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Same-Sex Marriages Have Existed Legally in  
the United States For a Long Time Now

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# SAME-SEX MARRIAGES HAVE EXISTED LEGALLY IN THE UNITED STATES FOR A LONG TIME NOW

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## I. INTRODUCTION

Although Texas law prevents same-sex couples from obtaining marriage licenses,<sup>1</sup> until recently the legal definition of sex has gone undefined. On October 27, 1999, the Texas Court of Appeals, Fourth Appellate District [hereinafter Fourth Court],<sup>2</sup> ruled that the

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\* Phyllis Randolph Frye is an OUT transgender attorney from Houston. In her earlier life she was an Eagle Scout, her high school's ROTC commander, a member of the Texas A&M University Corps of Cadets, a military officer, a civil engineer, and a father. Ms. Frye has been involved, consistently on the front lines, in the LGBT freedom movement for twenty-five consecutive years. In 1980, she changed the Houston law against crossdressing. She founded the Transgender Law Conference in 1991. She was a pioneer in the national movement for transgender legal and political action. In 1995, Ms. Frye received the "Creator of Change" Award from the National Gay and Lesbian Task Force. In 1999, she received the Virginia Prince Lifetime Contribution Award from the International Foundation for Gender Education. During this year, she and attorney Alyson Meiselman of Maryland, took the *Christie Lee Littleton* case (discussed *infra*), which declared that genitals were not dispositive in the legal definition of sex so that a transgendered woman, vaginaed for over twenty years, was declared to be legally male. She has also taught as an adjunct professor of law and wants to continue that if allowed.

\*\* Ms. Meiselman is an OUT transgender lawyer from Maryland, admitted *pro hac vice* in Texas, and was Counsel of Record in the Petition for Writ of Certiorari, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (No. 00-25). Meiselman has been practicing family law since 1981 and is on the board of the National Lesbian and Gay Law Association and on the legal committee of the Harry Benjamin International Gender Dysphoria Association, Inc. She is also a father and was, prior to her transition, an Assistant Scoutmaster and a Cubmaster, having received awards for leadership in the local scouting units. Shortly after her transition, she was involuntarily dropped from all scouting leadership roles. The ostracizing actions of the local Boy Scout organizations toward her son have jeopardized her son's goal of attaining the rank of Eagle Scout.

<sup>1</sup> TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998) ("A license may not be issued for the marriage of persons of the same sex.").

<sup>2</sup> The jurisdiction of the Fourth Court covers the following Texas counties: Atascosa, Bandera, Bexar, Brooks, Dimmit, Duval, Edwards, Frio, Gillespie, Guadalupe, Jim Hogg, Jim Wells, Karnes, Kendall, Kerr, Kimble, Kinney, La Salle, Mason, Maverick, McMullen, Medina, Menard, Real, Starr, Sutton, Uvalde, Val Verde, Webb, Wilson, Zapata, and Zavala. See *Court of Appeals Fourth District of Texas*, at <http://www.4thcoa.courts.State.tx.us/content/htm> (last visited Feb. 20, 2001).

legal definition of sex has nothing to do with a person's genitals during that person's lifetime, but was "immutably fixed by our Creator at birth."<sup>3</sup> Further, the Fourth Court ruled that a person's sex is evidenced solely by "chromosomes [which] do not change with either hormonal treatment or sex reassignment surgery."<sup>4</sup> The *Littleton* court found the almost seven-year marriage of Christie Lee Littleton and Jonathan Mark Littleton invalid because "[a]s a male, Christie cannot be married to another male," even though Christie and Mark engaged in vaginal-penile intercourse.<sup>5</sup> The ruling labeled Mrs. Littleton's amended birth certificate<sup>6</sup> "ministerial" and "not binding on [the] court."<sup>7</sup> It also prevented Mrs. Littleton, a

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<sup>3</sup> *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000). Mrs. Littleton hired Frye and Meiselman after the trial, after the appeal to the Fourth Court, after the petition for discretionary review (P.D.R.) to the Texas Supreme Court, after the time for filing a motion for rehearing expired and shortly before the period for extensions of time expired. *See* TEX. RULES APP. PROC. 64.1 (noting that the time to file a motion for rehearing is "within 15 days from the date when the Court renders judgment or makes an order disposing of a petition for review"); *id.* at 64.5 (permitting an extension of time to file a motion for rehearing). The Texas Supreme Court granted the motion for extension, but then overruled the motion for rehearing on May 18, 2000. *See* <http://christielee.net> (last visited Jan. 27, 2001). The U.S. Supreme Court denied Mrs. Littleton's Petition for Writ of Certiorari on October 2, 2000. *See Littleton v. Prange*, 121 S. Ct. 174 (2000).

<sup>4</sup> *Littleton*, 9 S.W.3d at 230.

<sup>5</sup> *Id.* at 231. For a contrary opinion regarding the validity of marriage, see *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), which held "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."

The correct medical terminology must be used to accurately discuss the legal implications in this case about transsexuals and the intersexed. Further, with due respect to the restrictions the mainstream media imposes upon itself, we prefer the medical terms to social slang. *See* Petitioner's Brief for Writ of Certiorari at 5, *Littleton* (No. 00-25) (using proper medical terminology to discuss the issues in the case). *But see* Rick Casey, 'I Now Pronounce You Wife and Wife,' SAN ANTONIO EXPRESS-NEWS, Aug. 30, 2000, at 3A, available at LEXIS, News Library (referring to these anatomical parts as an "outie [and] an innie").

<sup>6</sup> *See* TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992) ("An amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate.").

<sup>7</sup> *Littleton*, 9 S.W.3d at 231 (holding that her original birth certificate stated Christie was a man and it was not validly amended because the record was not "incomplete or prove[n] . . . inaccurate," which are the only statutorily allowed reasons for an amendment). The authors detailed in the Motion for Rehearing the reasons the original birth certificate should be deemed ministerial:

The marking of the sex of an infant is a ministerial act. It is a simple observation, a mere glance between the legs, that could be, non-negligently, in error. This ministerial act does not take into consideration, the intersex of the infant (unless mutilated, mixed or incomplete genitals also appear), the A.I.S. [Androgen Insensitivity Syndrome] of the infant, or the brain's sexual identity manifesting itself after birth, as the stipulation of evidence showed for Mrs. Littleton.

Newborns with mutilated, mixed or incomplete genitals face adverse effects within days of birth. Considering that the parents and surgeon do not consult the child's brain,

forty-eight year-old widow, from suing for the alleged medical malpractice that caused her husband's death<sup>8</sup> by legally reducing her to a vaginaed male. These are the results of the Fourth Court following medical thinking that is thirty years out of date.<sup>9</sup>

As an unintended result<sup>10</sup> of the Fourth Court's ruling that voided the straight-appearing, opposite-sex-appearing, heterosexual-appearing marriage of Mrs. Littleton,<sup>11</sup> some same-sex-appearing marriages within the jurisdiction of the Fourth Court became legal. For example, on September 16, 2000, Ms. Jessica Wicks and Ms. Robin Manhart Wicks were legally married in San Antonio, Texas.<sup>12</sup> Jessica's original birth certificate read "boy" and Robin's original birth certificate read "female."<sup>13</sup> These women shared vows, exchanged rings, and were blessed by a Minister of God in a private ceremony before about fifty friends and supporters.<sup>14</sup> Their marriage was similar to Christie Lee and Jonathan Mark Littleton's opposite-sex marriage,<sup>15</sup> except that they were two women getting

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surgical selection of genitals is little more than a coin toss, a 50-50 guess, and then intentionally recorded on the birth record as an otherwise ministerial act. Petitioner's Motion for Rehearing at n.5, *Littleton* (No. 99-1214).

<sup>8</sup> See *Littleton*, 9 S.W.3d at 231 (noting that Littleton may not bring a wrongful death suit because her marriage was invalid).

<sup>9</sup> See *infra* notes 132-42 and accompanying text (discussing current medical technology in determining gender as noted in other court cases and recognized by international organizations).

<sup>10</sup> The theme of the *Littleton* decision was to remove the legality of anything appearing to be a same-sex marriage. *Littleton*, 9 S.W.3d at 225, 226-27.

<sup>11</sup> Christie Lee Littleton and Jonathan Mark Littleton "engaged in private, intimate, heterosexual vaginal-penile sexual intercourse. They also filed federal income taxes as husband and wife, walked hand in hand along San Antonio's Riverwalk, enjoyed each other's companionship and company, and, were known in the community as husband and wife." Petitioner's Brief for Writ of Certiorari at 5, *Littleton* (No. 00-25).

<sup>12</sup> Michelle Koidin, *Woman, Transsexual Born a Man Get Wedding License; Couple Take Advantage of Ruling Defining Gender*, DALLAS MORNING NEWS, Sept. 7, 2000, at 21A, available at LEXIS, News Library ("[B]ecause of a state appeals court ruling that said chromosomes, not genitals, determine gender, the two will be able to wed legally.").

<sup>13</sup> See Adolfo Pesquera, *Lesbian Couple Get License to Wed; Transsexual Ruling Clears the Way*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2000, at B1, available at 2000 WL 26414672 [hereinafter Pesquera, *Clears the Way*] (noting that Wicks, a male-to-female transsexual, showed her birth certificate that "showed she was born male and a copy of the appellate opinion *Littleton vs. Prange*" in order to obtain a marriage license).

<sup>14</sup> John Gutierrez-Mier, *Lesbian Pair Are Married*, SAN ANTONIO EXPRESS-NEWS, Sept. 17, 2000 at B1, available at LEXIS News Library [hereinafter Gutierrez-Mier, *Pair*].

<sup>15</sup> See *Littleton*, 9 S.W.3d at 230-31 (noting the birth certificate of Christie Lee states that she was born a male and, therefore, the court concluded Christie Lee had the appropriate male chromosomes). Neither Christie Lee nor Jonathan were tested to determine chromosomal status. Similarly, neither Jessica nor Robin were tested. *Press Release, Lesbians Seek Legal Marriage Using Recent Texas Decision* (August 15, 2000), available at <http://www.christielee.net/press5.htm> (last visited Feb. 20, 2001). This marriage was reported around the world. See <http://www.christielee.net> for the press release, press coverage of obtaining the marriage license, and press coverage of the marriage itself.



legally married. Despite what one conservative lawmaker said,<sup>16</sup> this couple passed the “duck test.”<sup>17</sup> Less than two weeks later, two more women obtained a marriage license.<sup>18</sup> Other same-sex couples have been invited to wed.<sup>19</sup> Even amateur chess players should have seen these couples coming as the political result of the *Littleton* decision.<sup>20</sup>

Other couples that could now marry in San Antonio include those that were previously married as heterosexuals, but were coerced into divorcing by the transitioning partner’s doctor prior to corrective surgery.<sup>21</sup> The coercion continues although it is not as prevalent.<sup>22</sup> Even so, those who were once married can remarry if they remained the best of friends and continued to live together.<sup>23</sup>

More transsexual couples are networking at regional and national conferences and on the Internet,<sup>24</sup> and meeting couples that have

<sup>16</sup> Texas State Representative Warren Chisum, R-Pampa, a staunch opponent of same-sex marriage, stated, “[v]irtually what we have is a man that looks like a woman that’s getting married to another woman, and clearly that’s within the law.” Koidin, *supra* note 12, at 21A.

<sup>17</sup> If it looks like a duck, walks like a duck and quacks like a duck, it is a duck. For the word “duck,” substitute either “lesbian” or “same-sex marriage.”

<sup>18</sup> See John Gutierrez-Mier, *2 More Women Obtain County Marriage License; 1 Member of Couple Was Born a Man*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2000, at B7, available at LEXIS, News Library [hereinafter Gutierrez-Mier, *Obtain*] (reporting that Lori D. Killough and her partner, Cynthia J. Young, of Corrales, New Mexico, obtained a marriage license).

<sup>19</sup> Any unmarried transwoman (male-to-female) who has an unmarried lesbian woman-friend, and any unmarried transman (female-to-male) who has an unmarried gay man-friend, whether they live in Texas or not, can come to San Antonio, show a pair of birth certificates—one saying F and the other saying M—to the marriage clerk of Bexar County and they will receive a legal marriage license. After waiting seventy-two hours, they can get legally married. See generally Todd Ackerman, *Marriage, a Changing Union?; Transsexual Wedding Shows Gender Can Be a Complex Issue*, HOUS. CHRON., Sept. 17, 2000, at A1, available at LEXIS, News Library (noting that Frye sent an e-mail to gay and lesbian activists about two women, the Wicks, legally getting married); Gutierrez-Mier, *Pair*, *supra* note 14 at B1 (noting that Frye “advised the Wickses to seek a license in Bexar County, one of 32 counties under the jurisdiction of the 4<sup>th</sup> Court of Appeals”).

<sup>20</sup> When carried to its logical conclusion, the similar, unintended results of the *Littleton* decision are surprising. Many of these will be used as lobbying tactics developed by Sarah DePalma, the Director of the Texas Gender Advocacy and Information Network (T-GAIN). See *infra* notes 147-67 and accompanying text (listing possible conclusions resulting from the *Littleton* decision, such as problems for persons whose genetic make-up or prior surgeries could change the status of their marriages).

<sup>21</sup> See *infra* notes 45-53 and accompanying text (discussing both the history of why doctors insisted on patients divorcing and some reforms that have occurred over time).

<sup>22</sup> See *infra* notes 54-58 and accompanying text (citing research done in this area and reporting on proposed reforms that do not insist on divorce before surgery).

<sup>23</sup> See *infra* note 40 and accompanying text (discussing an international organization dedicated to the preservation of these marriages).

<sup>24</sup> See Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle With the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 140-42, 151-52 (2001)

remained legally married even though one in the couple underwent genital corrective surgery.<sup>25</sup> There are many such legal same-sex marriages in the United States today.<sup>26</sup> If such a marriage is challenged, the non-transsexual should sue, alleging that all the non-transsexual spouse did was remain true to the marriage vow.<sup>27</sup>

This article will discuss the existence of same-sex marriages in the transgender community; the lesbian, gay, and bisexual (LGB) community continues to fight for its own legal same-sex marriages, but refuses to use transgender same-sex marriages as a wedge issue.<sup>28</sup> This article then addresses the important question of whether transgender same-sex marriages can survive attacks from Defense of Marriage Act statutes, other state action, or private litigants in other civil actions.<sup>29</sup> Finally, the article presents strategies to circumvent *Littleton v. Prange* until it is overturned.<sup>30</sup>

## II. THE STRUGGLE FOR THE LEGALITY OF SAME-SEX MARRIAGES

The struggle within the lesbian, gay, and bisexual (LGB) community for the legality of same-sex marriage<sup>31</sup> is not the subject of this article. However, several speakers discussed this topic at the 2000 *Albany Law Review* Annual Symposium. For detailed information and references on this issue, refer to Paula L. Eittlebrick's *Domestic Partnership, Civil Unions or Marriage: One*

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[Hereinafter Frye, *Cider House Rules*] (discussing the increased activity among the transgender community, including attending conferences).

