

POST OPERATIVE TRANSSEXUALS' RIGHT TO MARRIAGE

By Sarah Leinicke*

Can people born female and who identify as men, whose birth certificates and drivers licenses state they are men, and have masculine names, beards, chests, who wear men's clothing, and go by the pronoun "he" marry women? Similarly, can people born male and who identify as women, whose birth certificates and drivers licenses state they are women, and have feminine names, breasts, vaginas, who wear women's clothing, and go by the pronoun "she" marry men?

As medical and societal understandings of gender change, courts are grappling with who defines a person's gender for legal matters such as marriage. The medical community no longer considers gender a clear, simple factor determined by sex at birth. For example, the Merriam Webster Medical Dictionary, reflecting a more complicated and nuanced concept of gender, now defines it as a combination of behavioral, cultural and psychological traits.¹ In response to this change, some courts have found that a person's gender was a medical factor for doctors to define.² Other courts have considered gender a matter of social policy that the legislative branch should define.³ None, thus far, have determined that one's gender is for the individual alone to determine. This article will examine how the definition of gender impacts a transsexual person's the right to marriage.

DEFINITIONS: THE TRANSGENDER UMBRELLA

"Transgender" is an umbrella term for people whose gender identity does not conform to traditional notions of their biological sex. Examples of transgender people include cross-dressers, drag queens, and transsexuals.

Transgender people who want to change their physical sex characteristics, through hormone treatment and/or sex reassignment surgery, are transsexuals. If they have already undergone hormone treatment or surgery, they are called "post-operative transsexuals," as opposed to "pre-operative transsexuals." Today, transgender people endure discrimination in employment, housing, health care, social services, and face disproportionate police harassment.⁴ As a result of such rampant inequity, transgender people are disproportionately poor, homeless, and incarcerated, and are 7-10 times more likely to be a victim of murder.⁵

SEXUAL REASSIGNMENT HORMONE TREATMENT AND SURGERY

Psychiatrists repeated attempts to treat transsexuals without hormones or surgery have been ineffective in combating the population's high incidence of self-mutilation or suicide.⁶ In contrast, sex reassignment treatment significantly reduces suicide rates among transsexuals and improves their mental stability, socioeconomic functioning and partnership experience.⁷

In order to undergo sex reassignment treatment, potential patients must prove they meet the requirements of Gender Identi-

tity Disorder as defined by the Diagnostic and Statistical Manual of Mental Illness (DSM – IV).⁸ The DSM – IV has a long list of criteria for transsexuals, such as "persistent discomfort" in the gender role that causes "clinically significant distress or impairment" in their work or personal lives.⁹

However, despite satisfying these strict requirements, many people still do not have access to sex reassignment treatment due to the high cost of the procedure and few alternative sources to provide funding. Medical treatment for Gender Identity Disorder can cost thousands of dollars and is rarely covered by insurance plans. Medicare does not cover sex reassignment surgery and Medicaid very rarely extends coverage for the treatment.¹⁰ Furthermore, all private insurance plans in the U.S. explicitly exclude coverage for sex reassignment treatments.¹¹

Low-income transsexuals who cannot afford hormones or surgery are more visibly gender non-conforming and thus prone to employment and other discrimination. Also, people cannot change the gender on their driver's licenses or birth certificates if they have not undergone sex reassignment treatment.¹² Absent proper identification documents, low-income, pre-operative transsexuals do not have the advantages of their wealthier, post-operative counterparts in trying to access legal marriage. For that reason, this article only addresses the right to marriage for post-operative transsexuals.

THE FIGHT FOR EQUAL MARRIAGE BENEFITS

Post-operative transsexuals have joined queers and their allies in the fight to access federal and state benefits for married couples that are not offered in civil unions, including benefits in health insurance, taxes, unemployment compensation, immigration status, family leave, inheritance, and hospital visitation.¹³ The marriage equality movement suffered a significant setback in the November 2004 elections, when many states adopted constitutional amendments banning same-sex marriage. Due to recent case holdings, state governments now have the responsibility to determine whether the marriage of post-operative transsexual to persons of their birth-sex falls into the category of same-sex marriage.

