Defining Sex: On Marriage, Family, and Good Public Policy

Mark Strasser
Capital University Law School

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Law and Gender Commons, Legislation Commons, Sexuality and the Law Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjgl/vol17/iss1/4

This Symposium Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
INTRODUCTION

Thomas Beatie became the subject of national attention after announcing in *The Advocate* that he was pregnant and after being interviewed on national television by both Oprah Winfrey and Barbara Walters. Beatie became known as the first man to give birth to a baby.

---

*Trustees Professor of Law, Capital University Law School, Columbus, Ohio.


2. See *ABC Good Morning America* (ABC television broadcast July 23, 2008), available at 2008 WLNR 13746105. Thomas Beatie first made headlines five months ago when news of his pregnancy first became public. Born Tracy Lagondino, he began his transition at 24, taking testosterone and having his breasts surgically removed, but still hoping to one day have a child, Thomas kept his female reproductive organs. After meeting wife Nancy who couldn’t conceive, the couple decided to inseminate Thomas with donor sperm. Since then, the Beaties have faced a whirlwind of criticism for their decision, criticism they addressed with Oprah Winfrey.


4. Ellen Goodman, *Daddy becomes a mother, father*, TULSA WORLD, July 12, 2008, at A17, available at 2008 WLNR 13125209 ("For those of you who do not watch Oprah or read tabloids, Beatie is 'The World’s First Pregnant Man.'").
and has since given birth to a second child. Transgendered individuals and their families face legal risks that most families do not, at least in part, because state laws are often unclear about whether or under what conditions transgendered individuals are permitted to marry the individuals whom they love. Challenges to the validity of marriages involving the transgendered may arise under a variety of circumstances, ranging from cases in which individuals may have hidden or may not even have known that they were transgendered until after their marriages, to cases in which the individuals had already transitioned and had explained their personal histories to their partners before they were married. Where such marriages are contested, a number of issues may have to be resolved including the validity of the marriage, parental status, and who should have custody of or visitation with any of the children raised by the parties.

This Article focuses on the spousal and parent-child relationships of transgendered individuals. Regrettably, much of the law is still unclear. While most states specify the conditions under which a transgendered individual can have his or her birth certificate modified to reflect his or her self-identified sex, states have been much less clear about how local marriage laws apply to transgendered individuals. In many states, there is no express policy with respect to whether a transgendered person will only be permitted to marry someone of the opposite sex of his or her self-identified sex or, instead, someone of the opposite sex of his or her birth sex. Current law in most states is intolerable, either because it fails to take into account the actual lives of the transgendered, or because it is simply indeterminate.

I. ON BIRTH CERTIFICATES AND QUALIFICATIONS FOR MARRIAGE

Almost all states permit a transgendered individual to have his or her birth certificate changed, as long as certain conditions have been met. However, there are at least two reasons why the general willingness of states to permit birth certificate modifications does not settle issues related to familial status. First, states vary with respect to what is re-

5. Baby No. 2 born to 'man', HERALD-SUN (Melbourne), June 12, 2009, at 29, available at 2009 WLNR 11167537 ("Thomas Beatie, the world's first pregnant man, has given birth to his second child.").

6. Kristi Turnquist, Oh, what a glitzy year we had! PORTLAND OREGONIAN, Dec. 30, 2008, available at 2008 WLNR 24991737 ("Beatie and his wife, Nancy, of Bend, ... ").
quired in order for a birth certificate to be changed, which means that what one state requires for modification might not suffice in a different state. Second, even where a modification has been permitted, the state may only recognize the modified birth certificate as establishing the individual's sex for certain legal purposes—a transgendered individual might be considered male for purposes of identification on a birth certificate or driver's license but be considered female for purposes of determining the sex of potential marriage partners. To add insult to injury, the state's policy with respect to family relationships may not be established by statute and may instead have to be established in the courts in the context of an individual case, which creates the potential for harm to both adults and children and may make planning difficult if not impossible for those individuals wishing to do what is best for their families.

A. Modifying Birth Certificates

Currently, only Ohio, Idaho, and Tennessee do not permit transgendered individuals to change their birth certificates to reflect their self-identified sex.\(^7\) Other states permit changes as long as certain medical procedures have taken place,\(^8\) although there is no agreement about which procedures are required in order for such changes to be made.\(^9\) This raises the distinct possibility that transgendered individuals who had undergone certain surgical procedures would qualify for birth

---


8. Dean Spade, Documenting Gender, 59 Hastings L.J. 731, 768 (2008) ("Every state allowing change of sex on a birth certificate requires evidence of surgery to warrant a gender reclassification, though they vary in what proof is required and in the specificity of the evidentiary requirements."); Alice Newlin, Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act, 17 Colum. J. Gender & L. 461, 481 (2008) ("Of the twenty-five jurisdictions to enact statutes allowing transgender people to modify birth records, all but a handful require proof that the individual seeking modification has undergone some form of sex reassignment surgery.").

9. Shana Brown, Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes, 38 San Diego L. Rev. 1113, 1129 (2001) ("The circumstances under which transsexuals and intersexed persons may legally change the sex designated on their birth certificates vary from state to state.").
certificate modifications in some jurisdictions but not others. Indeed, the requirements within the state of New York differ depending upon where one lives, and a particular procedure that would suffice in one part of the state for purposes of meeting the birth certificate modification requirement would not suffice in another.