<sup>25</sup> See *infra* notes 44-58 and accompanying text.

<sup>26</sup> See *infra* note 48 and accompanying text (discussing the use of the Internet to disseminate information to people around the world).

<sup>27</sup> See Phyllis Randolph Frye, *Opinion: September 11, 1996, The Defense of Marriage Act (DOMA) and Its Impact on Same-Sex Transgender Marriages*, in PROCEEDINGS FROM THE FIFTH INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 15-16 (1996) [hereinafter Frye, *Opinion*, FIFTH PROCEEDINGS].

<sup>28</sup> See *infra* Part II (highlighting the case law surrounding these issues and how it has resulted in unexpected legal consequences).

<sup>29</sup> See *infra* Part III (analyzing the *Littleton* decision's underlying facts to predict what future legal action might bring forth).

<sup>30</sup> See *infra* Part IV (exploring practical ways to circumvent the *Littleton* ruling until it is overturned, and urging transgenders to come out and lobby for legislative change).

<sup>31</sup> We are uncertain if an organized effort exists within the bisexual community, but we include them herein because those bisexuals in long-term, monogamous same-sex relationships are within the struggle. At the most recent October 19-21, 2000, Lavender Law Conference, sponsored by the National Lesbian and Gay Law Association (NLGLA), the Bisexual Caucus included bisexuals either in or searching for a long-term monogamous relationship. In reality, bisexuals, homosexuals, and heterosexuals in such a search are all searching for the same thing. The only difference for bisexuals is that the search pool is larger, and can include either homosexuals or heterosexuals. See National Lesbian and Gay Law Association, *What's New?*, at <http://www.nlgla.org> (last visited Feb. 20, 2000).

*Size Does Not Fit All*,<sup>32</sup> Mark Strasser's *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and the Electoral Process Guarantees*,<sup>33</sup> or Vincent J. Samar's *Gay-Rights as a Particular Instantiation of Human Rights*.<sup>34</sup>

#### A. *Same-Sex Marriages Already Exist in the Transgender Community*

Same-sex marriages already exist in the transgender community.<sup>35</sup> Such trans-marriages exist when one or both partners<sup>36</sup> in a legal marriage are transgendered.<sup>37</sup> Although much

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<sup>32</sup> See Paula L. Ettlebrick, *Domestic Partnership, Civil Unions or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001) (arguing that society needs a new definition of "family" and that "marriage . . . no longer . . . fit[s] our social policy interests").

<sup>33</sup> See Mark Strasser, *Same-Sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees*, 64 ALB. L. REV. 949 (2001) (arguing that "constitutional guarantees are violated when the electorate makes it harder for one group to secure marriage rights by precluding the legislature from according those rights").

<sup>34</sup> See Vincent J. Samar, *Gay Rights as a Particular Instantiation of Human Rights*, 64 ALB. L. REV. 983 (2001) ("This article argues that lesbian, gay, bisexual and transgendered (LGBT) rights are a particular instantiation of human rights.").

<sup>35</sup> See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 236-44 (1998) (describing the transgendered population's view of sexual orientation and reporting survey results that show same-sex marriages within this population). See generally Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning With Transsexualism*, 24 N.Y.U. REV. L. & SOC. CHANGE 383, 409-10 (1998) (discussing how some courts have viewed sex as a "bipolar" theory, thus allowing a post-surgical male-to-female transsexual to marry a male); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 297-98 (1997) (highlighting different courts' interpretations of sex in the context of legal marriage and concluding that "sex is a legal function, not a biological one").

<sup>36</sup> Although few in number, there are legally married couples in which one partner, after revealing her transgender secret, was surprised to find the other partner relieved to be able to reveal the same secret. They remain together while one transitions, and then the other. Transitioning at the same time can cause extreme economic hardship and employment problems, as detailed in Frye, *Cider House Rules*, *supra* note 24, at 174-88. In the case of Christie Lee and Jonathan Mark Littleton, before the Fourth Court invalidated their marriage, their Kentucky marriage license read "bride" and "groom." See Petition for Writ of Certiorari at 5, Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (No. 00-25).

<sup>37</sup> Transsexual is a subset of the larger group called transgender. A transsexual is a person who lives full-time within his or her correct gender identity. Transsexuals get their names legally changed and usually are on hormone replacement therapy. Some seek corrective genital surgery. However, some cannot afford surgery and others have medical problems that prevent it. Still others are not interested in surgery after hormonal transition takes effect. Sadly, some transsexuals who rushed to have the surgery are not pleased with the results, which have been mixed. See Frye, *Cider House Rules*, *supra* note 24 at 158-61 (discussing transsexualism and the process of transition); see also JAMISON GREEN, HUMAN RIGHTS COMMISSION CITY AND COUNTY OF SAN FRANCISCO, INVESTIGATION INTO DISCRIMINATION AGAINST TRANSGENDERED PEOPLE 9-11 (1994) [hereinafter GREEN, INVESTIGATION] (describing the "transgender experience"). Green has defined "transgender" as follows:

has already been written about trans-marriages,<sup>38</sup> since both authors are in long-term trans-marriages,<sup>39</sup> were co-counsel in the

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[T]ransgender has become an 'umbrella' term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers . . . intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.

Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1, 3-5 [hereinafter Green, *Introduction*].

Further, transsexuals could be considered a subset of the intersexed because of the juxtaposition of brain sexual identity with incorrect genitals in the same body. *See infra* note 133 (illustrating that other biological factors aside from genitalia and chromosomal considerations define sex).

<sup>38</sup> *See* Coombs, *supra* note 35, at 243-44 (examining marriages involving transgendered people). Professor Coombs was also the Keynote Speaker at the Fifth International Conference on Transgender Law and Employment Practice. *See* FIFTH PROCEEDINGS, *supra* note 27, at 19-27 (highlighting Coombs' research); *see also* Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 746 (2000) [hereinafter Greenberg, *When is a Man a Man?*] (examining "the policy considerations that arise when courts are faced with the issue of determining the legality of marriages involving post-operative transsexuals"). *See generally* Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box By Closing the Door on Transsexuals' Right to Marry*, 9 TUL. J.L. & SEXUALITY (1999-2000) (explaining, in great detail, the issues surrounding transsexuals and discussing the effects of the *Littleton* case).

<sup>39</sup> This is Frye's second marriage to a woman. Frye began this marriage as the husband in June of 1973 and transitioned to a full-time male-to-female transsexual woman in 1976. This is Meiselman's first marriage to a woman. Meiselman began her marriage as a husband in January of 1978 and she too transitioned to full-time male-to-female transsexual woman in 1998. For the Wicks' marriage, and the surrounding newspaper, radio, and television publicity, Frye and Meiselman issued the following written release on September 11, 2000:

SOME ITEMS THAT THE MEDIA IS STILL MISSING IN ITS REPORTING ON THIS ISSUE . . .

A. One wire service article covered our refusal to comment on the status of Jessica Wicks genitals with a paragraph something to the effect that Jessica may be "simply on hormones." To which I comment, "simply?" Do people have any idea what kind of medical and financial hoops transgendered people have to go through to "simply" be on hormones? Do people have any idea what a completely thorough, bodily turnaround, being on hormones does to a person? There is not a "simply" on hormones.

B. The discrimination does not start or end with genital surgery. **THE DISCRIMINATION STARTS WITH FULL-TIME TRANSITION.** When transition begins, so does the queer-baiting, the job loss, the difficulty in being rehired, the loss of insurance. [sic] the divorce and loss of visitation to children, the obscene phone calls and other hate violence, the parental-sibling ostracism, the cutoff from a person's place of worship, the hassles by police, and more. The people who harm us and misunderstand us do not wait for genital surgery to begin their harm and misunderstanding. No, no. They begin their harm and misunderstanding right away, as soon as we identify ourselves in the beginning of transition.

Those who have genital surgery do not always find that the discrimination suddenly ends after genital surgery. Lots of folks call or write me and complain because they finally finished genital surgery, yet the discrimination continues. And continues. And continues!

Lots of people cannot have genital surgery. They either cannot afford it; or they have medical complications making it more dangerous; or they find in many cases that genital surgery is still not very good—this is especially for the FTM where genital surgery is



*Littleton* case, and have extensive experience and contacts in the transgender community, the authors are uniquely situated to address certain issues that readers should consider.

1. There Are Legal Opposite-Sex Trans-Marriages Where the Transgendered Partner is a Part-Time Crossdresser.

While this type of marriage is currently not under legal attack, the heterosexual crossdresser and spouse have a definite stake in the trans-marriage issue.<sup>40</sup> The stresses of homophobic discrimination,<sup>41</sup> which remains socially acceptable in the employment context,<sup>42</sup> can wreck a marriage. And when a trans-couple is in public with the crossdresser cross-dressed, the couple passes the “duck test.”<sup>43</sup>

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also multistaged and very much more expensive. Some folks who have had genital surgery are not happy with the result and express that they felt socially pressured to rush into genital surgery. And some people, who transition and “simply” stay on hormones, find it is not necessary for them to fit their self-image of who they are. For all of these reasons and because the 4th Texas Court of Appeals said that Christie Lee Littleton’s genital surgery was irrelevant to the legal determination of her legal sex; therefore, we are not going to reveal genital status. Besides, unless we have sex with you or the public, you will not see our genitals anyway. Why are folks so worried about the status of something they will never experience?

<sup>40</sup> There is an international organization, the Society for the Second Self, Inc., or Tri-Ess, that is dedicated to the preservation of marriages between heterosexual male-to-female crossdressers and their wives. See *Tri-Ess*, at <http://www.geocities.com/WestHollywood/Stonewall/6801/FIBER.html> (last visited Feb. 20, 2001); see also *The Philosophy of Tri-Ess*, at <http://www.geocities.com/SouthBeach/Cliffs/4873/philosophy.html> (last visited Feb. 20, 2001).

<sup>41</sup> See Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 446 (2000) (stating that “homophobia and heterosexism remain much more socially acceptable than other forms of bias”); see also Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 430 (1998) (illustrating, through quotes by lesbian, gay, bisexual and transgender (LGBT) youths, that “LGBT youth today are the victims of cultural homophobia and transphobia” (citations omitted)).

<sup>42</sup> See Green, *Introduction*, *supra* note 37, at 11 (noting that “employment-related discrimination is a particularly critical issue for transsexual people . . . [despite the fact that] in the overwhelming majority of cases, transsexual people are competent and successful, providing they receive ordinary social support”); Frye, *Cider House Rules*, *supra* note 24, at 174-75 (noting that transgenders are not protected by Title VII of the Civil Rights Act of 1964, resulting in legal discrimination in the employment realm).

<sup>43</sup> See *supra* note 17.

## 2. There are Legal Opposite-Sex Trans-Marriages Where the Transgendered Partner is a Full-Time Transsexual, but the Marriage was Enacted Before the Transition.<sup>44</sup>

Until the 1990s, almost all married transgenders seeking sex reassignment were coerced into divorce by the medical profession.<sup>45</sup> Much of this coercion began as self-preservation by the physicians, who did not want to be convicted under castration or mayhem statutes.<sup>46</sup> In 1971, the mere prescription of feminizing hormones resulted in a suit by the wife against the doctor.<sup>47</sup>

In response to an e-mail inquiry on the "Phyllabuster" list serve,<sup>48</sup> dated October 31, 2000, titled, "I Am Searching for TGs Who Were FORCED TO DIVORCE Prior to Surgery," Frye received numerous replies. Some replies indicated that genital surgery without a divorce was impossible in the 1980s. One person who replied reported having had the surgery as recently as 1997, but only after a medically coerced divorce.<sup>49</sup> Dallas Denny<sup>50</sup> reminded us that

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<sup>44</sup> See, e.g., *supra* note 39 (noting that Frye and Meiselman are in trans-marriages).

<sup>45</sup> See *infra* notes 48-58 (discussing the reprehensible practice of using coerced divorce as a prerequisite to genital surgery, as well as tactics used to circumvent this practice).

<sup>46</sup> See Rose, *supra* note 38, at 42-44 (discussing doctors' fear of prosecution under castration and mayhem statutes).

<sup>47</sup> See SR. MARY ELIZABETH, SSE, LEGAL ASPECTS OF TRANSEXUALISM 28 n.64 (1990) [hereinafter LEGAL ASPECTS] (citing *Burnell v. Catazone*, No. 184985 (Orange County Super. Ct., Calif. filed July 21, 1971)). While living as a man, Sister Mary Elizabeth was a U.S. Navy veteran. She became a transgender activist in the early 1970s and was responsible for California's transgender-friendly birth certificate law in 1977. In 1978, she successfully sued the Department of Defense and became the first person to serve in the U.S. military as both a male and as a female. The first edition of LEGAL ASPECTS OF TRANSEXUALISM was published in 1982 for the now defunct JANUS Information Facility. She made vows as an Episcopal Sister in 1988. In 1990, Sister Mary founded the AIDS Education Global Information Service (AEGIS), which has become the most respected HIV/AIDS knowledge base in the world. See <http://www.aegis.org> (last visited Feb. 20, 2001).

<sup>48</sup> Frye began cyberspace planning in mid-1995, along with Riki Wilchins and Karen Kerin, for what became the second national transgender lobbying event in Washington D.C., held in October of 1995. See Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community* [hereinafter Frye, *Facing Discrimination*] in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 464 (John D'Emilio et al. eds., 2000).

<sup>49</sup> Confidential reply dated October 31, 2000, on file with Frye and *Albany Law Review*.

