THE INTEREST OF THE PUBLIC

A court of civil appeals may not consider an unassigned error unless that error is fundamental.² And the authority of the Supreme Court of Texas to reverse the judgment of a trial court or a court of civil appeals for fundamental error is the same as that of the court of civil appeals.³ Although the supreme court has not given an all-inclusive definition of the term, it has explained that the field of fundamental error is very narrow.⁴ Fundamental error is that which "directly and adversely affects the interest of the public generally."⁵ In addition, if the record affirmatively and conclusively shows that the court rendering judgment was without jurisdiction of the subject matter, the error is fundamental.⁶ Error in proceeding without an indispensable party is also included within this narrow concept.⁷

¹ *Newman v. King*, 421 S.W.2d 149 (Tex. Civ. App. 1968).

² *McCauley v. Consol. Underwriters*, 157 Tex. 475, 304 S.W.2d 265 (1957).

³ *Id.*

⁴ *State v. Sunland Supply Co.*, 404 S.W.2d 316 (Tex. 1966).

⁵ *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947).

⁶ *McCauley v. Consol. Underwriters*, 157 Tex. 475, 304 S.W.2d 265 (1957).

⁷ *Petroleum Anchor Equip., Inc. v. Tyra*, 406 S.W.2d 891 (Tex. 1966). Excluded from the concept of fundamental error is entry of judgment by a trial court on conflicting findings, *St. Paul Fire & Marine Ins. Co. v. Murphree*, 163 Tex. 534, 357 S.W.2d 744 (1962), and the admission of improper testimony, *State v. Sunland Supply Co.*, 404 S.W.2d 316 (Tex. 1966). And a mere negative showing that the record fails to contain sufficient pleadings or evidence to support the judgment will not be fundamental error. *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947).

To determine what constitutes "the interest of the public generally," the courts must look to the statutes or the constitution of the state.⁸ For example, the Texas Constitution expresses a pledge to the preservation of a republican form of government;⁹ therefore, according to the supreme court,¹⁰ it is fundamental public policy that no one may be declared elected to public office unless he receives a majority or plurality of the votes cast. If the record shows that a plaintiff seeking to recover a public office did not receive a majority of the votes, an appellate court may reverse the trial court's granting of such relief on the basis of fundamental error. However, the error must directly and adversely affect this public policy. If irregularities in the conduct of an election are not shown to have materially affected the results, the irregularities are immaterial and there is no fundamental error.¹¹

Two cases illustrate the supreme court's reluctance to find error which affects the "interest of the public generally." In *City of Deer Park v. State*¹² it was not violative of public interest for a court of civil appeals to rule on the detached character and use of acreage sought to be annexed to a city although a large number of persons would be affected by the action. In *Worden v. Worden*¹³ there was no violation of a fundamental public policy in a judgment restoring a child to a wife and providing that the husband's rights to obtain custody in a court of another state would not be prejudiced. The supreme court explained that if neither party in the proceeding complained of the district court's failure to make a complete determination of the question of custody, such failure did not constitute fundamental error.

II. JUDICIAL STANDARDS FOR APPOINTMENT OF GUARDIAN AD LITEM

The discretionary and inherent power of the courts to appoint a guardian *ad litem* to secure the interests of minors has long been recognized.¹⁴ Statutory provisions have acknowledged the inherent power of the courts¹⁵ yet have not limited their discretion in determining when a guardian *ad litem* is necessary in a particular suit involving minor parties or their interests.¹⁶

This flexible approach serves the interests of the child, provided the trial court is aware of its duty to protect the child. Although investigation by several state legislatures has indicated that appointments of guardians *ad*

⁸ *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 983 (1947).

⁹ TEX. CONST. art. 1, § 2.

¹⁰ *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947).

¹¹ *Kennelly v. Gates*, 406 S.W.2d 351 (Tex. Civ. App. 1966).

¹² 154 Tex. 174, 275 S.W.2d 77 (1955).

¹³ 148 Tex. 356, 224 S.W.2d 187 (1949).

¹⁴ At common law, jurisdiction over infants resided in the chancery courts as a result of the delegation of the King's duty to protect persons under a disability. To enable the court to perform its obligation, the guardian *ad litem* was appointed to defend a law suit on behalf of the minor. See Note, *Guardians Ad Litem*, 45 IOWA L. REV. 376 (1960).

¹⁵ According to *Insurance Co. v. Bangs*, 103 U.S. 435 (1880), the concept of inherent power did not extend to federal courts. However, broad statutory power is given the federal courts in FED. R. CIV. P. 17(c).