That an individual would qualify for a birth certificate modification in one jurisdiction but not in another is troubling for a few different reasons. First, given all of the difficulties that can arise in our current terror-conscious society for someone whose physical appearance is not in accord with that person's official sex, precluding individuals from having their documents reflect their appearance and self-identified sex seems cruel. Second, it is hard to understand what asserted state interests could justify the differing treatments that individuals receive depending upon where they happen to have been born—an individual born in one jurisdiction is permitted to have his or her birth certificate changed, but an individual born in a different jurisdiction is not, even though both individuals have undergone identical surgical procedures.

One response to this confusing state of affairs is simply to assert that this is a price of being in a federal system where different states

10. See Spade, supra note 8, at 736 (noting that New York and California have differing standards).

11. Id. at 769-70. As a result of the conflicting standards, two similarly situated transgender people, who had both undergone the same gender-confirming surgery (such as two transgender women who have undergone penectomy, and no other procedures, or two transgender men who have undergone phalloplasty, and no other procedures) would have different results seeking gender reclassification on their birth certificates if one person was born in Westchester and the other was born in Queens. The transgender woman born in New York City would be denied a new birth certificate. The transgender man born in New York City would be granted one. The transgender woman born in Westchester would be granted a new birth certificate, but the transgender man would be denied.

12. See Nancy J. Knauer, Gender Matters: Making the Case for Trans Inclusion, 6 Pierce L. Rev. 1, 47-48 (2007) (citations omitted). Air travel is an excellent example of a normal everyday activity that can produce considerable stress and discomfort for transgender individuals. Although we may gripe and complain about long lines and the futility of putting our toothpaste in a clear Ziploc bag, the general public has largely accepted the enhanced security measures as part and parcel of post-September Eleventh reality. However, for transgender individuals, these new security measures have made air travel a complicated and, at times, perilous proposition. Transgender advocates have prepared advice sheets for transgender individuals who are planning to fly and recommend that transgender individuals report to the airport well in advance of a flight in order to leave sufficient time for all the questions to be answered and addressed. A transgender individual whose gender expression and/or embodiment does not match her/his identity documents will be subject to increased scrutiny and questioning. Even transgender individuals whose identity documents are congruent may find the more intrusive physical screening threatening and invasive.
weigh the competing interests differently and thus arrive at differing judgments with respect to the conditions, if any, under which a birth certificate modification is permissible. Yet, the “reasonable legislatures can disagree” approach is rather dissatisfying, given the burdens that are placed on transgendered individuals in those states where it is difficult or impossible to have their birth certificates changed.

Whether or not there is a constitutional right to have one’s birth certificate reflect one’s self-identified sex, something should be done legislatively to make that possible, either through a uniform act or through an act of Congress. There are at least two related but distinct issues that should be addressed in such legislation: (1) the ability of an individual to have his or her birth certificate changed to reflect his or her physical and psychological self in a particular jurisdiction, and (2) the assurance that a birth certificate, modified in one state, will be recognized as accurately reflecting the person’s sex when he or she travels through or moves to another state.

The existence of a great disparity among the states with respect to the conditions under which they will permit birth certificate modifications poses two related challenges in this area. First, depending upon the strength of the implicated interests, states might be relatively unwilling to adopt a uniform law that would either (1) make it easier for those born in the state to change their birth certificates, or (2) commit those states to recognizing modifications to birth certificates from other states that could not be obtained locally.” But this would mean that there would still be a great disparity among the states even were a uniform law proposed, unless added incentives were offered for states to adopt that law.

Perhaps, then, the better course of action would be to have Congress require that full faith and credit be given to a state’s modified birth

13. See Newlin, supra note 8, at 465 (citation omitted). While at this time there is no recognized constitutional right to change one’s legal sex, the lack of an organized system to recognize sex reassignment in the United States has created an unconstitutional deprivation for transgender people. Sex has always been a major factor in assigning rights and privileges to an individual, and uncertainty as to legal sex creates uncertainty as to sex-linked rights.

14. See generally Newlin, supra note 8 (proposing a Uniform Interstate Sex Reassignment Recognition Act).

15. By the same token, a state might refuse to credit a record from another state because doing so would violate an important public policy of the state. See Mark Strasser, Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation, 3 Hous. J. Health L. & Pol’y 301, 315 (2003).

certificate. After all, Article IV of the Constitution specifically authorizes Congress to set the conditions under which a record from one state must be credited by another.\textsuperscript{17} However, there may be reason to be cautious about having the federal government specify the conditions under which modifications to birth certificates should be credited, since it turns out that some conditions that would suffice for a birth certificate modification under state law would not suffice under the regulations set by the Social Security Administration,\textsuperscript{18} and that most transgendered individuals do not undergo the surgery required by the Social Security Administration.\textsuperscript{19}