<sup>50</sup> Dallas Denny began her activism by addressing the astonishing amount of misinformation that had been printed about transsexualism and helping transsexuals obtain the information they needed to make informed decisions about their lives and bodies. In 1990, Denny founded the American Educational Gender Information Service, AEGIS (this group is unrelated to Sister Mary Elizabeth's AIDS organization), and the journal *Chrysalis Quarterly*. See *AEGIS Online*, at <http://www.gender.org/aegis/body/body.html> (last visited Feb. 20, 2001). As Executive Director of AEGIS she writes and speaks widely, criticizing the medical model of transsexualism. She worked with other activists through the 1990s to develop the transgender model. Denny also published several books on transgender issues. See generally CURRENT CONCEPTS IN TRANSGENDER IDENTITY (Dallas Denny ed., 1998) [hereinafter Denny, CURRENT CONCEPTS] (presenting an anthology of articles on transgender



after the Christine Jorgensen story made headlines in 1952, transgender clinics began as university-affiliated projects. Although the doctors initially knew little about their transgendered patients, they wrote medical journal articles and searched for grants.<sup>51</sup> So many transgendered people demanded help that the clinics set up stringent admissions standards, some of which were outrageous.<sup>52</sup> Both Denny and Sister Mary Elizabeth found that patients were most likely to get treatment by providing the desired answers.<sup>53</sup>

As it matured, the organized transgender community began to respond to this coercion. In 1993, the International Conference on Transgender Law and Employment Policy (ICTLEP, also known as the Transgender Law Conference) issued the "Health Law Standards of Care for Transsexualism," which were reviewed at each Conference and updated at the Sixth Conference in 1997.<sup>54</sup> Standards One and Three both read, in part, "[i]f the patient is married, the physician [or surgeon] may not require divorce, but may also require the spouse to sign a waiver of liability form."<sup>55</sup> Also, Principle Five reads, "[i]t is unethical to discriminate in the

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issues); DALLAS DENNY, GENDER DYSPHORIA: A GUIDE TO RESEARCH (1994) [hereinafter DENNY, DYSPHORIA] (providing a detailed bibliography of books, book chapters, cases and journal articles on transgender issues); DALLAS DENNY, M.A., IDENTITY MANAGEMENT IN TRANSEXUALISM: A PRACTICAL GUIDE TO MANAGING IDENTITY ON PAPER (1994) [hereinafter DENNY, IDENTITY MANAGEMENT] (discussing practical and legal aspects of sex reassignment). She was a founder of Atlanta's Southern Comfort Conference and provided funds that made the first female-to-male Conference of the Americas possible. In 1993 she founded the National Transgender Library & Archive, which is currently housed in the Labadie Collection at the University of Michigan in Ann Arbor. In 1998 the AEGIS assets were turned over to a new organization, Gender Education & Advocacy, of which she is Secretary. Currently, Dallas is editor of *Transgender Tapestry* magazine.

<sup>51</sup> See generally Dallas Denny, *The Politics of Diagnosis and a Diagnosis of Politics: The University-Affiliated Gender Clinics, and How They Failed to Meet the Needs of Transsexual People*, CHRYSALIS Q., 1(3), 1992, at 9-20 [hereinafter Denny, *Diagnosis*]. Christie Lee Littleton's diagnosis and treatment in the late 1970s was done through such a university-affiliated program. See *Littleton*, 9 S.W.3d at 224 ("At 23, she enrolled in a program at the University of Texas Health Science Center that would lead to a sex reassignment operation.").

<sup>52</sup> See Martine Aliana Rothblatt, *Report From the Health Law Project*, SECOND ANNUAL INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 101, 105 (1993).

<sup>53</sup> See Denny, *Diagnosis*, *supra* note 51, at 9-20 (noting that transsexual men and women presented themselves as stereotypical candidates to increase their likelihood of receiving clinical treatment); LEGAL ASPECTS, *supra* note 47, at 28 (declaring that few doctors are willing to provide therapy or surgery to transsexuals prior to a divorce action for fear of a malpractice suit).

<sup>54</sup> See Appendix A for the most recent (1997) version of the INT'L CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, INC., HEALTH LAW STANDARDS OF CARE FOR TRANSEXUALISM (1997) [hereinafter 1997 STANDARDS]. Some notes have been added therein by the authors to conform to anticipated post-*Littleton* concerns.

<sup>55</sup> See Appendix A for the Spousal Informed Consent and Waiver of Liability form.

provision of sex reassignment services based on the sexual orientation (actual or perceived), marital status, HIV status, or physical appearance of the patient.”<sup>56</sup>

In many states, the marriage laws state that you cannot *get* married if you are of the same sex.<sup>57</sup> Legally married couples have remained married even after one partner has changed sex, thereby creating a legal quandary.<sup>58</sup>

### 3. The Remaining Trans-Marriages Have Generated the Litigation Thus Far.

The situation involved in most litigation is a transgendered person who has partially or fully transitioned at the time of marrying a non-transgendered person. Others discuss these cases extensively.<sup>59</sup> Therefore, this article will not discuss them except to mention a distinction, some newer cases, and a lengthy discussion of the *Littleton* case.<sup>60</sup>

These cases were distinctive because the non-transgendered partner was trying to dissolve the marriage<sup>61</sup> rather than keep the marriage intact.<sup>62</sup> In this distinction, we are interested in determining how the opposite scenario will unfold. Will a marriage be considered legally intact if the transgendered spouse seeks to dissolve the marriage while the non-transgendered spouse desires to keep the marriage intact? Will courts find for the non-transgendered spouse, who remained true to the marriage vow, in

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<sup>56</sup> *See id.*

<sup>57</sup> *See* Greenberg, *When is a Man a Man?*, *supra* note 38, at 759 (listing states “that have statutes that specifically prohibit same-sex marriages”).

<sup>58</sup> *Id.* (“Congress has also passed DOMA, the Defense of Marriage Act [1 U.S.C. § 7 (Supp. 1995-2000)] which defines marriage at the federal level as a ‘legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.’”).

<sup>59</sup> *See* LEGAL ASPECTS, *supra* note 47, at 29 (noting that courts are more indecisive on postoperative than preoperative marriages); Coombs, *supra* note 35, at 220-21 (arguing that the debate on same-sex marriage has ignored transgendered people and their relationships); Rose, *supra* note 38, at 55-91 (providing an overview of cases relating to marriages with one transitioned partner); Greenberg, *When is a Man a Man?*, *supra* note 38, at 760 (theorizing that those states that have declared same-sex marriages to be illegal “were not considering marriages involving post-operative transsexuals”).

<sup>60</sup> *See infra* Parts III-IV (providing a detailed analysis of the *Littleton* opinion and predicting its future implications).

<sup>61</sup> Dissolving a marriage by annulment means that it legally never existed, thus avoiding the division of community, marital or estate property as would be done in divorce or probate. *See* BLACK’S LAW DICTIONARY 91 (6th ed. 1990).

<sup>62</sup> “Intact” in this sense means that a divorce would be required and assets must be legally divided, or that the non-transgendered surviving spouse would maintain the right to sue after the death of the transgendered spouse.

order to grant them a divorce, inheritance, or standing to file suit in a wrongful death action?

Three cases that may shed light on these questions are *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*,<sup>63</sup> *Hernandez-Montiel v. INS*,<sup>64</sup> and *In re Estate of Gardiner*.<sup>65</sup> In *Benefit Determinations*, the Department of Veterans Affairs determined that a transsexual veteran had a valid marriage in Texas nine years before the *Littleton* opinion.<sup>66</sup> The department found:

Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse.<sup>67</sup>

Based on the reasoning in *Benefit Determinations*, the *Littleton* Petition for Writ of Certiorari stated:

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may

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<sup>63</sup> VETERANS ADMIN. GEN. COUNSEL, DEP'T VETERAN AFFAIRS, *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, 1990 WL 605201 (Vet. Aff. Op. Gen. Couns. Prec. 15-90 May 25, 1990) [hereinafter *Benefit Determinations*]. The holding of *Benefit Determinations* was brought to the attention of the Fourth Court via a supplement to the Motion for Rehearing, dated April 26, 2000, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (No. 99-1214), available at <http://christielee.net/file2.htm>, and in the Petition for Writ of Certiorari at 13, 19, *Littleton* (No. 00-25).

<sup>64</sup> 225 F.3d 1084 (9th Cir. 2000).

<sup>65</sup> Unreported decision; appeal pending, Kansas State Court of Appeals, Docket #85030, filed Apr. 5, 2000. The facts of the *Gardiner* case are discussed in Mubarak Dahir, *Genetics vs. Love*, THE ADVOCATE, Oct. 10, 2000, at 25-26, available at [http://www.advocate.com/html/stories/822/822\\_genetics.html](http://www.advocate.com/html/stories/822/822_genetics.html) (last visited Jan. 20, 2001) (summarizing J'Noel Gardiner's story and the effect the Kansas court's decision may inadvertently have on same-sex marriages).

<sup>66</sup> *Benefit Determinations*, 1990 WL 605201, at cmt. 10 (holding that if benefits were denied the veteran "could create a valid marriage by going through another marriage ceremony with the current spouse;" accordingly, the transgendered spouse was entitled to veteran benefits). This 1990 opinion was totally ignored by the Fourth Court in 1999 when it came to the opposite conclusion in *Littleton*.

<sup>67</sup> *Id.* at \*3.

marry a female; if instead she travels south to New Jersey, she may marry a male.<sup>68</sup>

Therefore, Mrs. Littleton's gender and marital status presently depends on where she is located, which begs a decision from the United States Supreme Court to settle the matter.

*Hernandez-Montiel* was decided after the *Littleton* Petition for Writ of Certiorari was filed with the U.S. Supreme Court. *Hernandez-Montiel* involved a Mexican national who was classified as an effeminate gay male, but was described more completely by gender identification as a pre-operative transsexual.<sup>69</sup> In *Hernandez-Montiel*, the Ninth Circuit wrote:

The primary issue we must decide is whether gay men with female sexual identities in Mexico constitute a protected 'particular social group' under the asylum statute. We conclude as a matter of law that gay men with female sexual identities in Mexico constitute a "particular social group" and that Geovanni is a member of that group. His female sexual identity is immutable because it is inherent in his identity; in any event, he should not be required to change it.<sup>70</sup>

Sadly, the court did not grant Ms. Geovanni the dignity of the correct pronoun. At least this court recognized the inherent immutability of a person's sexual identity.<sup>71</sup>

*In re Estate of Gardiner*<sup>72</sup> is currently being appealed in Kansas.<sup>73</sup> J'Noel Gardiner is a post-surgical transsexual who, in 1994, had her

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<sup>68</sup> Petition for Writ of Certiorari at 11-12, *Littleton* (No. 00-25).

<sup>69</sup> See *Hernandez-Montiel*, 225 F.3d at 1087. Many transgenders' stories have been lost because they have been misclassified as "gay." See Frye, *Facing Discrimination*, *supra* note 48, at 457 (discussing how the gay history has been intermingled with transsexual history, causing much transsexual history to be lost); see also Green, *Introduction*, *supra* note 37, at 4 (explaining that sexual orientation often "is not the primary issue" to a transgendered person and that "the relationship between gender identity and sexual desire is highly complex and individual").

<sup>70</sup> *Hernandez-Montiel*, 225 F.3d at 1087.

<sup>71</sup> See *id.*

<sup>72</sup> Unreported decision; appeal pending, Kansas State Court of Appeals, Docket #85030, filed Apr. 5, 2000.

<sup>73</sup> As with Mark Littleton, one may wonder if the outcome would have been the same had J'Noel been the wealthy intestate decedent and Marshall the one trying to keep their marriage intact. See *supra* notes 61-62 and accompanying text (pointing out the disparate treatment courts are likely to give transgendered and non-transgendered spouses, and suggesting that, in the future, this disparity may actually open the door to a broadening of transgender rights); see also John T. Dauner, *Wealth and a Sex Change are Highlights of Kansas Estate Litigation: Judge Rejects Claim for Half of \$2.5 Million*, KANSAS CITY STAR, June 24, 2000, at A1 (discussing the *Gardiner* case and how J'Noel underwent corrective surgery prior to marrying Marshall Gardiner); Tom Perrin, *Estate Claim Hinges on Sex-Change Ruling*, KANSAS CITY STAR, Jan. 10, 2001, at B1 (noting that the Kansas Court of Appeals heard the case on January 9, 2001 and a ruling is expected within sixty days).

birth certificate amended<sup>74</sup> and, in 1998, married Kansas millionaire, Marshall Gardiner, who died intestate eleven months later.<sup>75</sup> His son is now seeking to use *Littleton* to have the marriage voided, and, thereby, to keep J'Noel from her widow's share of a multimillion-dollar estate.<sup>76</sup>

*B. The Lesbian and Gay Community Refuses to Use Transgender Same-Sex Marriages as a Wedge Issue*

In April of 1993, Frye was the only transgendered speaker at the Third Annual March on Washington for Lesbian, Gay and Bi Equal Rights.<sup>77</sup> In her speech, Frye stressed the importance of transgendered people in bringing about the legalization of same-sex marriages:

One of the ten legal strategies that we will develop at the 2<sup>nd</sup> Transgender Law Conference this upcoming August in Houston will be to resist those surgeons who demand that heterosexual couples divorce as a condition to transgender surgery, even though both partners wish to remain married. Sex reassignment surgery on one half of an ongoing heterosexual marriage yields a same-sex marriage. Therefore, my lesbian, gay and bisexual sisters and brothers, it will be the transgendered community who leads you into the legalization of the same-sex marriage.<sup>78</sup>

Transgenders already have legal same-sex marriage.<sup>79</sup> Why then is the lesbian and gay community<sup>80</sup> reluctant to use this as a wedge

<sup>74</sup> J'Noel completed her corrective gender reassignment-surgery and had her birth certificate amended prior to her marriage. Christie Lee Littleton had also completed her corrective gender reassignment-surgery before her marriage, but had her birth certificate amended after she married. Katrina Rose argues that by amending her birth certificate after her marriage, Mrs. Littleton's position was jeopardized. *See Rose, supra* note 38, at 73-74. Although we do not fully agree with Rose's position, her assessment of the politics involved in the *Littleton* case is undeniable. *See id.* at 52-54 (outlining the political landscape of Texas in the summer of 1999 and questioning the influence of politics on the application of the law).

<sup>75</sup> *See Dauner, supra* note 73, at A1 (discussing the facts of the *Gardiner* case).

<sup>76</sup> *See Perrin, supra* note 73, at B1 (discussing the possibility that the court will invalidate J'Noel and Marshall Gardiner's marriage based on the *Littleton* case).

<sup>77</sup> Phyllis Frye, *Taped Speech from March on Washington*, in SECOND INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, at 168-169 (1993) [hereinafter Frye, *Taped Speech*] (noting that Frye was the "only . . . transgendered political speaker" at the rally).

<sup>78</sup> *Id.* at 170.

<sup>79</sup> *See supra* notes 10-20 and accompanying text (noting the irony of the *Littleton* decision: intending to invalidate same-sex marriages, its actual effect was to legalize marriages between couples who outwardly appear to be same-sex, but have original birth certificates of the opposite sex).

<sup>80</sup> *See Frye, Facing Discrimination, supra* note 48, at 456-57.



issue when lesbian and gay same-sex marriage is debated on the news, on talk shows, and in litigation? The reluctance is incomprehensible.