¹⁶ CAL. CODE CIV. P. § 372 (1967) (may be appointed); ILL. ANN. STAT. ch. 22, § 6 (1968) ("it shall be lawful for the court . . . to appoint").

litem should be encouraged by statute,¹⁷ judicial concern over the protection of minors does not always need legislative stimuli to encourage appointment of a separate legal representative for minors.¹⁸ The inherent power of the courts and the encouragement of the Wisconsin Supreme Court¹⁹ permitted two Milwaukee family courts to institute rules concerning the appointment of guardians *ad litem*.²⁰ In cases where there is a dispute as to custody or reason for concern as to the welfare of the children,²¹ the courts will appoint a guardian *ad litem*, who may participate in the hearings, cross examine the parties and witnesses, and subpoena witnesses.²² According to Justice Hansen of the Wisconsin Supreme Court, the participation of the legal representative of the child "is an insurance policy against the children becoming mere pawns in a power contest or prizes to be awarded to the winner in a court dispute."²³

Apparently, in only three states—Wisconsin, Michigan, and New York—has it been a practice to appoint guardians *ad litem* for children in custody, divorce, and adoption suits²⁴ (*i.e.*, in suits affecting substantial interests of the child—his physical, moral, and educational environment). In New York, if the legitimacy of a child is affected by a change of name proceeding, a guardian *ad litem* must be appointed to protect the "paramount" rights of the child.²⁵ Thus, the natures of the proceeding and, specifically, of the interests of the child have been relevant factors in the

¹⁷ This conclusion was reached by the Colorado Legislative Council in its *Report to the Colorado General Assembly: Proposed Colorado Children's Code 22-3-5(1)(a)* (Dec. 1966). Under the proposed draft, the court may appoint a guardian *ad litem* to protect the interests of a child in a number of circumstances, *e.g.*, when the court finds that a conflict of interests may exist between the child and his parents or other custodian or that it is in the child's interests and necessary for his welfare. In California the Governor's Commission on the Family recommended that the courts be specifically enabled to appoint an attorney as guardian *ad litem* in custody cases and cases where good cause exists, to give official representation to the child. See Childs, *Rights of the Legally Disadvantaged in Adoption and Child Custody Matters*, 53 *WOMEN LAW. J.* 50 (1967).

¹⁸ *E.g.*, *In re Gault*, 387 U.S. 1 (1966) (violation of due process in commitment hearing of juvenile as a delinquent if boy not notified of right to counsel).

¹⁹ *Wendland v. Wendland*, 29 Wis. 2d 145, 138 N.W.2d 185 (1965); *Edwards v. Edwards*, 270 Wis. 48, 71 N.W.2d 366 (1955).

²⁰ Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 *J. FAMILY L.* 181 (1964).

²¹ Cases where there is reason for concern for the welfare of the children include cases in which the mental or emotional health of the custodian appears to be less than robust, where there are indications of neglect of the children, and where the children appear to be having difficulties in school adjustment or other areas. *Id.* at 182.

²² He is aided by the investigation and evaluation of the Family Court Conciliation Department, and at the conclusion of testimony he makes a statement of recommendation on behalf of the children. But as Judge Leander Foley explained to the Family Law Section of the Texas Bar Association:

The guardian ad litem's role is not duplicitous of the social agency or the trained case worker advising the court. The guardian is best able to advise the social worker what will be the required proof, the type of information that should be made available to the court and in an examination and cross-examination, he can help buttress the inquiry with information favorable to the ward's interest.

Foley, *Lawyer's Role in the Constructive Aspects of Family Law*, summarized in 28 *TEX. B.J.* 610, 612 (1965).

²³ Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 *J. FAMILY L.* 181, 184 (1964).

²⁴ *The Final Report of the Governor's Commission on the Family in California* (1966) cited the success of these three states. An example of the type of cases in which a guardian *ad litem* is appointed is *Sommers v. Sommers*, 33 Wis. 2d 22, 146 N.W.2d 428 (1966), a custody case in which Judge Foley found the mother unfit and the father unable to care for the children and concluded that the County Department of Public Welfare should have custody.

²⁵ "P" v. Dept. of Health, 200 Misc. 1090, 107 N.Y.S.2d 586 (Sup. Ct. 1951).

court's determination of the need for separate representation.