The difficulty pointed to here is that the congressional full faith and credit measure might not simply say that any birth certificate modified in one state would have to be given full faith and credit in another, but might instead say that modifications granted in light of certain specified requirements, e.g., those used by the Social Security Administration, would be entitled to full faith and credit. Such a statute would be regrettable for two very different reasons: (1) it would mean that some but not other birth certificate modifications would be entitled to full faith and credit, and some individuals who had crossed state lines still would not know their sex for legal purposes,\textsuperscript{20} and (2) states might well tailor their own requirements for birth certificate modifications to reflect the federal ones if only to assure that their own birth certificate modifications would receive full faith and credit in other states. But this might mean that states would make it too difficult for individuals to have their birth certificates changed. Professor Spade discusses the "common misunderstanding . . . that all transgender people undergo genital surgery (phalloplasty or vaginoplasty—the creation of a penis or vagina) as the primary medical treatment for changing gender,"\textsuperscript{21} noting that "the majority of transgender people do not undergo surgeries"\textsuperscript{22} for a variety of reasons including expense and its being contra-indicated

\begin{footnotes}
\item[17] U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").
\item[18] See Spade, supra note 8, at 762 ("genital surgery is required to change gender with SSA").
\item[19] See id. ("most transgender people do not undergo genital surgery").
\item[20] See Brown, supra note 9, at 1116 ("Many transgendered individuals must guess as to their legal gender because an intersexual or transsexual can be legally categorized as a woman in one state, but a man in another.").
\item[21] See Spade, supra note 8, at 754.
\item[22] Id.
\end{footnotes}
Were a uniform standard imposed by Congress, it is not at all clear that the standard chosen would meet the needs of the transgendered community.

**B. Birth Certificates and Marriage**

One issue is whether or not state law will permit an individual to have a birth certificate modified to reflect his or her current gender. A separate issue is the effect of such a change, e.g., for marriage purposes.

In *In re Ladrach*, an Ohio court explained that it seemed obvious that "if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled." The court refused to order that a marriage license be issued to Elaine Ladrach, because Ladrach’s birth certificate indicated that Ladrach was male, notwithstanding that she had already undergone sex reassignment surgery.

Suppose, however, that an individual did have an amended birth certificate indicating that the person’s sex had changed. One would infer from *Ladrach* that such a person should be permitted to marry someone of his or her birth sex, i.e., someone who was not of the individual’s

---

23. *Id.* at 755.
25. *Ladrach*, 513 N.E.2d at 831; *but see In re Heilig*, 816 A.2d 68, 85 (Md. 2003) (refusing to “opine on what the collateral effect of any judgment attesting to a change in gender might be”) (italics in original). The Maryland court explained that the issue of a transsexual’s true gender can arise in many different contexts and have a wide variety of collateral consequences [citing Goodwin v. United Kingdom, [2002] 2 FCR 577, 67 BMLR 199 (Eur. Ct. H.R. (Grand Chamber) 2002)]. It may affect or determine, for example, the validity of a marriage, whether a birth certificate may be amended, entitlement to pension or insurance rights that distinguish by gender, whether distinctions in employment are, as to a particular individual, permissible or unlawful, application of the law of rape or other offenses in which gender may be an element or issue, medical treatment and housing assignment upon incarceration or other institutional confinement, entitlement to participate in certain amateur or professional sports and housing and work assignments available for persons in military service.

*See Heilig*, 816 A. 2d at 85, n.9 (citing Richards v. United States Tennis Ass’n., 400 N.Y.S.2d 267 (1977)).
26. *See Ladrach*, 513 N.E.2d at 829 (birth certificate indicated that Ladrach was male and Ohio prohibited same-sex marriage).
27. *See Ladrach*, 513 N.E.2d at 830 (discussing “the recent medical surgical procedure that resulted in the removal of the penis and testicles and the creation of a vagina”).
current sex. At issue in another Ohio case, *In re Marriage License for Nash*, 28 was an appeal by Jacob B. Nash and Erin A. Barr who were challenging a denial of their application for a marriage license. 29 While Nash had been born a female, 30 he had undergone gender reassignment surgery and had had his birth certificate amended in light of Massachusetts law. 31 Surgery notwithstanding, the court rejected that the amended birth certificate accurately reflected Nash's sex, instead finding that the original birth certificate was the more accurate representation. 32

Ohio takes the position that transgendered individuals born in Ohio cannot have their birth certificates changed, even if those individuals have undergone sex reassignment surgery. In addition, Ohio refuses to recognize amended birth certificates, at least for purposes of its marriage laws. Here, the state seems to be offering a consistent view, although a separate question is whether that consistent view can be justified by legitimate state interests. 33

Other states have adopted inconsistent policies in that they may treat a transgendered individual as belonging to one sex for certain purposes and the other sex for different purposes. Consider Texas, which permits birth certificates to be changed under certain conditions. 34 In *Littleton v. Prange*, 35 a Texas Court of Appeals rejected that an amended birth certificate represented Christie Littleton's true sex, 36 notwithstanding that Christie had undergone sex reassignment surgery at the University of Texas Health Science Center. 37

When explaining why the amended birth certificate should not be thought to represent Christie's sex, the Texas court reasoned that the legislature had intended to permit the correction of inaccurate birth cer-