### III. CAN TRANSGENDER SAME-SEX MARRIAGES SURVIVE?

Members of the homosexual community have indicated that trans-marriages are not used as a wedge issue for fear that an unfavorable court decision could invalidate existing trans-marriages.<sup>81</sup> Considering the existing litigation history, the situation for trans-marriages could not get much worse.<sup>82</sup>

#### *A. Can Transgender Same-Sex Marriages Survive Attacks From Defense of Marriage Act Statutes?*

In a word, yes. Katrina C. Rose's thorough analysis of the DOMA/trans-marriage issue represents, in our opinion, the best work to date on this topic.<sup>83</sup> Rose's article presents the argument that differences between states on the legality of trans-marriages will produce the same result as the lower court decision in *Loving v. Virginia*.<sup>84</sup> Had the Supreme Court not overruled the lower court's

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I have never noted or been aware of any discrimination from bisexuals. Many years ago leaders of the bisexual community and the transgender community met to discuss that both of our communities were marginalized by the lesbian and gay community. Bisexuals get mentioned more often than do transgenders, but they still feel left out. Therefore we made a mutual pledge that we would support each other. The transgenders would always speak out for the rights of transgenders and bisexuals, and the bisexuals would always speak out for the rights of the bisexuals and the transgenders.

*Id.*

<sup>81</sup> *But cf.* PAISLEY CURRAH & SHANNON MINTER, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 20-21 (2000) (discussing the "long battle . . . within the gay, lesbian, bisexual, and transgender community" to include transgender issues in the "mainstream" lesbian and gay political agenda, leading one to surmise that lesbian and gay reluctance to use trans-marriages as a wedge issue may be a remnant of this battle).

<sup>82</sup> *See* Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (stating that "mere removal of the male organs would not, in and of itself, change a person into a true female"); Corbett v. Corbett, 1971 P. 83, 106 (U.K.) (holding that the cardinal factors in determining the sex of an individual are biological—chromosomes, genitals, and gonads—and ruling that the sex of a post-operative male-to-female is legally male); S.-T. v. J., 1998 Fam. 103, 146 (1996) (Potter, L.J., concurring) (agreeing with the Corbett court that "[f]or the purpose of determining whether a particular human being is of a particular sex, the criteria are biological"); *see also* Coombs, *supra* note 35, at 244-51 (examining the decisions in the Corbett and S.-T. cases); Greenberg, *When is a Man a Man?*, *supra* note 38, at 299-302 (providing discussion and analysis of the cases above).

<sup>83</sup> *See* Rose, *supra* note 38, at 91-133 (discussing DOMA and its implications).

<sup>84</sup> *See id.* at 111-13 (illustrating the similarities between the situation in *Loving v. Com*, 147 S.E.2d 78 (Va. 1966), *rev'd*, 388 U.S. 1 (1967), which involved anti-miscegenation statutes, and the *Littleton* situation, involving DOMA statutes).



ruling in *Loving*, the Lovings would be subject to criminal liability in states with anti-miscegenation statutes, but not in states without such statutes.<sup>85</sup>

In the second paragraph of the opinion in *Littleton*, Chief Justice Hardberger wrote: "The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"<sup>86</sup> Compare that question to the pronouncement of the trial judge in *Loving*.

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>87</sup>

*B. Can Transgender Same-Sex Marriages Survive Attacks From State Action or From Private Litigants in Other Actions? An Examination of Littleton v. Prange.*

The answer is, we do not know. In pursuit of that answer, it is best to revisit, in detail, the Christie Lee Littleton situation as an example of how transgender same-sex marriages have been attacked. The *Littleton* case, its background, treatment by the courts, and implications will provide the foundation for discussing what is required to preserve transgender same-sex marriages. First, this section discusses how Mrs. Littleton followed all the rules before her marriage was invalidated.<sup>88</sup> Second, the section presents the various Texas laws that were violated or ignored by the Fourth Court, the Texas Supreme Court, and the United States Supreme

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<sup>85</sup> Ms. Rose wrote of the *Loving* situation as follows:

The Lovings, however, were sentenced to one year in jail, though the trial judge suspended it for 25 years on the condition that the Lovings banish themselves from the state of Virginia for that period of time. They initially complied, but sought to return to Virginia and eventually brought an action to vacate the sentence.

*Id.*

<sup>86</sup> *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000).

<sup>87</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (leading ultimately to the Supreme Court's decision prohibiting anti-miscegenation statutes); *see also* Rose, *supra* note 38, at 111-16 (analyzing the similarity in language and effect of the *Loving* and *Littleton* decisions).

<sup>88</sup> *See Littleton*, 9 S.W.3d at 224-25 (stating that Christie Lee legally changed her name in 1977, underwent corrective genital reassignment surgery from 1979 until 1980, and was married to Jonathan Mark Littleton in 1989); *see also* Petition for Writ of Certiorari at 4-5, *Littleton* (No. 00-25) (indicating that, in 1980, the Texas Department of Public Safety, with full knowledge of Christie Lee's transition and genital reassignment surgery, issued her an identification card listing her sex as female).

Court, respectively.<sup>89</sup> Finally, this section explores the various populations—other than transsexual—and the various areas of law that will be adversely affected if the Fourth Court’s ruling remains the law.<sup>90</sup>

### 1. The Background of the *Littleton* Case: Mrs. Littleton Followed All the Rules Before Her Marriage was Invalidated.

Christie Lee Littleton was born Lee V. Cavazos, Jr., on March 29, 1952, in San Antonio.<sup>91</sup> Her birth certificate listed her as male, but, as she has explained to television and radio audiences and during press conferences,<sup>92</sup> she became aware of her gender identity as a female at an early age.<sup>93</sup> She consistently fought being forced into “boy things,” and, at approximately age fifteen, quit school and lived as Christie Lee.<sup>94</sup>

In the mid 1970s, Christie Lee went to the University of Texas Health and Science Center and entered a program that eventually led her to sex reassignment surgery.<sup>95</sup> During this four-year period “Christie underwent psychological and psychiatric treatment by a number of physicians.”<sup>96</sup> Christie began to receive female hormones in 1977, and, in August of that year, legally changed her name to

<sup>89</sup> See *infra* notes 129-46 and accompanying text (noting that by following a chromosomal standard, as opposed to a physical standard, the courts have violated or ignored certain statutes and prior decisions).

<sup>90</sup> See *infra* notes 161-69 and accompanying text (explaining how complicated and expensive issues such as marriage, incarceration, and restroom use can become if the chromosomal standard continues to be used).

<sup>91</sup> See *Littleton*, 9 S.W.3d at 224 (noting that, at birth, Christie possessed normal male genitalia and was named after her father); see also Petition for Writ of Certiorari at 4-6, *Littleton* (No. 00-25) (summarizing the relevant facts leading up to the action).

<sup>92</sup> *Dateline* (NBC television broadcast, Aug. 2, 2000); Dahir, *supra* note 65, at 25.

<sup>93</sup> See JUST EVELYN, MOM, I NEED TO BE A GIRL 1 (1998) (“I need to be a girl. I’m a girl inside. I like boys but as a woman would, not the gay way. I have felt this way for years, and you know how feminine I am.”); see also MARY BOENKE, TRANS FORMING FAMILIES: REAL STORIES ABOUT TRANSGENDERED LOVED ONES 5-6 (1999) (“I had no idea why Sarah was convinced it was better to be a boy. Surely someone could tell me what I was doing wrong. And it must be something I was doing, or failing to do, because the children were in my care twenty-four hours a day.”).

<sup>94</sup> See *Littleton*, 9 S.W.3d at 224 (noting that “Christie sought successfully to be excused from sports and physical education because of her embarrassment over changing clothes in front of the other boys”); e-mail from Christie Lee Littleton to Phyllis Frye (Jan. 28, 2001, 08:49:09 CST) (on file with Frye and *Albany Law Review*) (“I dropped out of school, two weeks after entering the 9th grade at age 15. Yes I did start living as female at that age, as Christie.”).

<sup>95</sup> See *Littleton*, 9 S.W.3d at 224 (stating that Christie Lee participated in a program at the University of Texas Health Science Center for a period of four years); see also *supra* note 50-53 and accompanying text (discussing transgender clinics in the 1950s).

<sup>96</sup> *Littleton*, 9 S.W.3d at 224.

Christie Lee Cavazos.<sup>97</sup> Beginning in 1979 and ending in 1980, Christie endured “three surgical procedures, which culminated in a complete sex reassignment.”<sup>98</sup> With her court ordered name change, and a sworn letter from her surgeons, she went to the Texas Department of Safety and had her state-issued identification changed to read “F.”<sup>99</sup>

Approximately ten years later, while in Kentucky for a short time, she met Jonathan Mark Littleton.<sup>100</sup> After they fell in love, she told him of her past.<sup>101</sup> Mark was not bothered by Christie Lee’s past, and asked Christie Lee to marry him.<sup>102</sup> They were married in Kentucky using the Texas identification she had openly secured several years prior.<sup>103</sup> The Kentucky license identified her as “bride.”<sup>104</sup> At that time she had been a vaginaed person for about ten years. On their honeymoon, their woman-man, opposite-sex, heterosexual marriage was consummated in the State of Kentucky.<sup>105</sup>

The couple moved back to San Antonio, where Christie opened her hair salon and Mark worked “washing high-rise windows.”<sup>106</sup> They were in love, and friends and family commented on how happy they were.<sup>107</sup> During those almost seven years they filed “married filing jointly” tax returns with the IRS.<sup>108</sup> When Mark could not pay child support the Texas Attorney General coerced Christie Lee, as the

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see also Petition for Writ of Certiorari at 4, *Littleton* (No. 00-25) (summarizing the history of Christie Lee’s corrective genital reassignment surgery).

<sup>99</sup> See Petition for Writ of Certiorari at 4-5, *Littleton* (No. 00-25) (noting that the card was secured without fraud: the State of Texas was informed about Christie Lee’s medical corrective genital reassignment surgery).

<sup>100</sup> *Id.* at 5 (stating that “[i]n 1988, Mrs. Littleton temporarily moved to Kentucky at which time she met Jonathan Mark Littleton”).

<sup>101</sup> *Littleton*, 9 S.W.3d at 225 (noting that Christie Lee’s husband “was fully aware of her background and the fact that she had undergone sex reassignment surgery”).

<sup>102</sup> See Dahir, *supra* note 65, at 25 (“‘I see a woman, I met a woman, and I fell in love with a woman’ was all he had to say when she told him.”).

<sup>103</sup> See Petition for Writ of Certiorari at 5, *Littleton* (No. 00-25) (stating that when the Littletons applied for a Kentucky marriage license, Christie Lee used her Texas identification card).

<sup>104</sup> See *id.*

<sup>105</sup> *Id.*

<sup>106</sup> Lisa Gray, *XX Marks the Spot*, HOUSTON PRESS, Sept. 14, 2000, at B5, available at <http://www.houstonpress.com/issues/2000-09-14/gray.html> (last visited Feb. 20, 2001).

<sup>107</sup> See *id.* (remarking that Christie Lee “is quick to say that their marriage was consummated, [and] that she and Mark enjoyed lots of what her lawyers call ‘private, intimate, heterosexual vaginal-penile sexual intercourse’”).

<sup>108</sup> Copies of some of those forms are available and were shown on NBC Dateline. See *supra* note 92 (noting Christie Lee’s appearance on NBC Dateline on August 2, 2000).

legal spouse in a community property state, to pay Mark's child support for his children by a previous marriage.<sup>109</sup>

Four years ago, after numerous medical problems, Mark died.<sup>110</sup> There was an allegation of medical malpractice.<sup>111</sup> Christie Lee hired a San Antonio law firm.<sup>112</sup> During her deposition, Christie Lee disclosed her past status as a transsexual.<sup>113</sup> The insurance company for the doctor offered Mrs. Littleton's original birth certificate as evidence of a same-sex marriage in a motion for partial summary judgment<sup>114</sup> that the trial court subsequently granted.<sup>115</sup>

On appeal of that partial summary judgment came the Fourth Court's decision of *Littleton v. Prange*, which held against Mrs. Christie Lee Littleton even though she had followed all of the rules.<sup>116</sup>

## 2. The Courts' Treatment of the *Littleton* Case: Various Texas Laws Were Violated or Ignored by the Fourth Court, the Texas Supreme Court, and the United States Supreme Court.

The Fourth Court's decision stated that the legal definition of sex was a question for the legislature, not for the court.<sup>117</sup> Then the court made law by announcing that genitals were no longer the legal standard for determining an individual's sex, and that the

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<sup>109</sup> Copies of some of those cancelled checks are available and were shown on NBC Dateline. *See supra* note 92.

<sup>110</sup> *See Gray, supra* note 106 at \*5 (noting that Mark's death was caused by blood clots soon after arriving home from the hospital).

<sup>111</sup> *See id.* (stating that Christie's mother-in-law urged Christie to sue the doctor for malpractice).

<sup>112</sup> *See supra* note 3 (noting that neither Frye nor Meiselman were involved with Mrs. Littleton's lawsuit until after the first appeal to the Texas Supreme Court was refused).

<sup>113</sup> *See* Petition for Writ of Certiorari at 4, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (No. 00-25) (indicating that Mrs. Littleton "freely disclosed that in 1979, she had undergone corrective genital reassignment surgery").

<sup>114</sup> The same law firm that represented Mrs. Littleton also represented Mark's mother and two children. Mark's mother and children remained in the case. The doctor's insurance company reportedly settled with Mark's mother and children.

<sup>115</sup> *Littleton*, 9 S.W.3d at 225 (summarizing the trial court's decision that held that Christie Lee's status as a man made her ineligible as the surviving spouse of a man with respect to beneficiary status).

<sup>116</sup> Appellant's Motion for Rehearing, at n.14, *Littleton* (No. 99-1214). A very detailed accounting of Mrs. Littleton's life was written by Lisa Gray. *See Gray, supra* note 106, at \*3-\*6 (noting that at the age of five, Christie Lee knew she was not a boy).

<sup>117</sup> *See Littleton*, 9 S.W.3d at 230 (stating that the claim is "statutorily-based," thus not within the judiciary's control); Rose, *supra* note 38, at 77-79, 87 (commenting that "[t]he stark reality of *Littleton v. Prange* is that Chief Justice Hardberger did make law where none existed").

legal standard is now predicated upon an individual's chromosomes.<sup>118</sup>

The Fourth Court wanted something immutable to be the determinant of a person's gender.<sup>119</sup> Even though Mrs. Littleton's medical history occupied much of the majority opinion,<sup>120</sup> the fact that Mrs. Littleton was mentally female for approximately forty-four years of her forty-seven-year life was not considered immutable.<sup>121</sup> The concurring opinion also preferred biological considerations to those same psychological considerations that Mrs. Littleton had evidenced for over ninety-four percent of her life.<sup>122</sup> In a recent Ninth Circuit decision, the federal court recognized, based on current medical knowledge, that an individual's mental gender identity is immutable.<sup>123</sup>

In choosing chromosomes as the immutable factor, the Fourth Court relied heavily on *Corbett v. Corbett*,<sup>124</sup> a thirty year old British trial-level opinion. Other British Commonwealth courts in Australia<sup>125</sup> and New Zealand,<sup>126</sup> as well as the Court of Justice of

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<sup>118</sup> *Littleton*, 9 S.W.3d at 227, 230-31 (concluding that "male chromosomes do not change with either hormonal treatment or sex reassignment surgery").