In Texas appointment of a guardian *ad litem* in a suit involving a minor plaintiff depends upon the existence of adverse interests between the minor party and his next friend or guardian, as specified in rule 173.²⁶ Although the statute requires the trial court to appoint a guardian *ad litem* if such a conflict appears,²⁷ it is within the discretion of the court to determine whether adverse interests exist. Cases involving property rights of minors frequently have raised the issue of conflicting interests between a minor and a parent appearing as next friend,²⁸ but in neither custody nor change in name cases had the issue been raised until the court of civil appeals did so in *Newman v. King*.

III. JUDICIAL STANDARDS FOR DETERMINING THE BEST INTEREST OF THE CHILD

Of course, adverse property interests are easier to detect and define than the more intangible adverse interests involved in custody proceedings. And since the interests involved in a change of name proceeding are even more intangible, to the point of being tenuous, the trial court faces a difficult task in protecting the child.

Not only must the trial court protect the child by detecting adverse interests, but also, and primarily, it must consider the best interest of the child. In Texas²⁹ and in other jurisdictions³⁰ the rights and welfare of the child are the paramount considerations in custody suits between parents. However, the determination of the child's best interests is made in the context of the parent's natural right to custody of the child. This right—recognized by statute³¹ and given the constitutional protection of due process³²—has been an almost absolute one.³³ Under this "natural right rule" in custody and adoption suits between a parent and a third party the parent is presumed to be the fit party and a showing of moral unfitness is required before a child can be awarded to a nonparent.³⁴ But in recent cases in several jurisdictions,³⁵ including Texas,³⁶ the interests of the parent have

²⁶ TEX. R. CIV. P. 173 reads: "When a minor . . . is represented by a next friend or a guardian who appears to the court to have an interest adverse to such minor, . . . the court shall appoint a guardian *ad litem* for such person."

²⁷ *King v. Payne*, 156 Tex. 105, 292 S.W.2d 331 (1956); *Jaynes v. Lee*, 306 S.W.2d 182 (Tex. Civ. App. 1957).

²⁸ *Missouri-Kansas-Texas R.R. v. Pluto*, 138 Tex. 1, 156 S.W.2d 265 (Tex. 1941); *Cooper v. Liverman*, 406 S.W.2d 927 (Tex. Civ. App. 1966); *Clarkson v. Ruiz*, 108 S.W.2d 281 (Tex. Civ. App. 1937), *error dismissed*.

²⁹ *Legate v. Legate*, 87 Tex. 248, 28 S.W. 281 (1894); *McLean v. Lewis*, 376 S.W.2d 428 (Tex. Civ. App. 1964), *error ref. n.r.e.*

³⁰ See *Ingraham, Protection of the Rights of Minors and Children in Divorce Cases*, 53 WOMEN LAW. J. 48 (1967).

³¹ For a summary of the statutes giving joint custody to the mother and father, see 4 C. VERNIER, AMERICAN FAMILY LAWS 18 (1936). Judicial preference favors the mother. *Douglas v. Douglas*, 146 So. 2d 227 (La. Ct. App. 1962); *Larson v. Larson*, 30 Wis. 2d 291, 140 N.W.2d 230 (1966).

³² *Armstrong v. Manzo*, 380 U.S. 545 (1965). In this case, involving an adoption, procedural due process giving adequate notice to the natural father was required.

³³ For a discussion of the right of the parent to control a child, see *Simpson, The Unfit Parent*, 39 U. DET. L.J. 347 (1962).

³⁴ *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892 (1963).

³⁵ See Note, *Parent and Child—Parent's Right to Custody as Against Third Party*, 19 BAYLOR L. REV. 299, 305-06 (1967).

³⁶ See *Smith, Family Law, Annual Survey of Texas Law*, 21 Sw. L.J. 50 (1967).

been subordinated to the welfare of the child, regardless of the moral fitness of the parent.

In change of name suits the welfare and happiness of the child is said to be the controlling consideration.³⁷ However, the factors which courts employ in denying a change of name reflect the father's natural right³⁸ to have his child bear his (the father's) name. If the father indulges in misconduct, abandons or fails to support the child, is indifferent to its welfare, or fails to make a timely objection to the change of name,³⁹ the father forfeits his time-honored right to have his child bear his surname. On the other hand, if the father conducts himself properly and manifests a continuing interest in the child's welfare, courts reason that a change of name may not be in the child's best interest because the effect of the change is the further estrangement of the child from a father who has exhibited a desire to maintain the parental relationship.⁴⁰ Thus, with some exceptions,⁴¹ where a child is brought into a second marriage and a new family is established, embarrassment and humiliation caused by the child's different surname are not sufficient grounds for granting the change of name.⁴²

