

FIRST INTERNATIONAL CONFERENCE ON
TRANSGENDER LAW AND EMPLOYMENT POLICY
August 26-30, 1992

Family Law Committee Report

I. Current Status of the Law

A. Change of Name, Gender, and/or Sex for the Transgenderal and Transsexual

1. Most jurisdictions allow court-ordered change of name, although this is usually determined on a case by case basis.
2. Where name changes are permitted, changing gender designation on identification documents is possible.
3. Changing the sex designation on birth records is specifically authorized by some jurisdictions and specifically disallowed in others. In a majority of jurisdictions, the decision has been left to the courts. Allowing the amendment usually hinges on the candidate's transition status; those jurisdictions which allow amendment usually require evidence of post-surgery status. Where the outcome is case-specific, the result depends on how many of seven factors which influence or determine gender status must be changed in order for sex to change.
4. Cases and Legislation
 - a. EUROPE. Article 8 of the European Convention of Human Rights guarantees the right of respect for private and family life. Article 12 guarantees the right to marry. The European Commission of Human Rights has given its opinion that, when the UK refused to correct the birth register of a transsexual, it violated Article 8. The same opinion determined that Article 12 rights had not been violated, because once birth register was changed, any obstacle to marrying would be removed. Rees v. United Kingdom, 7 Eur. Ct. H.R. 429 (1985).

On appeal to the European Court of Human Rights, it was determined that the Commission's ruling would place an undue burden on the UK governments to require changing birth records for transsexuals. Further, the court emphasized that Article 12 refers to traditional marriage between biological persons of the opposite sex, leaving in question whether changing the birth certificate would have enabled the sought-after marriage. The court strongly encouraged that UK laws be changed to accommodate the needs of the transgenderal community.

- b. UNITED STATES. OREGON. K. v. Health Division, 277 Ore. 371, 560 P. 2d 1070 (1977). In denying an application for change of sex on birth and school records, the court said that a birth certificate is historical document which registers sex as it existed at birth and that it is up to legislature to make provisions allowing for amendment for transsexuals.
- c. UNITED STATES. NEW YORK. Anonymous v. Weiner, 50 Misc. 2d 380, 270 N.Y. Supp. 2d 319 (1966). Male-to-female transsexual petitioned for change of sex designation on birth certificate; denied on basis that chromosomes were still male, and that certificate should not be changed to "help psychologically ill persons in their social adaptation."
- d. FOREIGN JURISDICTIONS ALLOWING LEGISLATIVE SEX CHANGE INCLUDE: Sweden, Czechoslovakia, Greece, Italy, Holland, Switzerland, Finland, West Germany.
- e. UNITED STATES JURISDICTIONS ALLOWING LEGISLATIVE SEX CHANGE INCLUDE: Alabama, California, Hawaii, Illinois, Maryland, New Jersey, North Carolina, Pennsylvania, Virginia, Texas.

- (1) TEXAS. Amendment of birth certificate permitted for sex, color, or race, without restriction as to cause. Evidence of change still required.
- (2) CALIFORNIA. Amended birth certificate allowed; amended birth certificate takes the place of the original for all purposes.
- (3) TENNESSEE. Amendment of sex on birth certificate prohibited if change is due to sex-change surgery.

B. Validity of Marriage

1. Distinguish change of gender vs. change of sex - some jurisdictions allow valid marriage for transsexual but not transgenderist
2. Distinguish ability to enter valid marriage vs. remaining in marriage after transition
3. Cases and Legislation
 - a. UNITED KINGDOM. Corbett v. Corbett, 2 All ER 33 (1970). Action for maintenance; husband's defense was no valid marriage because wife was male to female transsexual. Evidence at trial was five-element test for sex identity; chromosomes, gonads, genitals, psychologicals, hormonal factors and secondary sexual characteristics. Court held that law should adopt chromosomal-gonadal-genital test for determining sex; if all three congruent, then sex determined for purposes of marriage. Conflict among three prohibits marriage. This case has been criticized in most jurisdictions.

Regina v. Tan, [1983] Q.B. 1053 (C.A.). Fully transitioned male to female, married to a biological man, charged as a male with making money from prostitution (an offense for males only); conviction upheld on basis that opinion must be consistent with Corbett,

i.e. if not female to marry, not female for criminal prosecution either.

- b. AUSTRALIA. C & D (falsely called C), (1979) FLC 90-636. Hermaphrodite husband was neither man nor woman so not capable of marriage at any time.