<sup>119</sup> *Id.* at 223 ("This case involves the most basic of questions. When is a man a man, and when is a woman a woman?"). Further, the Motion for Rehearing reads,

There are at least ten statutes in which the laws of Texas overcome, erase or rewrite immutable biological facts to bestow rights, responsibilities and privileges upon its citizens (TEX. FAM. CODE, Sec. 2.004, 6.201, 101.024, 108.009, 151.02; TEX. HEALTH & SAFETY CODE, Sec. 192.088, 192.096; TEX. CODE ANN., Sec. 181.8; TEX. PENAL CODE, Sec. 25.02; TEX. CRIM. PROC., art. 63.0015). These legal fictions are, in turn, perpetuated in additional statutes, creating permanent irrebuttable determining factors in civil and criminal matters. Taken as a whole, these statutes provide ample precedent for the lower courts to determine that the amended birth certificate is a valid means of recognizing Mrs. Littleton as a female under the law.

Appellant's Motion for Rehearing at n.12, *Littleton* (No. 99-1214).

<sup>120</sup> *Littleton*, 9 S.W.3d at 224-25 (providing the factual background of the case).

<sup>121</sup> *Id.* at 227 (citing *Corbett v. Corbett*, 1971 P. 83 (U.K.), which "rejected the contention that individuals could 'assign' their own sex by their own volition, or by means of an operation").

<sup>122</sup> *Id.* at 232 (Angelini, J., concurring) (agreeing that the court must be "guided by biological factors such as chromosomes, gonads, and genitalia at birth").

<sup>123</sup> See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094 (9th Cir. 2000) (holding that gay men with female tendencies have a female identity that is immutable because it is inherent in their identities).

<sup>124</sup> 1971 P. 83 (U.K.). Repudiation of this case was brought to the attention of the Texas Supreme Court in supplemental filings to the Motion for Rehearing. See Appellant's Motion for Rehearing at 2, *Littleton* (No. 99-1214); see also *Littleton*, 9 S.W.3d at 226-27, 232 (citing *Corbett* numerous times throughout the majority and concurring opinions).

<sup>125</sup> See *Sec'y, Dept. of Soc. Sec. v. S.R.A.* (1993) 118 A.L.R. 467, 472, 493 (Austl.) (noting the narrowness of the *Corbett* decision, which the court rejected in favor of a more "compassionate and humane approach to the sensitivities of human sexuality").

<sup>126</sup> See *Attorney Gen. v. Otahuhu Fam. Ct.*, [1995] 1 N.Z.L.R. 603 (stating that the *Corbett* court had, in effect, erred by overlooking the "psychological and social factors" that help to define a person's sexual identity and gender).



the European Communities,<sup>127</sup> have repudiated *Corbett*. Consequently, the British Home Office initiated action in April of 2000 to legislatively overrule *Corbett* in light of current medical data.<sup>128</sup>

By choosing chromosome status over Mrs. Littleton's current medical sexual status,<sup>129</sup> the Fourth Court directly conflicts with both a federal district court decision in Connecticut<sup>130</sup> and an on-point 1990 federal administrative decision from Houston, Texas.<sup>131</sup>

When the Fourth Court decided that "biological considerations are preferable to psychological factors"<sup>132</sup> in determining what is immutable, it ignored the evolution of medical science.<sup>133</sup> Incredibly, by choosing a chromosomal standard, the Fourth Court also ignored the highly publicized evolution within sports medicine.<sup>134</sup> Neither

<sup>127</sup> See *P v. S and the Cornwall County Council*, Case C-13/94 [1996] CEC (CCH) 574, 2 C.M.L.R. 247 (holding that an individual who underwent gender reassignment surgery should be protected from discrimination, and, while not specifically repudiating *Corbett*, not mentioning chromosomal make-up in arriving at its holding).

<sup>128</sup> See British Home Office, *Report of the Interdepartmental Working Group on Transsexual People*, available at <http://www.pfc.org.uk/workgrp/wgrp-all.html> (last visited Feb. 20, 2001) (noting that many transsexuals have expressed the desire to marry, but the *Corbett* case disallows fulfilling this desire).

<sup>129</sup> The Fourth Court ignored stipulated medical evidence in arriving at its decision. This precedent will allow courts to ignore evidence and make rulings solely on the type of religious beliefs expressed in the second paragraph of the *Littleton* decision. See *Littleton*, 9 S.W.3d at 224, 231 (noting that Littleton was "anatomically and genetically" made a male at birth "by our Creator").

<sup>130</sup> See *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) (observing that a fundamental interest in marriage may be implicated if a state denies a person the right to change his birth certificate sex status).

<sup>131</sup> VETERANS ADMIN. GEN. COUNSEL, DEPT VETERAN AFFAIRS, *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, 1990 WL 605201 (Vet. Aff. Op. Gen. Couns. Prec. 15-90 May 25, 1990) (recognizing a marriage of a veteran, who had anatomically altered his sex from female to male, as legal, thereby awarding additional veteran benefits).

<sup>132</sup> *Littleton*, 9 S.W.3d at 232 (indicating that "[t]he only pre-operative distinction between Christie Lee Littleton and a typical male was her psychological sense of being a female").

<sup>133</sup> See Appellant's Motion for Rehearing at 2, *Littleton* (No. 99-1214) ("This 'test' is contrary to generally accepted medical knowledge."); see also, e.g., Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 326 (1999) [hereinafter Greenberg, *Collision*] (noting that biological factors alone do not define sex and gender); J.-N. Zhou, et. al, *A Sex Difference in the Human Brain and its Relationship to Transsexuality*, 378 NATURE 68 (1995), reprinted in INT'L J. TRANSGENDERISM 1, 1 (July-Sept. 1997), at <http://www.symposion.com/ijt/ijtc0106.htm> (explaining that gender identity alterations result from hormonal, not chromosomal, considerations); Cornell University, *Brain Neurochemicals Tell a Female to Act Like a Female, Not Her Gender*, *Cornell Biologists Discover*, CORNELL UNIV. NEWS (Feb. 16, 2000) [hereinafter Cornell University, *Brain Neurochemicals*], available at <http://www.news.Cornell.edu/Chronicles/2.24.00/gender/html> (last modified Feb. 24, 2000) (explaining that, based on a study of a species of fish, brain processes of social behavior are not necessarily linked to gonadal sex).

<sup>134</sup> The efforts of the International Olympic Committee to verify gender were detailed in the Motion for Rehearing:



the International Olympic Committee (I.O.C.),<sup>135</sup> nor the International Amateur Athletic Federation (I.A.A.F.),<sup>136</sup> perform the so-called 'chromosome femininity tests' today, but only require a physical examination by a qualified physician.<sup>137</sup>

The Fourth Court presumed that Mrs. Littleton had XY male chromosomes based on the sex noted on her original birth certificate.<sup>138</sup> The Fourth Court had no evidence as to what Mr. Littleton's birth certificate listed as his legal sex at birth. Therefore, the Fourth Court made the presumption that it read male.<sup>139</sup> Neither Mrs. Littleton nor Mr. Littleton had ever been tested.<sup>140</sup> Due to the Fourth Court's presumptions, Mrs. Littleton was put in the position of having to defend herself by presenting test information in violation of state law<sup>141</sup> and of the American Medical Association Code of Medical Ethics.<sup>142</sup>

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The International Olympic Committee (I.O.C.) has struggled for forty years to verify the sex of its female athletic competitors. I.O.C. history [includes] many examples of using chromosomes as the indicator of sex, which ultimately proved painful, inaccurate and abusive. In one example, a female athlete disqualified for having male chromosomes gave birth to a child a few years later. Other organizations of athletes have already left the chromosome test behind and are now using the genital presentation test. The I.O.C. is steadily moving back to sex verification by genital presentation.

Appellant's Motion for Rehearing at n.3, *Littleton* (No. 99-1214). See also Adolfo Pesquera, *Lawyer Ponders Effects of Transsexual's Case*, SAN ANTONIO EXPRESS-NEWS, April 8, 2000, at 7B, available at <http://christielee.net/isaen2.htm> [hereinafter Pesquera, *Ponders*] (illustrating how a Polish sprinter was banned from the European Cup because she had "one chromosome too many to be declared a woman," but later "gave birth to a healthy baby").

<sup>135</sup> "The IOC Session also agreed to refrain, on an experimental basis, from performing gender tests at the 2000 Games in Sydney. The IOC will nonetheless reserve the right to conduct such tests, if necessary." Press Release, *IOC Plans Random Drug Testing for Sydney 2000* (June 17, 1999), available at [http://www.olympic.org/ioc/e/news/pressreleases/press\\_126\\_e.html](http://www.olympic.org/ioc/e/news/pressreleases/press_126_e.html).

<sup>136</sup> Press Release *Gender Verification*, IAAF (July 30, 1991) ("The Buccal smear test [a chromosome test] will no longer be used. It has proved to be scientifically unreliable." Instead, the IAAF determined athletes will "undergo a physical examination by a qualified doctor.").

<sup>137</sup> Mark Robinson, *The Olympic Chromosome* (Sept. 13, 2000), at <http://www.tehelka.com/oly091300sextest.htm> (last modified Sept. 13, 2000) (stating that "physicians worldwide" claim the chromosomal tests "lack scientific merit").

<sup>138</sup> *Littleton*, 9 S.W.3d at 231 ("Christie was created and born a male. Her original birth certificate . . . clearly so states.").

<sup>139</sup> *Id.* (holding that Christie's marriage to Jonathan was invalid because Texas law prohibits same-sex marriages).

<sup>140</sup> See Appellant's Motion for Rehearing at n.9, *Littleton* (No. 99-1214).

<sup>141</sup> The Motion for Rehearing states:

By ignoring the stipulated medical evidence and imposing its own 'test' based on genetic information (chromosomes), the court of appeals violated V.T.C.A. Art. 9031 which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency", defined to include the "judicial branch of state government." Neither Mrs. Littleton nor her deceased husband has even had a chromosome test. By granting and upholding a Summary Judgment based on the chromosome test, and by assuming that the vaginaed Mrs. Littleton is XY and the

The Fourth Court also relied on the Federal Defense of Marriage Act (DOMA)<sup>143</sup> as a basis for testing the validity of the Littleton's Kentucky marriage.<sup>144</sup> DOMA was enacted several months after Mr. Littleton died.<sup>145</sup> Therefore, by relying on DOMA, the Fourth Court violated the Texas Constitutional provision of Art. 1, Sec. 16 that bans retroactive laws.<sup>146</sup>

All of these violations and inconsistencies were pointed out to both the Texas Supreme Court and the United States Supreme Court and were ignored. Therefore, Mrs. Littleton remains a legal male, although fully and functionally vaginaed.

### 3. The Implications of *Littleton*: Various Populations—Other Than Transsexual—and Areas of Law Will be Adversely Affected if the Fourth Court's Ruling Remains the Law.

If the reader is a non-transgendered person and wonders why one should care about the Fourth Court's decision yielding an unfair result to some transsexuals in Texas, it is because the results of this decision are going to adversely affect many more than just transsexuals.<sup>147</sup>

The Fourth Court's legal sex test, which defined chromosomes to be the only immutable characteristic, ignores everyone whose chromosomal make-up is not XX or XY.<sup>148</sup> It also failed to consider

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penised deceased Mr. Littleton was XY, the lower courts are requiring Mrs. Littleton to test herself and reveal that information in violation of Art. 9031.

*Id.*

<sup>142</sup> "Such a requirement also violates five of the American Medical Association, Code of Medical Ethics, sections 2.132, 2.135, 2.137, 5.08. and 5.09, dealing with the confidentiality of genetic information." *Id.* at n.10.

<sup>143</sup> 28 U.S.C.A. § 1738 (c) (Supp. 2000) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.").

<sup>144</sup> See *Littleton*, 9 S.W.3d at 226 (stating that same-sex marriage does not need to be recognized by other states just because one state does so).

<sup>145</sup> See Appellant's Motion for Rehearing at n.9, *Littleton* (No. 99-1214) ("D.O.M.A. was enacted in September 1996. Mr. Littleton died in July 1996.").

<sup>146</sup> *Id.*

<sup>147</sup> See *infra* notes 157-59 and accompanying text (noting that insurance companies, jails, women who have had hysterectomies, and various others may be affected by the *Littleton* decision).

<sup>148</sup> See Appellant's Motion for Rehearing at n.9, *Littleton* (No. 99-1214) (criticizing the court for imposing a test based on genetic information and ignoring the stipulated medical evidence).

that some women are XY and some men are XX.<sup>149</sup> This population is considered "intersexed."<sup>150</sup>

The estimated percentage of intersexuals among the general population ranges from one to four percent.<sup>151</sup> In the United States, with a population exceeding 266 million, anywhere from 2.7 million to 10 million people are intersexual, according to the most recent medical science.<sup>152</sup> With the population of Texas exceeding 20 million,<sup>153</sup> there could be from 200,000 to 800,000 intersexual Texans.<sup>154</sup> In addition, the Fourth Court's ruling can considerably affect all of the people who have married or plan to marry someone without knowing for certain if that person is intersexed, and the children who are born to or adopted by those people.<sup>155</sup>

Recently, the Human Genome Project discovered that every person has from five to thirty genetic errors.<sup>156</sup> Who among us will not be touched in some way by *Littleton* or its progeny?

<sup>149</sup> *Id.* at n.11; see also *Littleton*, 9 S.W.3d at 232 (noting that some individuals' "sex may be ambiguous"). See generally Greenberg, *Collision*, *supra* note 133, at 271-78 (providing exhaustive references in this area, which were available to the Fourth Court).

<sup>150</sup> See Greenberg, *Collision*, *supra* note 133, at 281-92 (listing the various conditions—physical, psychological, and social—that can cause a person to be classified as "intersexual").

<sup>151</sup> *Id.* at 267-68 & n.6 (noting the percentage of "transgendered" persons might be even greater than one to four percent, since this is a "broader term . . . used to describe individuals [other than just] . . . intersexed people") (citing Carey Goldberg, *Shunning "He" and "She," The Fight for Respect*, N.Y. TIMES, Sept. 8, 1996, §1, at 24).