The statutory provision for change in name of a minor in Texas dictates that the change shall be for the benefit and interest of the minor.⁴³ Few appellate decisions have construed the statute. In one case the interests and desires of the father were said to be secondary to the best interests of the children, and the names were changed despite the fact that the father had conducted himself properly and had shown an intent to maintain his parental relationship with the children.⁴⁴ In another proceeding, the application of the mother on behalf of her minor child was denied because the father had demonstrated his continuing interest in the child and there was no evidence to indicate that the father's surname would bring shame or disgrace or would affect the physical welfare or property rights of the child.⁴⁵ Prior to *Newman v. King* the Supreme Court of Texas had not commented on factors to be considered by a trial court in exercising its discretion to change the name of a minor.

IV. NEWMAN V. KING

In *Newman v. King* the Texas Supreme Court primarily considered whether the failure of the trial court to appoint a guardian *ad litem* to represent a minor in a change of name proceeding is fundamental error. Specifically, the omission had resulted from the trial court's failure to discern

³⁷ Lazow v. Lazow, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962); Solomon v. Solomon, 5 Ill. App. 2d 297, 125 N.E.2d 675 (1955); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956); Sobel v. Sobel, 46 N.J. Super. 284, 134 A.2d 598 (Super. Ct. 1957).

³⁸ According to *In re Shipley*, 26 Misc. 2d 204, 205 N.Y.S.2d 581 (Sup. Ct. 1960), the custom of hereditary surnames never amounted to a common law legal right of the father.

³⁹ Degerberg v. McCormick, 41 Del. Ch. 46, 187 A.2d 436 (Ch. 1963); Lazow v. Lazow, 147 So. 2d 12 (Fla. Dist. Ct. App. 1962); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956).

⁴⁰ Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (Mass. 1955); Ouellette v. Ouellette, 420 P.2d 631 (Ore. 1966).

⁴¹ Clinton v. Morrow, 220 Ark. 377, 247 S.W.2d 1015 (1952); Binford v. Reid, 83 Ga. App. 280, 63 S.E.2d 345 (Ga. Ct. App. 1951).

⁴² Degerberg v. McCormick, 41 Del. Ch. 46, 187 A.2d 436 (Ch. 1963).

⁴³ TEX. REV. CIV. STAT. ANN. art. 5929 (1962).

⁴⁴ *Ex Parte Taylor*, 322 S.W.2d 309 (Tex. Civ. App. 1959).

⁴⁵ Plass v. Leithold, 381 S.W.2d 580 (Tex. Civ. App. 1964).

adverse interests between the mother, as next friend, and the boy. Recognizing that "caution would dictate the displacement [of the next friend by a guardian *ad litem*] in every legal proceeding in which the pleadings or the evidence indicate a reasonable possibility of adverse interest,"⁴⁶ the supreme court nevertheless likened the error in deciding the preliminary issue of adverse interests to those errors in judgment which a trial judge may make in deciding many other questions during the course of a trial. Such an error was then placed against the yardstick of rules which the court had used in determining whether a judgment would be reversed on unassigned error, and it fell short. The "interest of the public generally" was not adversely affected because, as the supreme court stated quite simply, the error affected the rights of only the particular minor and the particular litigants. The court also observed that such an error did not deprive the trial court of jurisdiction.⁴⁷ Thus, like other errors occurring in the trial process which had been consistently held not to be fundamental,⁴⁸ the error in *Newman* did not warrant reversal by an appellate court.⁴⁹

Three additional questions of law were considered by the supreme court.⁵⁰ Two were constitutional questions: first, whether there was a denial of due process of law with regard to the rights of the father, and secondly, with regard to the rights of the child. Clearly, there was no denial of procedural due process in regard to the rights of the father—he had notice and participated in the trial.⁵¹ The court also rejected the contention that there are constitutional prohibitions against taking the name of a natural father away from his child unless the father has forfeited, from misconduct, his right to have his child bear the name. No authority was discovered to substantiate this contention;⁵² moreover, the trial court expressly had found that the change of name was in the child's best interest.

The third question was based on the assertion that the trial court had abused its discretion in changing the child's name because the father had not been guilty of any misconduct, while the parents had falsified records by indicating Mr. Newman as the natural father of the boy.⁵³ The supreme

⁴⁶ 11 Tex. Sup. Ct. J. 408, 409 (May 11, 1968).

⁴⁷ A dissenting opinion by Justice Smith was based entirely on the question of fundamental error. It argued that the error was fundamental not only because the court lacked jurisdiction over the child, but also because public policy had been violated by the error—public policy as expressed in rule 173 and in constitutional guarantees of due process.