---

32. *Nash*, 2003 WL 23097095, at *5 ("In this case, the amended birth certificate submitted by Nash as evidence of his sex was rebutted by the evidence already in possession of the trial court, to wit, Nash's original birth certificate designating Nash's sex as female.").
33. The state justifies its position by appealing to the "clear Ohio public policy against same-sex marriages." See *Nash*, 2003 WL 23097095, at *9. But the state has neither articulated persuasive reasons to justify its same-sex marriage prohibition nor persuasive reasons to justify treating marriages involving transsexuals as falling within the category of same-sex marriages.
35. 9 S.W.3d 223 (Tex. App. 1999).
tificates only in those cases in which the inaccuracy had been at "the time the certificate was recorded." This meant that Christie was a man, notwithstanding her having a vagina and labia and not a penis, scrotum, and testicles. The court recognized that Christie had made "every conceivable effort to make herself a female," and that some doctors would consider Christie female, but nonetheless reasoned that the "body that Christie inhabits is a male body in all aspects other than what the physicians have supplied," and thus Christie must be considered male for matrimonial purposes. That meant that her seven-year marriage to Jonathan Mark Littleton was a marriage between two males, which Texas would not recognize. Christie was thus precluded from bringing a wrongful death action as Mark Littleton's surviving spouse, which made it unnecessary for the lower court to reach the merits with respect to whether medical malpractice had caused the death of Christie's not-legally-recognized husband.

Another case involved a challenge to the validity of a marriage after one of the parties to the marriage had died. In In re Estate of Gardiner, the Kansas Supreme Court was asked to determine the validity of a marriage between J'Noel Ball and Marshall Gardiner. J'Noel had undergone sex reassignment surgery and then had had her birth certificate amended in accord with Wisconsin law. She and Marshall were married in Kansas.


In our opinion, it is at least equally, if not more reasonable, to assume that in enacting these statutes it was the intent of the legislature of Oregon that a 'birth certificate' is an historical record of the facts as they existed at the time of birth, subject to the specific exceptions provided by statute.

The Oregon Legislature subsequently passed legislation authorizing amendments to birth certificates under appropriate conditions. See Or. Rev. Stat. § 432.235(4) (West 2009).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by rule of the state registrar.

39. See Littleton, 9 S.W.3d at 224.
41. See Littleton, 9 S.W.3d at 231.
42. Littleton, 9 S.W.3d at 231.
43. Littleton, 9 S.W.3d at 231.
44. Littleton, 9 S.W.3d at 231.
45. In re Est. of Gardiner, 42 P.3d 120 (Kan. 2002).
46. See Gardiner, 42 P.3d at 121–22.
47. See Gardiner, 42 P.3d at 122.
One of the implicated issues was whether Kansas should give the Wisconsin amended birth certificate full faith and credit. A point meriting emphasis is that Kansas permits birth certificates to be amended under certain conditions, and a state permitting birth certificate modifications cannot plausibly say that crediting a birth certificate modification from another state violates public policy if that same modification could have been obtained locally by someone born in the state. Thus, even if an amended birth certificate need not be given full faith and credit by a state that refuses to permit such modifications, a separate question is whether a state that permits such modifications can somehow nonetheless claim that it has a strong public policy that would be violated by recognizing the other state’s amended birth certificate.

While it might have been credible for Ohio to have claimed that recognizing a Wisconsin amended birth certificate would violate local public policy, it was not credible for Kansas to make such a claim. Nor would it have been credible to argue that the procedures undergone by J’Noel were insufficient as a matter of law to qualify for an amendment to her birth certificate, since J’Noel had “undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery.” The Gardiner court did not suggest that some additional procedures would have made the difference, but instead concluded that even after all of the procedures “J’Noel remains a transsexual, and a male for purposes of marriage.”

The Kansas Supreme Court seemed to recognize one of the implications of its decision, namely, that J’Noel would be permitted to marry a woman under Kansas law, although the court mentioned this possibility in an offhand remark when analyzing the position offered by Joe Gardiner, the estranged son of the deceased, who was challenging the validity of J’Noel’s marriage. The Gardiner court noted,

50.  See *Strasser*, supra note 15, at 316. Kansas should be quite willing to credit an amendment to a birth certificate in another state if the amendment would have been permitted locally under those same conditions, since one then could hardly claim that legal recognition of the amended birth certificate would somehow undermine an important Kansas public policy.
51.  However, since the *Gardiner* decision, it may no longer be possible to get such a change of birth certificate in Kansas. See *Somers v. Superior Court*, 92 Cal. Rptr. 3d 116, 118 (Cal. App. 2009) (“In 2006, plaintiff sought advice from two Kansas attorneys regarding changing her birth certificate. Both advised her that Kansas law does not permit issuance of a new birth certificate to reflect a change of gender.”).
52.  *Gardiner*, 42 P.3d at 137.
53.  *Gardiner*, 42 P.3d at 137.
54.  See *Gardiner*, 42 P.3d at 122.
Applying the statute as Joe advocates, a male-to-female transsexual whose sexual preference is for women may marry a woman within the advocated reading of K.S.A.2001 Supp. 23-101 because, at the time of birth, one marriage partner was male and one was female. Thus, in spite of the outward appearance of femaleness in both marriage partners at the time of the marriage, it would not be a void marriage under the advocated reading of K.S.A.2001 Supp. 23-101.55

Yet, the state of Kansas had announced a strong public policy that only permitted the recognition of marriages between a man and a woman.56 One might have inferred that the reading advocated by Joe Gardiner would have been rejected, because it meant that the state would be recognizing a same-sex marriage, announced policy to the contrary notwithstanding. After all, regardless of how a transsexual appears at birth, someone like J'Noel who had undergone a whole array of procedures would seem much more plausibly characterized as a woman than as a man.57 However, appearances notwithstanding, the Kansas Supreme Court's holding that J'Noel was a man for marriage purposes58 meant that J'Noel's marriage to a woman would have been valid under Kansas law.