<sup>152</sup> *Id.* ("[T]he manner in which the law defines 'male,' 'female,' and 'sex' will have a profound impact on at least 2.7 million persons in the United States.").

<sup>153</sup> See United States Census Bureau, *State and County Quickfacts* (1999), available at <http://quickfacts.Census.gov/qfd/states/48000.html> (last visited Feb. 20, 2001) (estimating the 1999 Texas population to be 20,044,141).

<sup>154</sup> The Motion for Rehearing stated:

The population of intersexed Texans ranges from 20[0],000 to 800,000. Most intersexed do not know that they are intersexed, especially those who are older, for whom testing was not available to them as adolescents or young adults, and who had no outward physical manifestations or reproductive fertility problems. The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified.

The number of Texans with Androgen Insensitivity Syndrome (A.I.S.) is much smaller but still significant at approximately 500 or more. These are the XY born vaginaed individuals. These and the 20[0],000 to 800,000 intersexed Texans will face voiding of their marriages and loss of benefits by application of the court of appeals sex test, as did Mrs. Littleton, retroactively.

The number of Texans who are transsexual is less well known. For this motion, the number of non-transsexual Texans who will be adversely effected [sic] if this decision remains is very large and significant in its own right.

Appellant's Motion for Rehearing at n.2, *Littleton* (No. 99-1214).

<sup>155</sup> See generally Coombs, *supra* note 35, at 246 (illustrating numerous flaws in the standard procreation argument since people of varied sexual orientation can successfully raise a family).

<sup>156</sup> "Each of us has an estimated 5 to 30 serious misspellings or alterations in our DNA; thus, we could all be targets for discrimination based on our genes. Of particular concern is

The Fourth Court emphasized the fact that Mrs. Littleton had no internal female organs.<sup>157</sup> Taken to a logical extreme, this could mean that every woman who has had a complete or partial hysterectomy, a mastectomy, or hormone replacement therapy after menopause, may be required to prove her womanhood by showing her original birth certificate or the results of a chromosome test.<sup>158</sup> It is also foreseeable that every man who has had an orchiectomy or prostate removed due to cancer could be required to prove his manhood by showing his original birth certificate or the results of a chromosome test.<sup>159</sup>

The Fourth Court failed to give full faith and credit to the public acts, records, and judicial proceedings of the State of Kentucky, thereby violating Article IV, Section 1 of the United States Constitution.<sup>160</sup> How will this affect future litigation involving people who have married in other states and then moved to Texas?

Will future Texas lawsuits following the *Littleton* decision require the genetic testing of litigants despite the existence of the Texas Statute, Article 9031, prohibiting the use of genetic information?<sup>161</sup> If so, lawyers may be committing malpractice if they fail to have their clients genetically tested in light of the *Littleton* decision. However, lawyers who disclose such information would violate Article 9031.<sup>162</sup> When litigating a high-stakes divorce or a bitter child custody fight, if testing revealed that the genetic make-up was

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the fear of losing jobs or health insurance because of a genetic predisposition to a particular disease." Congressional Task Force on Health Records and Genetic Privacy: Preventing Genetic Discrimination in Health Insurance (July 22, 1997) (statement of Francis S. Collins, M.D., Ph.D., Dir., Nat'l Human Genome Research Inst.), *available at* [http://www.nhgri.nih.gov/Policy\\_and\\_public\\_affairs/Legislation/Stearnsh.html](http://www.nhgri.nih.gov/Policy_and_public_affairs/Legislation/Stearnsh.html).

<sup>157</sup> See *Littleton*, 9 S.W.3d at 230 (concluding that any medical treatment received by a transsexual would be incapable of creating a woman's internal sexual organs, such as a womb, cervix, or ovaries).

<sup>158</sup> See Greenberg, *Collision*, *supra* note 133, at 294 (noting that the courts have consistently relied on simple biological factors, such as genitalia, to determine gender without further considering other factors or variables that may effect such a determination).

<sup>159</sup> See *id.* at 309 (stating that "the birth certificate is the first official document to indicate [a person's] sex").

<sup>160</sup> See Appellant's Motion for Rehearing at 5-7 nn.9, 13, 14, *Littleton*, (No. 99-1214) (pointing out that the court only considered genetic information, disregarding Mrs. Littleton's Texas Department of Public Safety Identification Card and other prior actions of the Texas courts and executive branch); see also Petition for Writ of Certiorari at 6-7, *Littleton* (No. 00-25) (arguing that the Texas Supreme Court should have reviewed the lower court's alleged unconstitutional actions).

<sup>161</sup> TEX. OCC. CODE ANN. Art. 9031 (Vernon 2000) (prohibiting the disclosure of information derived from a genetic test).

<sup>162</sup> *Id.* (stating that "[a] person or entity that holds that information may not disclose or be compelled to disclose, by subpoena or otherwise, genetic information about an individual unless the disclosure is specifically authorized by the individual as provided by . . . this section").

not exactly XX / XY, under *Littleton* the marriage would be considered void.<sup>163</sup>

In a probate case, especially one involving an intestate decedent with adult children who dislike the surviving, non-parental spouse, there may be a means to cut that surviving, non-parental spouse out of her or his portion of the estate.<sup>164</sup> With a one to four percent chance that an individual is intersexed, many litigants would find it worth the expense to determine if their adversary is intersexed, with a resulting void marriage.<sup>165</sup>

In a wrongful death tort, personal injury with loss of consortium, or another type of tort where a marital relation is required for standing, an insurance company now has a helpful tool to keep the facts away from a jury.

Will insurance rates be affected because actuarial tables may require adjustment from genital sex to chromosome sex? Are those individuals with XO, XXY, XXXY, XYY, XYYY chromosomal sequences to be classified as a new gender type? An attorney friend of ours was born female and has been tested to have eighty-five percent XO and fifteen percent XY chromosomes. Can she marry? If she crosses the borders of the Fourth Court's jurisdictional lines,<sup>166</sup> must she begin using the men's restroom? On a hot summer day, can she legally take off her shirt at the public swimming pool or at the park, without being arrested for showing her breasts?<sup>167</sup> In such pool and park situations, what standard will the police use to establish probable cause for her arrest? What police see will no longer be legally accurate if they cannot see her chromosomes. Will everyone applying for a marriage license eventually have to pay for a chromosome test? Will county clerks have to be medically trained to read and interpret the test results?

These and other questions were presented to the Texas Supreme Court in the *Littleton* Motion for Rehearing,<sup>168</sup> which was overruled

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<sup>163</sup> An Austin attorney friend told Frye that such a custody fight already took place. The fight was not appealed and the attorney was instructed by the client not to reveal the parties' names.

<sup>164</sup> *Littleton* has already been carried to Kansas in *In re Estate of Gardiner*. Unreported decision; appeal pending, Kansas State Court of Appeals, Docket #85030, filed Apr. 5, 2000. See *supra* note 72-76 (discussing how millionaire Marshall Gardiner died intestate and his son has contested the claim of entitlement by the transsexual surviving spouse to half of the two and one-half million dollar estate).

<sup>165</sup> See Greenberg, *Collision*, *supra* note 133 at 267 (stating that "approximately one to four percent of the world's population may be intersexed" based on recent medical studies).

<sup>166</sup> See *supra* note 2 (setting out the Fourth Court's jurisdictional limits).

<sup>167</sup> *Littleton v. Prange*, 9 S.W.3d 223, 223-24 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000).

<sup>168</sup> Appellant's Motion for Rehearing at 4-5 n.8, *Littleton* (No. 99-1214).



by that body.<sup>169</sup> In effect, insurance company defense lawyers and their clients were allowed to keep facts from a jury. In so doing, the rights of many people were placed in jeopardy of future litigation by the very courts established to protect those rights.

#### IV. STRATEGIES TO CIRCUMVENT *LITTLETON V. PRANGE* UNTIL IT IS OVERTURNED

One of the many original goals of the International Conference on Transgender Law and Employment Policy, Inc. [ICTLEP] conferences was to discuss and develop strategies for progressive change<sup>170</sup> in the midst of inferior law or in the absence of any law at all.<sup>171</sup> We continue that heritage and suggest the following strategies to circumvent *Littleton* until it is overturned.

##### A. *Coming Out and Lobbying for Change*

First, transgenders need to come out, be proud, and lobby for legislative changes. As was discussed in the Dallas Denny article<sup>172</sup> and the Jamison Green introduction,<sup>173</sup> those transgenders who

<sup>169</sup> *Littleton*, 9 S.W.3d 223, *review denied* (Mar. 2, 2000), *reh'g denied* (May 18, 2000), *cert. denied*, 121 S. Ct. 174 (Oct. 2, 2000) (mem.) (No. 00-25).

<sup>170</sup> See FIFTH PROCEEDINGS, *supra* note 27, at xiv (listing transcribed presentations and submitted articles about transgender issues, including information on DOMA, transgendered behavior, and genital surgery).

<sup>171</sup> See Frye, *Facing Discrimination*, *supra* note 48, at 160-68 (describing the strategies and historical perspectives of the ICTLEP conferences); see also Green, *Introduction*, *supra* note 37, at 9-10 (outlining and discussing transgender issues in order to increase awareness and encourage positive legislative advances).

<sup>172</sup> See Denny, *Diagnosis*, *supra* note 51 (illustrating the myriad problems that transsexual people faced when seeking treatment at university affiliated gender clinics).

<sup>173</sup> See Green, *Introduction*, *supra* note 37, at 1-12. Jamison "James" Green began doing educational public speaking on behalf of transsexual men in 1989 and became the leader of the San Francisco female-to-male support group in 1991, which developed into "FTM International, Inc." Green's work on the San Francisco Human Rights Commission's *Report on Discrimination Against Transgendered People* (1994) was instrumental in the 1995 implementation of legislation to protect transgendered people in the City and County of San Francisco and has also served as a model for other cities, states, and counties. He writes and speaks on behalf of transgendered communities, providing academic lectures, organizational sensitivity trainings, and transgender advocacy services to groups, institutions, and corporations, including the San Francisco Police Academy, the American Psychological Association, the AIDS ministry at San Francisco General Hospital, the public, government officials, and institutions of various nations in Europe, Asia, and South America. Green has appeared in four documentary films (including the award-winning "You Don't Know Dick"), and has received all of the gender community's highest awards: The Outreach Institute Medal (2000), Renaissance Transgender Education Association Award (2000), FTM International's Pride Award (1999), IFGE's Trinity (1995) and Virginia Prince (1998) Awards, the International Conference on Transgender Law and Employment Policy (ICTLEP) Transgender Pioneer Award (1995), and the Transgender San Francisco (TGSF) Community



were transsexual, and who successfully sought out surgical correction in the 1960s through the early 1990s, often had to learn to lie to their medical clinic gatekeepers.<sup>174</sup> There was a social, familial, religious, and economic stigma of being associated with transgenders.<sup>175</sup> Thus, most adult transgenders across the spectrum have remained closeted and ashamed to some extent.<sup>176</sup>

Coming out can be a frightening process.<sup>177</sup> Yet, coming out is the only way transgenders will ever realize their rights. In order to finally lessen discrimination, family, friends, neighbors, co-workers, and lawmakers must be able to associate transgenderism with a human face, as opposed to a stereotyped myth.<sup>178</sup>

Since the 1990s, the results of transgenders coming out and beginning to lobby for their rights have been remarkable.<sup>179</sup> In 1990, only four United States cities had human rights laws that explicitly included transgendered people.<sup>180</sup> By 2000, an additional

Leader Award (1996). See Jamison Green, *available at* <http://www.jamisongreen.com/page5.htm>.

<sup>174</sup> See Green, *Introduction*, *supra* note 37, at 7 (noting that for years persons seeking “sex reassignment surgery” were forced to disavow any “similarity to or affiliation with lesbians and gay men”).

<sup>175</sup> See *id.*; see also Frye, *Cider House Rules*, *supra* note 24, at 153-54 (discussing the public’s inherently incorrect presumption that transgenders are “incorrectly assumed to be homogeneously heterosexual” and other stereotypes that are placed on transgenders).

<sup>176</sup> Some members of the transgender community resist merging with each other or merging politically with the lesbian, gay, and bisexual (LGB) community. While working on the *Littleton* appeals and during the Wicks marriage publicity, the authors were frequently the recipients of negative harassing e-mail from both transsexuals and crossdressers who stated that they wanted nothing to do with the LGB community. During preparation for this article, Frye e-mailed a request for transgenders who had been forced to divorce, asking them to please respond. She received several replies from transsexuals who stated that they were transsexual and not transgendered, and, since Frye addressed them as transgenders rather than as transsexuals, they would not give her any information about coerced divorces. Sadly, some transsexuals adamantly assert that, because they had surgery, they are no longer transsexuals but instead are “real women” who do not want to participate in the transgender struggle. Others replied that because they have successfully closeted their past, they do not want to risk helping others whose closet doors have been destroyed by bigots.

<sup>177</sup> See Frye, *Cider House Rules*, *supra* note 24, at 139-45 (noting the types of violence and discrimination transgenders are subject to when they “come out”). See generally Natalie Hopkinson, *Transgender Lawyer Moves Lawmakers on Discrimination Bill*, MONTGOMERY J., Mar. 22, 1999, at A5 (reporting how lawyer Alan Meiselman’s “transformation” to Alyson Meiselman “took a [heavy] toll” on both her career and personal life).

<sup>178</sup> See CURRAH & MINTER, *supra* note 81, at 28-29 (observing that it is particularly important, especially when dealing with lawmakers, for transactivists to convey personal accounts of transgender-based discrimination).

<sup>179</sup> See Frye, *Facing Discrimination*, *supra* note 48, at 460-68 (discussing the transgender activist population and the progress made in recent years).

<sup>180</sup> See CURRAH & MINTER, *supra* note 81, at 17, fig. 1 (illustrating the trend toward greater protection of transgender rights at the municipal level from 1975 to the present).

twenty-three municipalities<sup>181</sup> and one state had joined the list.<sup>182</sup> This progress was the result of grassroots activism by local transgenders who had come out and allied themselves with the local lesbian, gay, and bisexual political communities.

Change can occur. For example, consider the grassroots work being done by transgenders in Texas. If this work can be done in a state as conservative as Texas, it can be done anywhere. For four of the past five sessions of the Texas Legislature, transgender activists<sup>183</sup> have sought statutory reform to allow the legal determination of sex to be a factual issue. This determination can evolve with advances in medical science<sup>184</sup> and be heard by the state district courts. In January 1999, over fifty transgenders effectively lobbied at the state capitol in Austin.<sup>185</sup> In February of 2001, transgenders introduced both a House bill and a companion Texas Senate bill. In May of 2001, transgenders will resume efforts on a national level.<sup>186</sup>

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<sup>181</sup> See *id.* (listing cities and counties across the United States that now offer transgenders a degree of protection from discrimination).