⁴⁸ The court cited seven supreme court decisions following *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979 (1947), as examples of errors in the trial process. These cases include *State v. Sunland Supply Co.*, 404 S.W.2d 316 (Tex. 1966); *St. Paul Fire & Marine Ins. Co. v. Murphree*, 163 Tex. 534, 357 S.W.2d 744 (1962); *City of Deer Park v. State*, 154 Tex. 174, 275 S.W.2d 77 (1955); *Worden v. Worden*, 148 Tex. 356, 224 S.W.2d 187 (1949).

⁴⁹ One case cited by the court of civil appeals was distinguished by the supreme court because the reversal for failure to appoint a guardian *ad litem* had been based upon a proper assignment of error. *Cooper v. Liverman*, 406 S.W.2d 927 (Tex. Civ. App. 1966).

⁵⁰ Five points of error had been raised before the court of civil appeals but were not considered by that court. The supreme court had jurisdiction to decide all five.

⁵¹ The court referred to the decision of *Armstrong v. Manzo*, 380 U.S. 545 (1965), which had involved only the constitutional right of the natural father to notice of adoption proceedings.

⁵² The dissenting opinion, citing both *Armstrong v. Manzo*, *id.*, and *In re Gault*, 387 U.S. 1 (1967), discussed a different aspect of constitutional guarantees which could protect the child. This aspect concerned adequate representation to enable the child to be heard "at a meaningful time and in a meaningful manner at a hearing before a juvenile court judge to determine delinquency incarceration." 11 Tex. Sup. Ct. J. at 616.

⁵³ The trial court had ordered the Newmans to correct the school and church records and had given Mr. King specific visitation rights.

court found that the evidence supported the findings of the trial court,⁵⁴ and after reviewing the findings, it could discover no abuse of discretion in the decision to change the child's name. Thus, it concluded that the trial court's exercise of discretion could not be overturned "by the father's deep-seated and understandable wish that his son continue to bear his name or by the fact that he has been guilty of no misconduct which would bring the name into disgrace or disfavor."⁵⁵

V. CONCLUSION: THE RESPONSIBILITY OF THE TRIAL COURT

In affirming the trial court, the Supreme Court of Texas reached a commendable result with regard to change of name proceedings. By accepting the trial court's findings and use of evidence other than a showing of forfeiture by the father, the supreme court encouraged the lower courts to determine the best interest of the child on the basis of a broad factual presentation. In addition, the tenuous character of the interests to be protected by appointment of a guardian *ad litem* justified reliance on the discretion of the trial court. And exclusion of the unassigned error from the meaning of fundamental error is consistent with the narrow interpretation given to the term by the supreme court. Since the exclusion hinged upon an adverse, direct effect on the public interest, the court apparently reasoned that if the statutory language of rule 173 expresses a fundamental public policy, a lone case affecting a child and two families would not adversely and directly affect this public policy.

On the other hand, the praiseworthy impact of *Newman v. King* on change of name proceedings does not mitigate the unnecessary and unfortunate effect which the decision is likely to have on protection of the interests of minors by an appellate court and on utilization of guardians *ad litem*. The supreme court's rationale—that the error was not fundamental because it affected only those parties in the case—forecloses a ruling of fundamental error resulting from failure to appoint a guardian *ad litem* in custody and adoption suits. Such foreclosure was unnecessary. The supreme court should have recognized the tenuous character of the child's interest in his surname and concluded that because this interest was tenuous, public policy was not adversely affected by the failure to appoint a guardian *ad litem*. As it is, the court's rationale will likely affect adversely public policy as expressed by rule 173 because the appellate court now has no power to review the trial court's failure to appoint a guardian *ad litem* if error is unassigned. Thus, the duty of protecting the child lies entirely with the trial court and the parties. As the dissent points out, "The other parties do not object or assign, and the trial court errs, and that's the end of it."⁵⁶

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⁵⁴ There was no contention on appeal that the findings had no support in the evidence; neither was there a contention that the best interest of the child should not be the controlling consideration in the trial court. Granting of the application was based upon three findings: (1) the child's identity was established under the changed, baptismal name; (2) bearing his original name would humiliate the child and disrupt his home life; and (3) as medical experts had testified, changing the child's name back to the father's would probably have a detrimental effect on his developing personality.

⁵⁵ 11 Tex. Sup. Ct. J. at 410.

⁵⁶ *Id.* at 616.