R. v. Harris & McGinnis (1988) 35 A Crim R 146. Two defendants were accused of solicitation of two males; one defendant was post surgical and one was not. The one who was transitioned was treated as female (rejecting Corbett); the one who was not was convicted. The Court left open the competing approaches of Corbett and M.T. v. J.T. for application to family law situation.

- c. UNITED STATES. NEW YORK. B. v. B., 78 Misc. 2d 112, 355 N.Y.S. 2d 712 (1974). Female to male transsexual; post-operative as to hysterectomy and mastectomy but not phalloplasty. Opinion states that without ability to perform sexually as a male, no valid marriage.

Anonymous v. Anonymous. 67 Misc. 2d 982, 325 N.Y.S. 2d 499 (1971). Pre-operative male-to-female transgenderist married biological male. Husband, upon discovering he "married" another male, left household and later petitioned for determination of marital status. Prior to finalizing the case, the transgenderist underwent surgery. The court determined that no marriage existed, on the theory that the transsexual was not a female at the time of the marriage.

Section 10. of Domestic Relations Code: A person's sex at the time of marriage determines the ability to marry; subsequent operative procedures to change sex following a ceremony does not validate an otherwise invalid marriage.

- d. UNITED STATES. NEW JERSEY. M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204

(1976). Complaint for support and maintenance; husband's defense was that wife was a male-to-female transsexual which made the marriage void. The court held that the wife was functional female for purposes of performing sexual acts. It further stated that the genitalia test is crucial to each determination, and rejected the Corbett standard that a person's sex determined only at birth.

- e. UNITED STATES. OHIO. In re Ladrach, 32 Ohio Misc. 2d 6, (1987). In an appeal from the denial of a marriage application, the court said that a post-operative male-to-female transsexual cannot marry a biological male. Since Ohio doesn't allow for amending birth certificate, there seems to be no way for a transsexual born in Ohio to marry in Ohio. However, the opinion leaves room for persons who can change birth certificates to marry in Ohio.
- f. UNITED STATES. TEXAS. Baker v. Baker, Cause No. 92-B0410, 300th Judicial District Court, Brazoria County, Texas (not appealed). Trial court opinion denying summary judgment to declare marriage void on the basis that the parties, a female-to-male transsexual and a biological female, were legally married under Texas law. The parties obtained a marriage license and lived together as husband and wife for more than twelve years before the wife petitioned to declare the marriage void. Although Texas does not allow persons of the same sex to marry, it specifically prohibits declaring marriage void for any reason other than bigamy or consanguinity. Annulment is available for fraud or impotency, but the action must be initiated shortly after discovering facts which support annulment, and further co-habitation must cease. §2.02 of the Texas Family Code states in part, "...the validity of a marriage is not affected by any fraud, mistake, or illegality that occurred in obtaining the marriage license."

C. Custody, Possession & Access to Children

1. These issues are usually determined on a case by case basis.
2. Distinguish the plight of the transvestite vs. the transsexual. The cross-dresser may agree to a restriction against cross-dressing in the presence of the children, while the transsexual usually cannot abide by such a restriction.
3. The worst cases usually have other factors that are involved in addition to transsexualism. Courts are most concerned with the best interests of the children.
4. Cases
 - a. OREGON. In Re Darnell, 49 Or.App. 561, 619 P.2d 1349 (1980). The parental rights of the biological mother were terminated at the request of juvenile authorities. There were findings against the mother of perjury, drug use, failure to provide child with adequate environment, unfitness for court supervision, and failure to discontinue her association with her transsexual ex-spouse. Although the continued personal relationship with her former husband was a major issue in this case, there were a lot of reasons for the court to not like these people - not just transsexualism.
 - b. NEVADA. Daly v. Daly, 102 Nev. 66, 715 P.2d 56, (1986). Parental rights were terminated based largely on transsexualism. The court was divided and there is a well written and analyzed dissent filed. There was evidence of extreme stress on the 10 year old and the child did not want to see the father. The court found that because of no support or visitation for over a year, and visitation wasn't in best interest of child, that termination was warranted. Dissent pointed out that father maintained medical insurance and tried to visit child but met with

interference by mother. Thus the jurisdictional grounds should have failed. The dissent also pointed out that visitation was not occurring, and most of the majority's decision revolved around harm to the child during visits. This is incongruent. The dissent believed that a less restrictive alternative existed in this case. *"While Mary may no longer have a father figure, she still has a second parent who desires to contribute to her financial support, and who might someday in the future provide her with needed comfort, affection, and help."*