<sup>182</sup> See *id.* at 15, 19 (describing how, in 1993, Minnesota became the first state to ban discrimination against transgenders).

<sup>183</sup> See generally Sarah DePalma, *Are You a Man or A Woman?*, at <http://laplaza.org/pipermail/nmqn/2000-March/000688.html> (last visited Feb. 20, 2001) (listing the Texas Gender Advocacy Information Network [T-Gain] as "the oldest and largest state run transgender-lobbying organization in the country"); Barbara Findlay, *Finding Our Place: Transgendered Law Reform Project* (1996), at <http://www.geocities.com/westHollywood/Heights/5735/tglawrpt.htm> (last visited Feb. 20, 2001) (presenting a study done by High Risk Project Society, a transgender advocacy group in British Columbia). Transgender activist organizations are consistently engaged in lobbying efforts throughout North America.

<sup>184</sup> See Karen M. Goulart, *Attorney Sees 2 Sides of Law*, PHILA. GAY NEWS, 2000, available at <http://www.christielee.net/saen9.htm> (last modified Oct. 1, 2000) (reporting Frye's and Meiselman's efforts to change the evidentiary standard for determining a person's "legal sex"). See generally Cornell University, *Brain Neurochemicals*, *supra* note 133 (detailing how recent discoveries suggest that chemicals in the brain could be the "true" origin of gender, rather than gonadal physiognomy).

<sup>185</sup> See "Joe Blow," *Texas Transgender Lobby Day: A Guy's Perspective* (Jan. 1999), at <http://www.geocities.com/westHollywood/Castro/1130/lobbyday.htm> (last visited Feb. 20, 2001) (detailing the events surrounding the January 1999 Lobby Day); see also Ambush Mag 2000, *1st TX Transgender Lobby Day*, 17 GAY LESBIAN BISEXUAL TRANSGENDER NEWS 2, available at <http://www.ambushmag.com/is299/news4.htm> (last visited Feb. 20, 2001); Gender News, *Texas Transgender Lobby Day Planned for January 27* (Nov. 1998), available at <http://www.ifge.org/news/1998/nov/nwsb298.htm> (last visited Feb. 20, 2001) (illustrating the transgender movement's skillful use of the Internet in publicizing trans activist lobbying efforts).

<sup>186</sup> See National Transgender Advocacy Coalition, *Transgender Lobby Days Announced* (Press Release, Jan. 10, 2001), available at <http://www.ntac.org/news/010110lobby.html> (last visited Feb. 20, 2001) (detailing plans for a national Transgender Lobby Day in Washington, D.C., the week of May 14, 2001).

### B. Birth Certificates

Second, transgenders should consider whether to amend their birth certificates to reflect their corrected genitals or to retain their original, unamended birth certificates. Regardless of what one's genitals are initially, or are corrected to, if a transgendered person was married legally before genital correction, it may be advantageous for that person to retain her or his original birth certificate.<sup>187</sup> A medical malpractice insurance lawyer or a DOMA administrator could argue that the amended birth certificate replaced the original. Thus, the marriage of legal opposite sexes is now a same-sex marriage that is voidable.<sup>188</sup> Many marital benefits<sup>189</sup> are at risk from the desire to amend one's birth certificate after the completion of transsexual correction.<sup>190</sup>

Furthermore, if a post-surgical transgender wishes to legally marry someone who has matching genitals, having opposite sex, original birth certificates can be valuable.<sup>191</sup> Advising transgenders to pick and choose, and be consistent once the choice is made, seems justified when considering the way the transgender community has been legally victimized.<sup>192</sup>

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<sup>187</sup> Frye has been legally certified female by a Texas court, but decided not to amend her birth certificate for the reasons cited herein.

<sup>188</sup> See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000) (holding that Christie Lee's amended birth certificate is not binding on the court because no inaccuracy was shown to be within the meaning of the Texas statute).

<sup>189</sup> Such benefits include, but are not limited to, social security, medicare, employer health insurance benefits, surviving spouse recognition in tort actions, inheritance in the absence of a will, income tax bracketing status, legal parental status of children, and the automatic deference of administrators in emergency situations where hospitalization and other medical decisions are concerned.

<sup>190</sup> The term "completion" was deliberately used to remind the readers that not all transsexuals have genital surgery. Even so, when they reach that full-time, hormonal stage where they feel complete, they have just as much right to be recognized as being complete as do those who determine that genital surgery is correct for them. As stated in CURRAH & MINTER, *supra* note 81, at 40, "female-to-male transsexuals (FTMs) often have different routes to transition than male-to-female transsexuals (MTFs), and that many FTMs may never have genital ("bottom") surgery" and "many transsexuals are non-operative, either because they cannot afford or choose not to undergo sex reassignment or are prevented from doing so for health reasons." See generally Phyllis Randolph Frye, *Freedom From the Scalpel*, TRANSGENDER TAPESTRY, Spring 1999, at 32-33.

<sup>191</sup> See *supra* notes 12-19 (noting that Jessica Wicks was allowed to marry Robin, her lover, because, although a woman, Jessica's original birth certificate stated that she was a male).

<sup>192</sup> Consistency in the choice made allows for a defense if attacked, but it also opens the community door wide for freedom to choose a life partner. Thus, we must recognize that within pre-operative, non-operative, and post-operative transsexuals, there is variance as to individual sexual orientation, i.e. male-to-female heterosexual, male-to-female lesbian, male-to-female bisexual, female-to-male heterosexual, female-to-male gay man and female-to-male bisexual. Both authors are married to women, yet while Frye considers herself to be a male-to-female lesbian woman, Meiselman is a male-to-female heterosexual woman. See Alyson

*C. Marriage*

Third, transgenders should consider getting married again. This is especially important for those who are post-surgical transsexuals and have married someone with opposite genitals, as did Mrs. Corbett,<sup>193</sup> Mrs. Ladrach,<sup>194</sup> Mrs. Littleton<sup>195</sup> and Mrs. Gardiner.<sup>196</sup> We suggest that the documentation that supports the re-marriage license, usually the amended birth certificate, be examined in light of the *Littleton* dicta.<sup>197</sup> It may be wise to go back to a court of jurisdiction and obtain a new order to amend the birth certificate in a hearing that is patently non-ministerial,<sup>198</sup> that has all supportive documents formally admitted into evidence,<sup>199</sup> that has a certified transcribed record from the court reporter,<sup>200</sup> and, most importantly, that has a separately signed Statement of Evidence<sup>201</sup> that summarizes the supporting medical evidence.

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Dodi Meiselman, *Y2K—Looking Forward and Back on Marriage*, 33 MD. B.J. at 48, (May/June 2000); CURRAH & MINTER, *supra* note 81, at 1-12 (discussing various transgender issues, including discrimination in employment).

<sup>193</sup> See *Corbett v. Corbett*, 1971 P. 83, 106 (1970) (noting that petitioner claimed his marriage to respondent was a nullity because respondent was a male, even though respondent had undergone a “sex-change” operation years before and petitioner was aware of that fact before the marriage). It is important to distinguish between “correction of sex” and “sex change.” The sexual or gender identity in the brain remains the same. Instead, the social presentation, hormones and some parts of the body may be corrected to match the brain’s unchanged sexual identity.

<sup>194</sup> See *In re Ladrach*, 513 N.E.2d 828, 831-32 (Ohio Prob. Ct. 1987) (denying the application of Elaine Frances Ladrach, ne Edward F. Ladrach, to obtain a marriage license as a female because there was no evidence of error in the designation of Edward as a “boy” on his original birth certificate).

<sup>195</sup> See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000) (noting that Christie Lee’s birth certificate was not shown to be inaccurate at the time the certificate was recorded, and, therefore, the amended certificate was not binding on the court).

<sup>196</sup> Unreported decision; appeal pending, Kansas State Court of Appeals, Docket #85030, filed Apr. 5, 2000.

<sup>197</sup> *Littleton*, 9 S.W.3d at 230-31 (listing seven findings of the court which led it to its conclusion that Christie Lee is a male as a matter of law).

<sup>198</sup> To counter an assertion that the court proceeding was ministerial, do not use a court-provided fill-in-the-blank form. This would lend support to a court inclined to treat the proceeding as such. Instead, take the court form and type it out so that it does not have the appearance of a form. It may also be wise to purchase a certified copy of the docket sheet, where the judge has listed items, as further indicia that the proceeding was non-ministerial.

<sup>199</sup> This will include copies of identification, name change order, and a sworn physician’s affidavit. See generally *Littleton*, 9 S.W.3d at 231 (alluding to reliance upon the original and amended birth certificates and “the uncontroverted affidavit of an expert stating that Christie is a female”).

<sup>200</sup> The entire hearing is non-adversarial and should take only a few pages of transcript. If purchased at the time, the transcript could be invaluable during litigation ten or twenty years later.

<sup>201</sup> Such a separate document affirms that the judge read and considered the medical evidence. It also keeps the new order to amend short and, as such, it does not read like a



The new order would include a statement that the hearing was a formal proceeding amounting to much more than a mere ministerial function.<sup>202</sup> The order would also specify jurisdiction, venue, and the identifying documents of the petitioner, as well as a statement that the admitted evidence was clear and convincing.<sup>203</sup> One should use the terms “correct” and “amend,”<sup>204</sup> rather than “change,”<sup>205</sup> and should refer to the original birth certificate as “erroneous” or “mistaken.”<sup>206</sup>

To further rebut the dicta of *Littleton*, a Statement of Evidence to be signed in court by the judge should include a statement that, at birth, the petitioner’s brain’s gender identity was not checked.<sup>207</sup> It would note that, at birth, the incorrect and erroneous designation of her or his<sup>208</sup> sex was because of the ministerial check between the legs.<sup>209</sup> It should state that her or his brain’s gender identity had emerged by the age of three, and it was female or male, whichever is appropriate.<sup>210</sup> It should note that her or his original birth certificate listing the gender is an obvious non-negligent misstatement and error.<sup>211</sup> Further, the Statement of Evidence

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medical textbook. As with the certified transcribed record, the purchase of several certified copies of the signed Statement of Evidence could be invaluable during subsequent litigation.

<sup>202</sup> Let us place the classification of the merely ministerial function where it belongs: at birth, where a mere glance between the legs sets an entire social bi-polar machine into effect. *See supra* note 7. This is different from the non-ministerial and public court hearing that takes place after a person has lived many years dealing with his or her brain’s gender self-identity, medical gatekeepers, a difficult transition, legal processes, and has sworn to tell the truth under penalty of perjury. *See, e.g.*, N.Y. PUB. HEALTH LAW § 417 b(4) (West, 1985) (“The commissioner shall provide the application form for a correction of a record which must be . . . affirmed by the persons making them as true under the penalties of perjury . . .”).

<sup>203</sup> Without this finding on the evidence, the recorded transcript, the docket sheet, and the Statement of Evidence will lack probative value.

<sup>204</sup> *See infra* note 215 (noting that the word “change” was assigned to the transgender community by a misunderstanding public).

<sup>205</sup> *See infra* text accompanying notes 214-15 (noting that it is incorrect to label corrective procedures as sex changes because these procedures are not wholesale changes).

<sup>206</sup> *See supra* note 202 (noting that the glance between the legs at birth is ministerial); *infra* note 211 and accompanying text (noting that “error” is the correct terminology to use as a justifiable reason to amend the birth certificate).

<sup>207</sup> *See supra* notes 7, 119-37 (noting that the biological test used to determine gender is contrary to generally accepted medical knowledge).

<sup>208</sup> The pronouns should fit the petitioner’s consistent mental self-image, even if that image is socially contrary to the incorrect genitally assigned pronoun at birth.

<sup>209</sup> *See supra* note 7 (noting that this “ministerial check” may very well result in an error of gender determination).

<sup>210</sup> From an evidentiary standpoint it is important to demonstrate that the petitioner has spent most of her or his life in a social construct that is different from what her or his brain’s gender self-identity is.

<sup>211</sup> We would emphasize ERROR in both pleadings, testimony, written evidence and order to justify an amendment.



must state that for the last \_\_\_ years<sup>212</sup> of her or his \_\_\_-year life,<sup>213</sup> petitioner has felt like a female or male. The petitioner's corrective medical procedures to match her or his hormones and genitals<sup>214</sup> with her or his brain's gender identity should be set forth.<sup>215</sup> The Statement of Evidence should state that she has a vagina, or he has a penis,<sup>216</sup> and can be sexually penetrated as a female or can sexually penetrate as a male.<sup>217</sup> Further, breasts, skin and fatty or muscular distributions in the body, body hair, and pitch of voice should be noted.<sup>218</sup> Further findings should include that the petitioner is no different from any other person of the gender in question.<sup>219</sup> Finally, detailed observations that the absence of

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<sup>212</sup> Petitioner's age less three years.

<sup>213</sup> Petitioner's age.

<sup>214</sup> See *supra* note 39 (noting how corrections can be difficult, especially for female-to-males). This is still a gray area of law for non-operative transsexuals. A decade ago, after sitting in on several female-to-male workshops, Frye took the position that to require full genital (called "bottom") surgery for female-to-males as a legal requirement for amendment of their legal sex was legal barbarism. A female-to-male almost always has chest (called "top") surgery. Hormones are usually given by injection on a weekly or some other periodic schedule, which means that female-to-males have to again deal with hormonal ebb and flow, but this time it is testosterone. In contrast, male-to-females usually use oral or patch medication which is more steadily metabolized. With testosterone, female-to-males usually have a quick thickening of vocal chords and a noticeable deepening of the voice. In contrast, male-to-females' vocal chords were thickened at puberty and the voice is a constant problem. With testosterone, female-to-males usually see a bulking of shoulder muscle mass, an oiliness of the complexion with an enlargement of pore size, and the beginning of scalp baldness if they are genetically disposed to male pattern baldness. With testosterone, female-to-males stop menses, thus a hysterectomy is an option, depending on finances. With testosterone and an incision over the genital area, the fetal tissue that would have grown into a penis enlarges and erects—this procedure is called a metaoidioplasty. Scrotal implants can be surgically attached. Compare this to the expensive, multi-staged, and scarring phalloplasty, which, as foreign tissue, may be rejected. It is no wonder that most female-to-males do the above procedure only while they wait for a cosmetically better, more functional, and less expensive option. They wait, while living full-time as an otherwise completed man. Some of Frye's clients have waited for two or more decades. For example, some of Frye's male-to-female clients lived full-time as otherwise completed women for two or more decades for similar reasons. These people need legal relief that is not based upon genitals that no one but their intimate partners will ever experience.