KANTARAS V. KANTARAS: A LANDMARK CASE

The holdings of the trial and appellate courts in *Kantaras v. Kantaras* each reflect two different perspectives on a post-operative transsexual's right to marry.¹⁴ The Circuit Court for Pasco County ruled that a post-operative female-to-male transsexual's marriage to a non-transgender woman was legal.¹⁵ The Florida Second District Court of Appeals reversed the trial court's decision, ruling that the legislature should determine whether medical advancements support a change in the meaning of the words "female" and "male."¹⁶

In 1959, Margo Kantaras was born female in Ohio.¹⁷ In 1986, after coming to terms with her gender identity, Margo legally changed his name to Michael in Texas.¹⁸ In 1987, Michael was approved by the Gender Treatment Program at the Rosenberg Clinic in Texas for sex reassignment surgery.¹⁹ He underwent hormonal treatment, a hysterectomy, and a double mastectomy.²⁰ In 1988, he met Linda, who was pregnant by a former boyfriend.²¹ Linda knew that Michael was a transsexual.²² In 1989, Michael married Linda in Florida and adopted her son.²³ In 1992, Linda gave birth to a daughter after undergoing artificial insemination with the sperm of Michael's biological brother.²⁴ Michael and Linda raised their two children together for nine years.²⁵ In 1998, Michael filed for divorce and custody of both children.²⁶ Linda counterpetitioned for dissolution and/or annulment claiming that the marriage was void because it violated the Florida law banning same-sex marriage.²⁷ One year later, the Probate Court of Mahoning County, Ohio granted Michael's request to change his birth certificate to read "Michael Kantaras" with the sex marked as "male."²⁸

TRIAL COURT: MARRIAGE IS VALID

In a landmark 809-page opinion aired nationally on Court TV, the Circuit Court for Pasco County found that Michael Kantaras was legally male when he married Linda and that their marriage was valid.²⁹ The court also gave Michael primary residential custody of their two children.³⁰ It was the first known case in the United States that included testimony from medical experts concerning transsexual marriage.³¹ Previous transsexual marriage cases in Kansas and Texas were pre-trial defense motions that did not include such medical testimony.³² This is an example of a court's deference to medical expert testimony with regards to defining gender.

The trial court's reasons for determining that Kantaras was legally male included: 1) his parents and siblings observed male characteristics and agreed he should have been born as a boy; 2) Michael always perceived himself as a boy while he was growing up; 3) he completed the medical surgeries and hormone treatments to gain a male body and voice; 4) Linda was fully informed about Michael's sex reassignment status when they married; 5) Michael had been accepted as a man in "a variety of social and legal ways," including on his driver's license, birth certificate, and in legal adoption proceedings; 6) Michael was diagnosed with Gender Identity Disorder at age 20; 7) Michael had no secondary female characteristics, such as ovaries, fallopian tubes, or breasts; 8) the only female feature remaining on Michael's body, the vagina, was not typically female because of an enlarged and elongated clitoris; 9) no chromosome tests were conducted to determine that Michael had a female chromosomal pattern (XX); and 10) chromosomes were only one factor in determining sex and did not overrule gender or self identity.³³

The trial court's reasons for concluding Micheal Kantaras gender as legally male, as outlined above, focused on scientific advancements in gender determination that strayed from tradi-

tional notions of biologically determined gender. The court treated Kantaras' gender as a matter of fact rather than a matter of law.³⁴ In contrast, the Texas Court of Appeals and the Kansas Supreme Court had both found that post-operative transsexual marriage cases presented matters of law.³⁵

In the closing arguments of the trial court case, counsel for Linda Kantaras, Claudia Wheeler, cautioned against the disastrous consequences if the court deemed Micheal to be legally male. "If you open the door this much it's going to be like the barnyard door coming open. If Michael can be a male because Michael thinks he is a male, and because of some surgery, your Honor, then we're headed for big trouble... It will create utter chaos. I believe the floodgates will be opened."³⁶ Apparently, the appellate court agreed.

APPELLATE COURT: MARRIAGE RULED INVALID

The Florida Second District Court of Appeals reversed the trial court decision, ruling that a post-operative female-to-male transsexual could not validly marry a female in Florida.³⁷ The court ruled that the guidelines for transsexual marriage was an issue for the legislature to decide.³⁸ "We must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth."³⁹ In its decision the court noted the Probate Court of Ohio, the Kansas Supreme Court, and the Texas Court of Appeals decisions all delegated the issue of transsexual marriage to the legislature.⁴⁰

The Florida Second District Court of Appeals relied on the public policy view that the purpose of marriage was to procreate as the basis for their decision.⁴¹ The court noted that the New York Appeals Division voided a post-operative transsexual marriage because the marriage could not produce genetic offspring,⁴² and that marriage "exists for the purpose of begetting offspring."⁴³ Thus, the court associated gender with sexual function. Since sex reassignment surgery does not enable people to fully perform sexual functions, the New York court argued that post-operative transsexuals could not fulfill this purpose of marriage.⁴⁴ Similarly, the Kansas Supreme Court relied on sexual function in defining gender. The court used a 1970s definition of sex contained in Webster's dictionary that males are the "sex that fertilize the ovum and beget offspring" and females "produce ova and bear offspring."⁴⁵ As a point of contrast, the Florida court also examined one United States case where a transsexual marriage was ruled valid. The New Jersey court held that a transsexual could marry in his or her reassigned sex if the person could "fully function sexually."⁴⁶ However, in the New Jersey case, sexual function referred to the act of having sex rather than to "begetting offspring."