**Littleton and Gardiner** are in stark contrast to *M.T. v. J.T.*,59 in which a New Jersey appellate court upheld the validity of a marriage between a man and a male-to-female transsexual who had undergone sex reassignment surgery.60 In some respects, the facts were quite favorable for the plaintiff in *M.T.* in that, for example, M.T. had not only undergone sex reassignment surgery, but also the defendant had paid for it.61 J.T. could hardly have claimed, for example, that he had been defrauded by M.T. and that he had never realized that he was marrying someone

---

55. **Gardiner,** 42 P.3d at 126.
56. **See Gardiner,** 42 P.3d at 136.
57. **Cf.** Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now,* 64 ALB. L. REV. 1031, 1033 (2001). For example, on September 16, 2000, Ms. Jessica Wicks and Ms. Robin Manhart Wicks were legally married in San Antonio, Texas. Jessica's original birth certificate read 'boy' and Robin's original birth certificate read 'female.' These women shared vows, exchanged rings, and were blessed by a Minister of God in a private ceremony before about fifty friends and supporters.
58. **See Gardiner,** 42 P.3d at 137.
60. **See M.T.** , 355 A.2d at 211 ("the court below correctly determined that plaintiff at the time of her marriage was a female and that defendant, a man, became her lawful husband, obligated to support her as his wife.").
61. **See M.T.**, 355 A.2d at 205.
who was transgendered. Yet, there had been no fraud in *Littleton* or *Gardiner*—in both cases, the marriage had taken place after full disclosure of transsexual status.\(^{62}\)

Suppose that we consider a much different kind of case where there is ample evidence that the individual seeking an annulment of the marriage claims to have been defrauded because he had never been informed that his wife was transgendered.\(^{63}\) In this kind of case, i.e., one in which the validity of the marriage is being challenged on the basis of fraud *rather than* on whether a marriage between a man and a post-operative male-to-female transsexual will ever be recognized, the legal analysis would be much different from the kind offered by the *Gardiner* and *Littleton* courts. The question at hand would not be whether the state as a general matter will recognize a marriage between someone who is transgendered and someone who is not of that individual's self-identified sex. Rather, the validity of such marriages would be accepted as a general matter and the question, instead, would be whether the state would recognize the marriage on these particular facts.

A few points might be made about cases in which one of the parties was allegedly defrauded and seeks to have the marriage annulled. As a general matter, a claim of fraud cannot be brought successfully to annul a marriage unless the fraud concerns something essential to the marriage.\(^{64}\) While states vary with respect to what qualifies as essential to marriage,\(^{65}\) most states interpret this requirement to involve matters re-

---

62. *See* Littleton v. Prange, 9 S.W.3d 223, 225 (Tex. App. 1999). ("In her affidavit, Christie states that Jonathon was fully aware of her background and the fact that she had undergone sex reassignment surgery."). While this issue was not addressed in the Kansas Supreme Court decision, it was addressed in the Kansas Court of Appeals decision. *See* Gardiner, 22 P.3d at 1091 ("Noel further asserted that she told Marshall about the sex reassignment surgery she had undergone before the marriage.").

63. In Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971), the plaintiff had married the defendant without knowing that his spouse was transgendered. *See id.* at 499. On February 22nd the parties took part in a marriage ceremony in Belton, Texas. They returned to the plaintiff's apartment. Being intoxicated, the plaintiff went to sleep. He awoke at 2 o'clock in the morning, reached for the defendant and upon touching the defendant, discovered that the defendant had male sexual organs. He immediately left the bed, 'got drunk some more' and went to the bus station.

64. *See* Leax v. Leax, No. 01-08-00149-CV, 2009 WL 1635199, at *5 (Tex. App. June 11, 2009) ("American courts generally have held that marriages can be annulled on the basis of fraud only if the fraud concerns an issue essential to the marriage.").

65. *See* Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 104 N.E.2d 877, 880 (N.Y. 1952) "[W]hile we have, for better or worse, retreated from the old idea that marriages can be voided only for frauds going to the essentials of marriage, that is, consortium and cohabitation, it is, nonetheless, still the law in New York that annulments are decreed, not for any and every kind of fraud, but for fraud as to matters 'vital' to the marriage relationship only." (citations omitted).
lated to sexual activity and reproduction. Thus, for example, if an individual falsely represents that he is capable of or interested in having children, an annulment on the basis of fraud would be possible.

A voidable marriage, e.g., one that allegedly was celebrated because of the fraudulent behavior of one of the parties, can be annulled by a court, assuming that the relevant facts can be established. However, such a marriage is valid until it is annulled. After all, it may be that the defrauded individual forgave his or her spouse for the initial deception and wanted to remain married—indeed, the "victim" may have ratified the marriage by continuing to cohabit with the other party once the fraud had come to light. In any event, the general rule is that a marriage cannot be annulled on the basis of fraud once the marriage is no longer in existence because one of the parties had died.

66. See Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 MINN. L. REV. 1625, 1680 (2007) ("Most state courts have restricted annulment for fraud to cases involving misrepresentations that go to the 'essentials' of the marriage, defined as the capacity or willingness to procreate or have sexual intercourse.").