- c. OHIO. Cisek v. Cisek, 1982 WL 6161 (Ohio App.) 1982. The best thing that can be said about this case is that it is unpublished. At the time of the divorce, mother was awarded custody and father had ordinary visitation. Father transitioned after divorce. Mother petitioned to have visitation terminated and trial court refused. The Court of Appeals reversed and suspended visitation in a very negative opinion. Fortunately, visitation was not permanently precluded and the way was paved for additional strategies at the trial court level.
- d. MINNESOTA. In Re T.J., 1988 WL 8302 (Minn. App.) 1988. This is another unpublished opinion but this one is favorable. This is a case where good facts can make good law. The father in this case is a non-transitioned transgenderist, a very stable person and a loving parent. The mother has not been able to maintain stability in either job or housing. Evidence was presented that child did not suffer any harmful anxiety about his father's gender dysphoria and that the child suffered more from the acrimonious relationship between the parents. The court held that there was no evidence that showed that providing primary parenting responsibilities to a gender dysphoric father would cause future problems for T.J.

- e. COLORADO. Christian v. Randall, 33 Colo.App. 129, 516 P.2d 132 (1973). This is an excellent case and is published precedent. The father petitioned for a change of custody previously awarded to mother after mother transitioned from female to male. She had changed her name, married a woman, and had suffered financial problems. The court held that these facts did not support change of custody to father in view of the high quality of environment and home life of mother and children and the absence of evidence that the children had been adversely affected by the mother's change.

II. Progressive Strategies for Change

- A. It's time to challenge the old cases coming out of the 70's; courts are more amenable to hearing about transgenderists and transsexuals and the matters involved.
- B. Work for legislative action to remove obstacles and to give legal recognition to the transgenderist and transsexual identity.
- C. Use existing laws and opinions to our advantage
1. Initiate name/gender/sex change actions
 2. Get married (or divorced) in jurisdictions where marriage laws do not specifically limit marriages between males and females, or otherwise have loopholes.
- D. Become better litigators. Plan cases with best interests of children in mind. Best results occur in cases with best facts (i.e. where children are not adversely affected). Bad facts make bad law. Don't be too quick to give up at the trial level; use experts to educate judges and juries.
- E. Establish programs to educate court personnel who have direct impact on custody and visitation decisions (i.e. social workers, psychologists, judges.)

FILED
at 4:31 o'clock P.M.

JUN 19 1992

FRANCES BENNETT
Clerk of District Court
Brazoria County, Texas

Deputy

No. 92-B0410

IN THE MATTER OF	§	IN THE DISTRICT COURT OF
THE MARRIAGE OF	§	
	§	
MARILYN STEWART BAKER	§	BRAZORIA COUNTY, TEXAS
	§	
AND	§	
	§	
RUGBY JEAN BAKER	§	300TH JUDICIAL DISTRICT

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Movant is RUGBY JEAN BAKER, Respondent in this cause, who, pursuant to the provisions of Rule 166-A, Texas Rules of Civil Procedure, moves for summary judgment against MARILYN STEWART BAKER, Petitioner in this cause, on her Petition to Declare Marriage Void.

I. Procedural History

Petitioner Marilyn Stewart Baker filed for divorce in this case on or about February 14, 1992. Respondent duly filed his Original Answer March 4, 1992, and later filed his Original Counterclaim for Divorce. Temporary orders were entered in this cause on March 5, 1992. Subsequently, Petitioner filed her Petition to Declare Marriage Void or, In The Alternative, First Amended Petition for Divorce. A true and correct copy of this pleading is attached as Exhibit "A". Respondent has filed his First Amended Answer and Counterclaim for Divorce. This case is set for trial on the non-jury docket for July 7, 1992.

II. Summary of Arguments

Respondent is entitled to judgment as a matter of law dismissing Plaintiff's Petition to Declare Marriage Void because the uncontradicted summary judgment evidence establishes as a matter of law the absence of a right to recover under this cause of action for the reasons alleged by Petitioner. Alternatively, Respondent is entitled to summary judgment as a matter of law against Petitioner on her Petition to Declare Marriage Void on the basis of the affirmative defenses of ratification and waiver.