Ruling that sexual function and the ability to procreate are requisites for marriage raises complications for other infertile couples, such as sterile men or post-menopausal women.⁴⁷ Such complications underscore the inadequacy of the Florida court's decision in an age where gender and sex no longer align with

traditional roles in procreation.

AUSTRALIAN AND EUROPEAN COURT POSITIONS

Michael Kantaras drew on Australian precedent to defend his case.⁴⁸ Australia also prohibits same-sex marriage but found that a post-operative female-to-male transsexual could legally marry a woman.⁴⁹ In contrast to most U.S. courts, the Australian Family Court recognized advancements in medical knowledge surrounding gender identity and found that a female-to-male transsexual was a man for purposes of marriage.⁵⁰

The European Court also allows post-operative transsexuals to marry.⁵¹ In 2002, the European Court held that the United Kingdom violated a male-to-female transsexual's right to marriage under the European Convention on Human Rights.⁵² The European court contrasted the stress and humiliation caused by the disjuncture between the transsexual person's legal and personal lives with the impact that changing the law would have on United Kingdom authorities.⁵³ The court concluded that "[S]ociety may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."⁵⁴ The European Court held that member countries could not bar transsexuals from marrying; however, each country could determine the specific requirements applicants must meet in order to be eligible for legal sex reassignment.⁵⁵

In contrast to the Australian Family Court and the European Court, U.S. federal courts, like the Florida Second District Court of Appeals, do not recognize the right of post-operative transsexuals to marry.⁵⁶ A Filipino man filed suit against the Citizenship and Immigration Services (CIS) for denying him citizen-

ship based on his marriage because his American wife was transsexual.⁵⁷ The woman had undergone male-to-female sex reassignment nearly 20 years prior.⁵⁸ The Filipino man married the woman a year after legally entering the U.S. and applied for permanent resident status.⁵⁹ This case is likely the first suit to challenge the CIS in federal court over the immigration status of married transsexuals.⁶⁰ The U.S. federal government currently has no statute or regulation that addresses whether people can legally change their sex.⁶¹

CONCLUSION

At a time when scientific understandings of gender have outgrown traditional definitions, the societal benefits of denying transsexual marriage are vague. In contrast, the benefits of marriage to transsexual people are clear. They would not only gain the traditional legal advantages of marriage, but formal and legal recognition of their lives as reflected on their birth certificates and drivers licenses – the lives they lead in their homes and in their jobs. The Florida District Court of Appeals called on the state legislature to amend marriage law if it wanted the courts to include post-operative transsexuals in marriage.⁶² The decision of the Florida state legislatures and other state legislatures will bear great implication for transsexuals and their partners. As Michael Kantaras' attorney Karen Doering said during the closing arguments of the trial court case: "[Michael's] family knows [that he is a man], the community knows it, and the medical community knows it. And now, your honor, you've been asked to decide whether the legal community knows that Michael Kantaras is a man."⁶³

ENDNOTES

*Sarah Leinicke is a first year student at American University Washington College of Law.

¹ MERRIAM WEBSTER'S MEDICAL DICTIONARY, available at <http://www.nlm.nih.gov/medlineplus/medlineplusdictionary.html>

² *Kantaras v. Kantaras*, No. 98-5375CA (Fla. Cir. Ct. Feb. 19, 2003), *rev'd* 884 So. 2d 155 (Fla. 2d Dist. Ct. App. 2004) [hereinafter *Kantaras I*]; *In re Kevin*, (2001) 28 Fam. L.R. 158; *Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

³ *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. 2d Dist. Ct. App. 2004) [hereinafter *Kantaras II*]; *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate 1987); *In Re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2002); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999).

⁴ See Shannon Minter and Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, National Center for Lesbian Rights and the Transgender Law Center (2002), available at <http://nclrights.org/publications/transrealities0803.htm> (reporting that in a survey of 155 transgender people in San Francisco, reported that nearly one in two transgender people faced employment discrimination, one in three endured housing discrimination, 30 percent had been discriminated against while trying to access health care, more than one in four had been harassed by a police officer, one in five had been discriminated against while trying to access social services, and 14 percent suffered discrimination while in prison).

⁵ See generally SYLVIA RIVERA LAW PROJECT, at <http://www.srlp.org/index.php?sec=01A&page=about>.

⁶ See RICHARD GREEN & JOHN MONEY, *TRANSSEXUALISM AND SEX REASSIGNMENT*, (John Hopkins Press 1968).