67. See, e.g., Rich v. Rich, 337 N.Y.S.2d 530, 531 (App. Div. 1972) "[P]laintiff properly and adequately established that defendant before the marriage falsely represented to her that he intended to have children; that defendant then knew such representations to be false and fraudulent; that plaintiff believed defendant's representations, married him in reliance thereon and would not have married him if she knew he did not intend to have children; and that when defendant's true intentions surfaced, she no longer cohabited with him and thus did not cohabit with full knowledge of the facts constituting the fraud. Under the circumstances, annulment should have been granted.

68. Skagen v. New York City Emp. Ret. Sys., 437 N.Y.S.2d 497, 498 (1981) ("When a marriage has been procured by fraud, it is merely voidable, subject to appropriate action by the defrauded party.").

69. Robinson v. Commonwealth, 212 S.W.3d 100, 105 (Ky. 2006) ("And a voidable marriage is valid and binding upon the parties until such time as it is annulled by a competent court.") (citing Brewer v. Miller, 673 S.W.2d 530, 532 (Tenn. App. 1984)).

70. See, e.g., Wirth v. Wirth, 23 N.Y.S.2d 289, 292 (1940). [T]he plaintiff lived with the defendant as his wife for over four months after he received the January, 1937, report of the detective agency and is estopped from claiming any fraud on the part of the defendant because by living with her after knowing the contents of the reports he ratified the marriage.

71. See Gibbons v. Blair, 376 N.W.2d 22, 25 (N.D. 1985) ("Applying the majority rule and rationale to the facts of this case, we hold that an action to annul a marriage on the ground of fraud can only be brought by the defrauded spouse while both parties to the marriage are living."); Andrade v. Jackson, 401 A.2d 990, 994 (D.C. 1979) ("The significance of whether decedent's marriage to appellee was void ab initio or merely voidable is that a marriage void ab initio is subject to collateral attack at any time whereas a marriage merely voidable cannot be annulled after the death of either spouse.") (citing Loughran v. Loughran, 292 U.S. 216, 226 (1934)).
A claim that someone had been fraudulently induced to marry requires both that the defrauded party had not known, and that the other party had known the relevant information. Thus, in a case in which an individual only discovers that he or she is transgendered after the marriage has already been celebrated, the requisite knowledge would not have been present before the marriage, and thus that person would not have been guilty of having foisted a fraud upon his or her marital partner. Such a marriage might be dissolved, for example, because of irreconcilable differences, but that would be different from holding that the marriage had never existed.

In some cases, federal courts have attempted to determine whether a state would recognize the marriage between a post-operative transsexual and her spouse. For example, at issue in In re Lovo-Lara was whether North Carolina would recognize a marriage between a resident

---

72. See, e.g., Morin v. Morin, No. 2006-418, 2007 WL 5313306, at *2 (Vt. May, 2007). In considering defendant’s request for annulment pursuant to 15 V.S.A. § 516, the court noted that the parties’ testimony differed regarding whether defendant was aware of plaintiff’s transgender identity at the time of their marriage. The court found credibility determinations to be difficult in light of the dramatically conflicting testimony. Ultimately, the court concluded that defendant had failed to meet the high standard for proving fraud.

73. See, e.g., CAL. FAM. CODE § 2310 (West 2009) ("Dissolution of the marriage or legal separation of the parties may be based on . . . [i]reconcilable differences, which have caused the irreremediable breakdown of the marriage."); IDAHO CODE § 32-603 ("Divorces may be granted for any of the following causes: . . . 8. Irreconcilable differences."); N.D. CENT. CODE 14-05-03 (2010) ("Divorces may be granted for any of the following causes: . . . 7. Irreconcilable differences."); N.H. REV. STAT. ANN. § 458:7-a (2010) ("A divorce from the bonds of matrimony shall be decreed, irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irreremediable breakdown of the marriage.").


A decree of annulment in reality does not annul the marriage, for it does not speak only from its date; it merely declares that the marriage was void from the very beginning. It does not create a new status, but, on the contrary, affirms that there has been no change in status. A nullity in law is not comparative, to be measured by degrees; it is absolute, implying that the thing has no legal existence. Such decree is no more than a declaratory judgment, judicially determining with certainty and finality that there never was a valid marriage.

see also, Skagen v. New York City Emp. Ret. Sys., 437 N.Y.S.2d 497, 498 (1981) ("Once annulled by the court for fraud, however, that marriage is deemed erased as if it never took place. In that respect it is very much unlike a divorce, which serves to legally terminate a marriage deemed to have validly existed.") (citing Sleicher v. Sleicher, 167 N.E. 501 (N.Y. 1929)).

of North Carolina and a citizen of El Salvador. The court noted that the petitioner, Gia Teresa Lovo-Ciccone, had been born male, but had undergone sex reassignment surgery and received a new birth certificate designating her sex as female. Further, the state of North Carolina had registered her marriage, listing her as the bride. The Lovo-Lara court found that the marriage was valid under North Carolina law and thus that the visa should be issued. Indeed, the Lovo-Lara court suggested that for immigration purposes, an individual’s gender should be determined “based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.”