<sup>215</sup> It is more likely that an amendment will be granted for a correction than for a wholesale change. A misunderstanding public attached the transgender community with the "sex change" label.

<sup>216</sup> Cf. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000) (noting even with a man-made female anatomy, some physicians will still perceive a female-to-male as a male).

<sup>217</sup> See *id.* at 230 (noting that a transsexual female can look like a woman but cannot have the internal sexual organs of a woman). FTM's with a metaoidioplasty can also achieve penetration. The depth of that penetration is only important to the partners and should not function as a legal yardstick.

<sup>218</sup> Cf. *id.* (explaining that female genitalia and breasts can be created through surgery and hormones).

<sup>219</sup> Cf. *id.* (illustrating that through surgery and hormones, a male-to-female can be made to have the physical characteristics of a woman).

internal female organs, or prostate, gonads, and penis does not make the person any less male or female.

The document to support the re-marriage license, usually the amended birth certificate, should be examined in light of the *Littleton* dicta. An alternative document, especially for those states that will not amend or accept an amended birth certificate, is the passport.<sup>220</sup> It may be more difficult for a state court to reverse a marriage if the underlying sex identification document for the issuance of the marriage license is a federal passport.<sup>221</sup>

#### *D. Documents*

Fourth, transgenders must ensure that all wills, powers of attorney, insurance, and other documents are in order. Mrs. Gardiner would not be in her current predicament if her husband had a validly executed will.<sup>222</sup> Powers of attorney can get an otherwise “challenged” transgendered spouse access to the individual accounts, deposit boxes, and property titles of the other spouse.<sup>223</sup> Powers of attorney may also keep stepchildren from making medical decisions concerning a hospitalized spouse.<sup>224</sup> It is difficult to challenge an insurance policy that lists the transgendered spouse as the beneficiary.<sup>225</sup> Even though the transgendered partner and the other spouse may believe they are legally married, they should presume a challenge in the future,

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<sup>220</sup> For a discussion of passports for transgenders, see Melinda Marie Whiteway, *Philosophy and How-To's of Documentation Changes in* PROCEEDINGS FROM THE THIRD INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY (hereinafter cited as THIRD PROCEEDINGS) 119, 125-127, G10-11 (1994). For the application, use the original birth certificate, the name change order, and the physician's affidavit, patterned to support the Statement of Evidence. See *supra* notes 212-219 and accompanying text (discussing the Statement of Evidence).

<sup>221</sup> In Mrs. Littleton's case, she used her State of Texas, Department of Public Safety Identification Card, which listed her as female, to procure her marriage license as a “bride” from the State of Kentucky. See *Littleton*, 9 S.W.3d at 231. The Fourth Court in Texas had no trouble sweeping that supporting document aside in denying the legal female sex of the vaginaed Mrs. Littleton. *Id.*

<sup>222</sup> See HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* 5-6 (Shae Irving ed., Nolo Press 9th ed. 1996) (“You can leave your property to anyone you wish. No laws prohibit you from leaving your property to your lover.”).

<sup>223</sup> See *id.* at 4-20 (explaining some general rules regarding the durable power of attorney for finances).

<sup>224</sup> See *id.* at 4-8 (listing some examples of specific authorizations given to the power of attorney for health care).

<sup>225</sup> See *id.* at 2-21 (noting that insurance companies “don't believe that non-married partners have an ‘insurable interest’ in each other,” but do provide limited exceptions).

completing their documents in the fashion recommended for gay and lesbian couples to avoid unintended results.<sup>226</sup>

### *E. Litigation*

Finally, if the trans-marriage is challenged, the non-transgendered spouse should join or initiate the litigation. The non-transgendered spouse took a marriage vow something akin to “in sickness and in health, for richer and for poorer, until death do we part.”<sup>227</sup> This person is merely defending their vows and can play the role of martyr. This person cannot be cast in the role of the degenerate transgender by a court or jury with a conservative or religious agenda.<sup>228</sup>

## V. CONCLUSION

Same-sex marriages have existed legally in the United States for a long time now. The question of when a man is a man, and when a woman is a woman,<sup>229</sup> when removed by law from the arena of evolving medical evidence,<sup>230</sup> also has given Texans a voided heterosexual, vaginal-penile marriage.<sup>231</sup> Consequently, many more same-sex marriages will be forthcoming.<sup>232</sup> Hopefully, the lesbian and gay legal community will use trans-marriages as a wedge issue for securing their own legal same-sex marriages in the future.<sup>233</sup>

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<sup>226</sup> See *id.* (stating that using “business partners” as the nature of the relationship if the partners own property together is a feasible option).

<sup>227</sup> See generally 1 *Corinthians* 7:1-40 (King James) (explaining the sacrament of marriage as a commitment for life).

<sup>228</sup> See *supra* notes 61-62 and accompanying text (noting that a non-transsexual spouse can argue the sincerity of his or her marriage vow).

<sup>229</sup> See Greenberg, *When is a Man a Man?*, *supra* note 38, at 745 (discussing the issue of categorizing transsexuals).

<sup>230</sup> See *supra* note 134 (illustrating an incident where a male chromosome possessor gave birth).

<sup>231</sup> *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000) (presenting a decision that denied the marriage of a male-to-female to a male). Christie Lee Littleton has remarried—to another man. Her husband’s will and insurance beneficiary designations are in order. They live in San Antonio, within the jurisdiction of the Fourth Court. The first question presented is whether their marriage to be considered same-sexed? The second question is whether the *Littleton* ruling will subject the couple to arrest under the Texas sodomy statute [TEX. PENAL LAW § 21.06].

<sup>232</sup> See *supra* notes 15-20 (describing a person who had “boy” on his original birth certificate, was raised as a boy, and lived as a man, later corrected herself to be a woman and was legally allowed to marry another woman).

<sup>233</sup> See *supra* Part II (describing a resistance within the lesbian and gay community to use of transgender same-sex marriages as a wedge issue).

Have you had your chromosomes tested yet? At least one percent to four percent of readers<sup>234</sup> will be surprised at the results that are destroying other lives and relationships.<sup>235</sup> Perhaps we should ask, "for whom the bell tolls . . .?"<sup>236</sup>

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<sup>234</sup> See Greenberg, *Collision*, *supra* note 133, at 265, 267-69 (indicating one to four percent of the world's population may have ambiguous gender).

<sup>235</sup> See *supra* text accompanying notes 147-68 (suggesting that if *Littleton* stands, various populations will be adversely effected).

<sup>236</sup> JOHN DONNE, *Meditation 17* (1624), in 1 Norton Anthology of English Literature 1107 (5th ed. 1962).

## APPENDIX A

HEALTH LAW STANDARDS OF CARE FOR  
TRANSSEXUALISM<sup>237</sup>

## Introduction

These *Standards Of Care* were developed and adopted by consensus on September 15, 1993, after a two year period by the Health Law Project of the International Conference on Transgender Law and Employment Policy, Inc. (ICTLEP), a non-profit 501 C (3) Texas corporation.

Those taking part in the Health Law Project included professionals in the fields of law, health care policy and gender science. Most of the working on the Health Law Project are transgendered. The Health Law Project also included interested lay transgendered people in attendance at the first and second ICTLEP conferences in 1992 and 1993.

The International Conference On Transgender Law And Employment Policy, Inc. makes an effort to disseminate these *Standards Of Care* to all persons involved in the medical treatment of transsexualism. We suggest that you give these revised Standards of Care to gender services providers in your area. The *Standards of Care* also include standard legal forms for consent and waiver of liability.

The Health Law Project and the *Standards Of Care* were developed in the wake of widespread dissatisfaction with the Harry Benjamin Standards of Care. Four years later, that dissatisfaction remains. Also relevant is the pending de-listing of transsexualism [sic] per se as a mental disorder from the DSM-IV. Four years later, that de-listing is still pending.

As a result, many, if not most, of the transgendered patients seen for gender services may not require psychological services, a finding established in 1994 after the three year *Boulton and Park* survey (n=934) of non-clinical transgenders. And, with the growth of the female to male (FTM) transgendered community, it became obvious that the *Standards of Care* did not address FTM issues fully. Thus, Standard 3 was recently revised.



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The *Standards Of Care for Transsexualism* have been reviewed and amended in 1994, 1995 . . . 1996 and 1997. Further review and amendments may be initiated at future ICTLEP annual conferences. ICTLEP welcomes comments and constructive opposing points of view. Unfortunately, to date, most detractors of these *Standards Of Care* have not attended ICTLEP conferences. To participate in future reviews and possible amendments to the *Standards Of Care*, you are invited to attend future ICTLEP conferences, or to address your comments to ICTLEP at the above address.

Signed: Phyllis Randolph Frye, Executive Director and Founder  
Martine Aliana Rothblatt, former ICTLEP Director and  
Initial & Primary Author  
Spencer Bergstedt, Director, Revision Committee Chair

## PRINCIPLES

PRINCIPLE 1. Transsexualism is an ancient and persistent part of the human experience and is not in itself a medical illness or mental disorder. Transsexualism is a desire to change the expression of one's gender identity.<sup>238</sup>

PRINCIPLE 2. Persons have the right to express their gender identity through changes to their physical appearance, including the use of hormones and reconstructive surgery.

PRINCIPLE 3. Persons denied the ability to exercise control over their own bodies in terms of gender expression, through informed access to medical services, may experience significant distress and suffer diminished capacity to function socially, economically and sexually.

PRINCIPLE 4. Providers of health care (including surgical) services to transsexuals have a right to charge reasonable fees for their services, to be paid in advance, and to require a waiver of all tort liability except negligence.

PRINCIPLE 5. It is unethical to discriminate in the provision of sex reassignment services based on the sexual orientation (actual or perceived), marital status, HIV status, or physical appearance of a patient.

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<sup>238</sup> This is a 1997 document. In light of *Littleton* and other theories expressed in this article, the terms "change" and "alter" should be replaced by the term "correct."

## STANDARDS

STANDARD 1. Physicians participating in transsexual health care shall provide hormonal sex reassignment therapy to patients requesting a change in their sexual appearance subject only to: (1) the physician's reasonable belief that the therapy will not aggravate a patient's health conditions, (2) the patient's compliance with periodic blood chemistry checks to ensure a continued healthy condition, and (3) the patient's signature of an *informed consent and waiver of liability* form. If the patient is married, the physician may not require divorce, but may also require the spouse to sign a waiver of liability form.

STANDARD 2. Physicians providing hormonal sex reassignment therapy shall collect and publish on an annual basis the number of hormone prescriptions they have issued, and the number and general nature of any complications and complaints involved. The publication requirement of this Standard shall be satisfied by providing the collected statistics in writing, together with other current information on the potential risks and complications of sex hormone therapy, to all prospective patients inquiring into the physician's hormone therapy services.

STANDARD 3. Male to Female (MTF) Standards: Surgeons participating in MTF transsexual health care shall provide sex reassignment surgery to patients requesting a change in their sexual appearance subject only to: (1) the surgeon's reasonable belief that the surgery will not aggravate pre-existing health conditions, (2) the surgeon's reasonable determination that the patient has been under hormonal sex reassignment for at least one year, and (3) the patient's signature of an *informed consent and waiver of liability* form. If the patient is married, the surgeon may not require divorce but may also require the spouse to sign the waiver of liability form.

STANDARD 3. (continued) Female to Male (FTM) Standards: Surgeons participating in FTM transsexual health care shall provide sex reassignment surgery to patients requesting a change in their sexual appearance subject only to: (1) the surgeon's reasonable belief that the surgery will not aggravate pre-existing health conditions, (2a) in the case of chest reconstructive surgery, the surgeon's reasonable determination that the surgery will allow the patient to more fully and successfully live as a man. The patient need not have been under any hormonal treatment for this

surgery, (2b) in the case of genital surgery, the surgeon's reasonable determination that the patient has been under hormonal sex reassignment for at least one year, or that the surgery is otherwise medically necessary for the health and safety of the patient, and (3) the patient's signature of an *informed consent and waiver of liability* form. If the patient is married, the surgeon may not require divorce, but may also require the spouse to sign a waiver of liability form.

STANDARD 4. Physicians providing sex reassignment surgery shall collect and publish on an annual basis the number of sex reassignment surgeries they have performed, and the number and general nature of any complications and complaints involved. The publication requirement of this Standard shall be satisfied by providing the collected statistics in writing, together with other current information on the potential risks and complications of sex reassignment surgery, to all prospective patients inquiring into the physician's sex reassignment services.

STANDARD 5. Physicians and surgeons shall not divulge the name or identity of any patient requesting or receiving sex reassignment services except as explicitly directed in a notarized written request by the patient.

### Form 1

#### INFORMED CONSENT AND WAIVER OF LIABILITY

I, \_\_\_\_\_, having been fully informed in writing of the potential risks and complications of hormonal or surgical sex reassignment, do hereby choose of my own free will and consent to undertake this treatment because I want to alter my physical appearance to more closely reflect my gender identity.

I hereby release Dr. \_\_\_\_\_ of any and all liability for my decision to undertake a change of my sexual appearance and, for long-term use of hormones or for sex reassignment surgery, to affect on a permanent, irreversible basis my current sexual functioning.

I promise not to sue Dr. \_\_\_\_\_ for any of the consequences of my hormonal or surgical sex reassignment unless those consequences are the result of negligence in the conduct of my hormone therapy or in the carrying out of my surgery.

Dated, signed and witnessed.

## Form 2

## SPOUSAL INFORMED CONSENT AND WAIVER OF LIABILITY

I, \_\_\_\_\_ (*spouse*) am presently married to \_\_\_\_\_ (*patient*).

I understand that Patient wishes to alter *his* or *her* physical appearance to more clearly reflect *his* or *her* gender identity, and has been trying to do so for at least \_\_\_\_ year(s). I have been actively involved in and fully support Patient's sex change process.

I have been fully informed of the nature of transsexualism and sex reassignment surgery or hormonal therapy. I fully understand that the surgery and the effects of long-term use of hormones is not reversible and that Patient will never be able to sire or bear children after the surgery or long-term hormonal therapy.

I also understand that the sex reassignment process involves dangers and risks including, but not limited to, post-operative infection, depression, emotional changes, and other physical and psychological changes. It is with my full knowledge and consent that my spouse, the Patient, undergoes sex reassignment surgery and hormonal therapy to cause a change of his/her sex to occur.

I hereby release and hold harmless Dr. \_\_\_\_\_ from any and all claims arising out of performance of sex reassignment surgery or hormonal therapy, actual negligence excepted. I fully understand that I will not be able to seek monetary damages for any loss of sexual companionship between Patient and myself, the loss of Patient's ability to sire or bear children, or any similar problems that may arise from the performance of the sex reassignment surgery or hormonal therapy.

Dated, signed and witnessed.