III. Statutory Defenses - Void Marriages

A suit to declare a marriage void is a statutory action defined in the Texas Family Code. Section 2.24, Subchapter B of the Family Code provides that "either party to a marriage made void by this subchapter may sue to have the marriage declared void" (emphasis added). A marriage is void under Subchapter B for consanguinity, or if either party was previously married and the prior marriage is not dissolved. Tex. Fam. C. §2.21-22.

Texas policy is to preserve and uphold each marriage against claims of invalidity unless strong reasons exist for holding it void or voidable. Every marriage entered into in Texas is presumed valid unless it is expressly made void under the provision of Chapter 2 of the Family Code or is expressly made voidable by Chapter 2 and

is annulled. Fam. C. §2.01. By definition, the only persons who are eligible to bring suits to declare marriage void are those guilty of consanguinity or bigamy.

Petitioner's Petition to Declare Marriage Void does not give either one of these conditions as grounds for declaring this marriage void. The ground stated in Petitioner's petition is that "the purported marriage [between Petitioner and Respondent] is void and of no effect by reason of the virtue of the provision of Section 1.01 of the Texas Family Code because Petitioner and Respondent are persons of the same sex." However, Section 1.01 refers only to the rules for obtaining a marriage license and does not address the validity or invalidity of a subsequent marriage. Tex. Fam C. §1.01.

In keeping with this policy our courts have held that statutes relating to the mode of entering into the marriage relations, including provisions regarding application for a marriage license, are merely directory, and that although a marriage is entered into otherwise than in accordance with the provisions of such statutes, it is nevertheless a valid marriage unless, of course, the statute declares that its violation renders the marriage void. Fam. C. Sec. 2.02; *Williams v. White*, 263 S.W.2d 666 (Tex. Civ. App.- Austin 1953, writ ref'd n.r.e.).

Although Respondent does not deny that at his birth he was labeled female, prior to his marriage to Petitioner he underwent extensive medical treatment to become physically male to match his psychological and emotional make-up. See Affidavit of Rugby Baker attached as Exhibit "B". At the time he and Petitioner applied for their marriage license, Respondent was living his life as a man and has continued to do so throughout his entire marriage.

There is no provision, either in the Texas Family Code or in underlying case law that makes a marriage between and woman and a transsexual man void. Consequently, Petitioner has no basis upon the facts of this case to declare this marriage void, and Respondent should be granted judgment dismissing Petitioner's claim.

IV. Statutory Defenses - Voidable Marriages

Although Petitioner has brought a Petition to Declare Marriage Void, Respondent further argues that this marriage is neither void nor voidable. The Texas Family Code sets out the grounds for a voidable marriage in Sections 2.41 through 2.48.

As with void marriages, there is no Texas statute or case law which states that a marriage between a woman and a transsexual man is voidable. Likewise, there is no case law which says a violation of Section 1.01 makes the

subsequent marriage voidable. To the contrary, Section 2.02 explicitly states that, except as otherwise provided by Chapter 2, the validity of a marriage is not affected by any fraud, mistake, or illegality that occurred in obtaining the marriage license. Therefore, Petitioner has no statutory grounds for seeking an annulment based solely upon a possible violation of Section 1.01.

V. Public Policy Considerations

Respondent concedes that Section 1.01 of the Texas Family Code states that a marriage license may not be issued for the marriage of persons of the same sex. Our legislature has repeatedly emphasized that it will not sanction marriages between persons of the same sex. However, the facts of this suit, as set forth in the affidavit of Rugby Jean Baker, show clearly that this marriage is not between persons of the same sex who tried to conceal their true identity in order to circumvent the law. Likewise, this case is distinguishable from one where a homosexual tried to claim that a marriage existed in order to escape criminal prosecution. See *Slayton v. Texas*, 633 S.W.2d 934 (Tex. App. - Fort Worth 1982, no writ).

Respondent has the appearance of a man, has lived his life as a man, and has undergone surgery towards that end. For this reason, Respondent's marriage to Petitioner is not one which can be easily dismissed as a same-sex

marriage. Because he is actively living his life as a male, Respondent conformed to this State's laws and to society's expectations by obtaining a marriage license and participating in a ceremony before beginning his relationship with Petitioner.

To declare this marriage void would be to ignore Respondent's contribution to this relationship for thirteen years. To void this marriage would result in an imposition of a penalty and a forfeiture of rights and property acquired during the marriage. There is no overriding public policy that would justify this result.