While the Lovo-Lara approach of using the current birth certificate has much to commend it as a matter of public policy, Littleton and Gardiner suggest that such a policy may not be the best way to capture whether a state would in fact recognize a marriage between a post-operative transsexual and someone of that person’s birth sex, sex reassignment surgery and amended birth certificate in hand notwithstanding. Lovo-Lara might be contrasted with In re Oren, where Jack Keegan sought a visa for his wife, Ady Oren. Jack Keegan, née Jessica Wilson, had undergone sex reassignment surgery and had been issued a new birth certificate in accord with Michigan law. He had married his spouse in Oregon. Notwithstanding that both Michigan and Oregon authorize birth certificate modifications after appropriate surgical procedures have been performed, the Oren court refused to take a position on whether Oregon would recognize the marriage, remanding the case for further consideration.

---

76. Lovo-Lara, 23 I. & N. Dec. at 746. By the same token, the question before the court in In re Widener, File: A95 347 686, 2004 WL 2375065 (B.I.A. Sept. 21, 2004), was whether South Carolina would recognize a marriage between Jacob Widener and Esperanza Martinez Widener, who had been born male in the Philippines. Esperanza had undergone sex reassignment surgery and had been issued a Philippine birth certificate reflecting her change of sex.

77. See Lovo-Lara, 23 I. & N. Dec. at 746–47.

78. See Lovo-Lara, 23 I. & N. Dec. at 748 (“the documents submitted by the petitioner reflect that she underwent sex reassignment surgery”).


80. See Lovo-Lara, 23 I. & N. Dec. at 748.


82. Lovo-Lara, 23 I. & N. Dec. at 753.


Oren is the kind of decision that might give Thomas Beatie and his family pause. Jack Keegan had met the requirements for a birth certificate modification in Michigan, just as Thomas Beatie had the necessary surgery to qualify for a change of sex designation on his birth certificate in Hawaii. Keegan and his wife had married in Oregon, while Beatie and his wife, Nancy, had married in Hawaii. Neither Michigan nor Hawaii required genital surgery in order for the birth certificate to be modified.

At issue in Oren was whether the Oregon marriage was valid, which depended upon whether Oregon would treat Keegan as male or female for marriage purposes. It should be noted that the fact that Keegan had an amended birth certificate and the fact that Keegan and Oren had an Oregon marriage license was not enough to convince the court that the marriage would be considered valid in Oregon. The claim here is not that Keegan's marriage would or should be considered invalid in Oregon, just as the claim here is not that Beatie's marriage would or should be considered invalid in Oregon. The point is merely that it is still an open question whether Oregon will recognize a marriage between a transgendered individual and that person's partner, even when a birth certificate has been modified in accord with local law and even when the parties have already secured a marriage license.

Perhaps the issue simply will not arise for the Beaties or, perhaps, the Oregon Legislature will make clear via statute the conditions under which the transgendered can marry their loved ones. That said, it is important to understand that a state's refusal to recognize the validity of a marriage can have a variety of implications. For example, as Littleton demonstrates, an individual might be precluded from bringing a wrongful death action if that individual is viewed as a legal stranger to, and not the legal spouse of the deceased. So, too, Gardiner demonstrates

86. See Beatie supra note 85, at 178. But see Goodman, supra note 4, at A17 (“Thomas married Nancy in Oregon”).
87. See Oren, 2004 WL 1167318, at *2 (“The petitioner has had a bilateral mastectomy, but not genital surgery.”); Beatie, supra note 85, at 161–62.
88. The Oregon Legislature has specified by statute that birth certificates can be amended because of surgical intervention. See Or. Rev. Stat. § 432.235(4) (2009) (Effective Jan. 1, 2008); see also In re Taylor, No. 03CA1753, 2003 WL 22382512, at *5 (D.C. Super. Ct. March 17, 2003) (“The legislature did respond to the issue, and Oregon now has a statutory provision that enables a person whose sex has been changed by surgical procedure to amend his or her birth certificate.”).
89. See Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (“As a male, Christie cannot be married to another male. Her marriage to Jonathan was invalid, and she cannot bring a cause of action as his surviving spouse.”)
that an individual might be viewed as a legal stranger to her deceased—albeit not legally recognized—husband and so be denied any portion of the estate should the deceased have died intestate. In both of these cases, the marriage had continued undisturbed until one of the parties had died, and someone else had challenged the validity of the marriage. Because the claim in both Littleton and Gardiner was that the marriage was void rather than merely voidable, the marriage was still subject to attack notwithstanding that one of the parties to the marriage had died.

C. Dissolutions of Marriages Where One of the Parties Is Transgendered

A few cases have involved marriage dissolutions where the person seeking the dissolution had knowingly married a post-operative transsexual. Kantaras v. Kantaras involved a challenge to the marriage between Michael, née Margo, Kantaras and Linda Kantaras. Michael had undergone sex reassignment surgery before meeting Linda, and Linda had been informed about Michael’s surgeries.

Linda and Michael married one month after she had given birth to a child fathered by a former boyfriend. A few months later, he applied to adopt Linda’s child. Three years later, Linda gave birth to a girl after having undergone artificial insemination with the sperm of Michael’s brother.