⁷ Pfäfflin Friedemann & Junge Astrid, *SEX REASSIGNMENT: THIRTY YEARS OF INTERNATIONAL FOLLOW-UP STUDIES AFTER SRS -- A COMPREHENSIVE REVIEW, 1961-1991*, IJT Electronic Books (1998), available at <http://www.symposium.com/ijt/pfaefflin/1000.htm>.

(This is the most comprehensive review of sex reassignment surgery over 30 years, including more than 2000 patients in 13 countries).

⁸ AMERICAN PSYCHIATRIC ASSOCIATION, *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 2000).

⁹ *Id.*

¹⁰ Shannon Minter, *Representing Transsexual Clients: Selected Legal Issues, 12-13*, National Center for Lesbian Rights (2003), available at <http://nclrights.org/publications/tgclients.htm>; see also Medicare Program: National Coverage Decisions, 54 Fed. Reg. 34555, 34572 (Aug. 21, 1989).

¹¹ *Id.*

¹² See *id.* (stating that 18 states allow transsexuals to change the sex on their birth certificate providing they have undergone sex reassignment).

¹³ U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Washington, D.C. Jan. 23, 2004) (identifying 1,138 federal rights and responsibilities that turn on marital status), at <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁴ *Kantaras I*, *supra* note 2.

¹⁵ *Id.* at 808.

¹⁶ *Kantaras II*, *supra* note 3, at 161.

¹⁷ *Id.* at 155.

¹⁸ *Id.*

¹⁹ *Kantaras I*, *supra* note 2, at 792.

²⁰ *Kantaras II*, *supra* note 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Arthur S. Leonard, *Transsexual Dad Wins Custody*, GAY CITY NEWS, Feb. 28-

ENDNOTES CONTINUED

Mar. 6, 2003, at 2 [hereinafter Leonard].

²⁶ Kantaras II, *supra* note 3.

²⁷ *Id.*

²⁸ Kantaras I, *supra* note 2, at 762.

²⁹ Kantaras II, *supra* note 3; *see also* Leonard, *supra* note 25, at 1.

³⁰ Kantaras II, *supra* note 3.

³¹ *Id.* at 2.

³² *Id.*

³³ Kantaras II, *supra* note 3, at 156.

³⁴ Leonard, *supra* note 25, at 3-4.

³⁵ Kantaras II, *supra* note 3, at 158; *see Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999); *see also In Re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

³⁶ Transcript of Closing Arguments, *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. 2d Dist. Ct. App. 2004) (No. 2D03-1377), available at http://www.courtvt.com/trials/kantaras/020802_ctv.html.

³⁷ Kantaras II, *supra* note 3.

³⁸ *Id.*

³⁹ *Id.* at 159.

⁴⁰ *Id.* at 158; *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate 1987); *In Re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999).

⁴¹ Kantaras II, *supra* note 3 at 158.

⁴² *Id.*; *see also B. v. B.*, 355 N.Y.S.2d 712, 717 (N.Y. App. Div. 1974).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Press Release, Transgender Law & Policy Institute, Kansas Supreme Court

Decision is a Call to Action (March 26, 2001); *see In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

⁴⁶ Kantaras II, *supra* note 3, at 158; *M.T. v J. T.*, 355 A.2d 204, 210-211 (N.J. 1976).

⁴⁷ *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

⁴⁸ Kantaras II, *supra* note 3, at 159.

⁴⁹ *Id.*; *see also In re Kevin*, (2001) 28 Fam. L.R. 158.

⁵⁰ Kantaras II, *supra* note 3, at 159; *see generally* Fiona David and Jake Blight, Understanding Australia's Human Rights Obligations in Relation to Transsexuals: Privacy and Marriage in the Australian Context, *DEAKIN LAW REVIEW*, Vol. 9 No. 2, pp. 315-316, 2004 [hereinafter David]; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

⁵¹ David, *supra* note 50; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 471-472.

⁵² David, *supra* note 50.

⁵³ *Id.* at 314-315.

⁵⁴ *Id.*; *see also Goodwin v. UK*, (2002) 35 EHRR 18, 477.

⁵⁵ David, *supra* note 51, at 316.

⁵⁶ Ann Rostow, *Man Who Wed Transsexual Faces Exile*, PLANETOUT NETWORK, (Dec. 2, 2004) at 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Gillian Flaccus, *Lawsuit: Filipino Husband Denied U.S. Citizenship Because Wife Was Transsexual*, ASSOCIATED PRESS, (Nov. 30, 2004), at 2.

⁶¹ *Id.*

⁶² Kantaras II, *supra* note 3 at 159.

⁶³ *Supra* note 36.