VI. Affirmative Defense - Ratification

There is no genuine issue as to any material fact necessary to establish each and every element of the Respondent's affirmative defense of ratification. Respondent is entitled to a judgment as a matter of law because Petitioner was aware of Respondent's gender identity change at the time of marriage, has voluntarily cohabited with Respondent for almost thirteen years and held herself out as Respondent's wife during that time.

In May of 1979, Respondent and Petitioner obtained a marriage license from the county clerk of Brazoria County, Texas. On or about May 23, 1979, a marriage ceremony was performed. The original marriage license is attached hereto as Exhibit "C" and incorporated herein for all purposes.

As set forth in the affidavit of Rugby Jean Baker, the parties had discussed Respondent's biological history prior to their marriage. Also set forth in Rugby Jean Baker's affidavit is that during the marriage, the parties engaged in sexual relations. There is, therefore, no genuine issue regarding the fact that Petitioner did have full knowledge of Respondent's biological status during her marriage and subsequent cohabitation.

With that knowledge, Petitioner voluntarily and intentionally cohabited with Respondent as husband and wife for thirteen years and held themselves out as such, thereby ratifying the marriage.

VII. Affirmative Defense - Waiver

There is no genuine issue as to any material fact necessary to establish each and every element of the Respondent's affirmative defense of waiver. Waiver occurs when a party has a right, benefit, or advantage that they intentionally relinquish or engage in conduct that infers such relinquishment.

If for some reason listed in the Texas Family Code this court were to find this marriage voidable, Petitioner's right to annul the marriage existed at the time she became fully aware of all the material facts concerning that right. As a matter of law, it can be inferred that Petitioner had

full knowledge of Respondent's physical status after engaging in sexual relations with him.

At no time did Respondent intentionally misrepresent any material fact regarding his physical status to Petitioner in order to induce her to continue in the marriage. Petitioner's continued cohabitation with Respondent after her full knowledge of the circumstances, warrants an inference of relinquishment as a matter of law. Her actions over the thirteen years of holding herself out to be Respondent's wife, and taking advantage of the legal and social benefits that status entails, are clear, unequivocal and decisive acts showing her intention to relinquish the right to annul the marriage. As set forth in Respondent's affidavit, the parties held themselves out as husband and wife for tax purposes, for applying for credit, when applying for financial aid to attend school, and in conducting normal daily transactions. These acts are clearly inconsistent with an intention to exercise what right she may have possessed to annul the marriage.

PRAYER

Movant prays that:

1. Movant requests that this matter be set for hearing, with notice to Petitioner, and that upon completion of the hearing, the Court enter judgment dismissing Petitioner's Petition to Declare Marriage Void.

AFFIDAVIT

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who, being by me duly sworn, under oath stated:

1. "My name is RUGBY JEAN BAKER. I am over age 18. I am fully competent to make this affidavit and have personal knowledge of the facts contained herein.

2. "I was born January 20, 1948. Based upon the physician's physical examination, the sex that was recorded on my original birth certificate was that of female. All my life I have felt that I was a male trapped inside a female body. In 1974, I started the necessary treatment to begin my gender identity change. In 1974, I had a complete hysterectomy to remove my female reproductive organs. Immediately following the hysterectomy, I developed secondary male characteristics. In 1975, I had a radical mastectomy to remove my breasts. I have since undergone a hormonal treatment program. I have facial hair and an underdeveloped penis.

3. "In 1974, my Texas driver's license was changed to reflect that I am male. In 1992, my social security records were also changed.

4. "Prior to my marriage with Marilyn Baker on May 23, 1979, we discussed my biological history. I

Exhibit "B"

informed her that my birth sex appeared to be female, that I was a transsexual, that I had undergone a mastectomy, hysterectomy, and hormonal treatment.

5. "I entered into my marriage with Marilyn in good faith that this was the appropriate thing to do under the circumstances.

6. "Marilyn and I lived together as husband and wife for almost thirteen years. We held ourselves out as man and wife to our families, to our friends, for tax purposes, when applying for credit, when applying for school, and for all other normal daily transactions. During our marriage, we engaged in sexual relations, and Marilyn was fully aware of my physical state. There are several family members and friends who are aware of my gender history, and most of them found out because Marilyn told them.

7. "Further Affiant sayeth not."

Rugby Jean Baker
RUGBY JEAN BAKER

SUBSCRIBED AND SWORN TO BEFORE ME, on this 18th day of June, 1992 to certify which witness my hand and official seal.

Allison A. Alter
Notary Public in and for
The State of TEXAS