Nine years after they had married, Michael filed for divorce, seeking custody of both children. In her answer, Linda claimed that the

90. See In re Est. of Gardiner, 42 P.3d 120, 123 (Kan. 2002) (“Marshall died intestate ... Joe alleg[ed] that he was the sole heir in that the marriage between J’Noel and Marshall was void since J’Noel was born a man.”).
91. See notes 64–71 and accompanying text supra (discussing voidable marriages).
92. Arnelle v. Fisher, 647 So. 2d 1047, 1048 (Fla. Dist. Ct. App. 1994) (“Although the invalidity of a void marriage may be asserted in either a direct or collateral proceeding and at any time, either before or after the death of the husband, the wife, or both, a voidable marriage is good for every purpose and can only be attacked in a direct proceeding during the life of the parties.”) (citing Kuehmsted v. Turnwall, 138 So. 775, 777 (Fla. 1932)).
94. Kantaras, 884 So. 2d at 155.
95. Kantaras, 884 So. 2d at 155.
96. Kantaras, 884 So. 2d at 155.
97. Kantaras, 884 So. 2d at 155–56.
98. Kantaras, 884 So. 2d at 156.
99. Kantaras, 884 So. 2d at 156.
100. Kantaras, 884 So. 2d at 156.
marriage was void because it involved individuals of the same sex, that
the adoption of her son was void because Florida precludes adoptions by
gays, and that Michael was neither the biological nor the legal father of
their daughter.\footnote{1}

The trial court found that Michael was male\footnote{2} and therefore up-
held the validity of the marriage.\footnote{3} The appellate court reversed,
reasoning that "whether a postoperative transsexual is authorized to
marry a member of their birth sex is a matter for the Florida legislature
and not the Florida courts to decide."\footnote{4} Because the legislature had not
spoken to this issue one way or the other, the appellate court held that
any marriage "not between persons of the opposite sex determined by
their biological sex at birth . . . is void ab initio."\footnote{5} The court refused to
"undertake a determination of the legal status of the children resulting
from our conclusion that the marriage is void,"\footnote{6} leaving that for the
trial court.\footnote{7} Fortunately, Michael and Linda were subsequently able to
negotiate a custody agreement.\footnote{8}

Just as the parent-child relationships continued in \textit{Kantaras} not-
withstanding the court’s finding the underlying marriage null and void,
a similar result occurred in \textit{Pierre v. Pierre}.\footnote{9} Lauraleigh and Andrew
Pierre married in 1994 and divorced in 2002.\footnote{10} The divorce judgment
reflected the couple’s wishes regarding custody, visitation and support.\footnote{11} However, possibly because of the influence of third parties,\footnote{12} Andrew
was forced to seek enforcement of his custody and visitations rights the
following year.\footnote{13}

While Andrew had an amended birth certificate stating that he was
male,\footnote{14} Lauraleigh argued that their marriage was null and void because
Andrew had been born a woman.\footnote{15} There was conflicting testimony
about whether Andrew had told Lauraleigh about his sex reassignment surgery prior to their marriage. In any event, she had understood that he could not father a child. Indeed, because the children had been born through artificial insemination and he had no biological tie to them, she sought to have his parental rights and obligations terminated.

The trial court held that Lauraleigh was to have sole custody, and refused to find that Andrew even had parental rights. The court nonetheless held that visitation with Andrew should continue because it was in the best interests of the children. The appellate court reversed the termination of parental rights on jurisdictional grounds, and upheld the court's visitation award.

While the decision had a good result in that Andrew was permitted to continue his relationship with his children, his parental rights were by no means rendered secure by this decision. The Pierre majority suggested that a different court would have jurisdiction to terminate Andrew's rights. If Lauraleigh's new husband had wanted to adopt the children via a stepparent adoption, it would not have been

---

116. See Pierre, 898 So. 2d at 421.
117. See Pierre, 898 So. 2d at 423. However, there was some dispute as to whether she understood why he could not father a child. See Pierre at 422–23.
118. Pierre, 898 So. 2d at 422.
119. Pierre, 898 So. 2d at 423 ("In the legal situation, I would find that in fact these children are [her] children and she is to have sole custody.").
120. Pierre, 898 So. 2d at 423 ("I don't think that we've reached the point now, in this jurisdiction where the situation we have, . . . the facts that we have in this case, warrant Andrew having parental rights.").
121. Pierre, 898 So. 2d at 423.
122. Pierre, 898 So. 2d at 425 ("There are simply no provisions in our law under which a district court has subject matter jurisdiction to terminate parental rights under these circumstances.").
123. Pierre, 898 So. 2d at 426 ("[W]e find no manifest error in the court's factual findings and no abuse of discretion in its decision to allow [Andrew] continued visitation with the children.").
124. See Pierre, 898 So. 2d at 424 ("[V]oluntary or involuntary termination of parental rights is a matter over which a court exercising juvenile jurisdiction has exclusive original jurisdiction.").
125. See Pierre, 898 So. 2d at 421 n.2.

A stepparent, stepgrandparent, great-grandparent, grandparent, aunt, great aunt, uncle, great uncle, sibling, or first, second, or third cousin may petition to adopt a child if all of the following elements are met:

1. The petitioner is related to the child by blood, adoption, or affinity through a parent recognized as having parental rights.

2. The petitioner is a single person over the age of eighteen or a married person whose spouse is a joint petitioner.
surprising for a new suit to have been brought to terminate Andrew’s rights. There was nothing in the Pierre decision to suggest that such a suit would not be successful and, indeed, the Pierre dissent argued that the trial court’s award of visitation was reversible error.127

In re Marriage of Simmons128 is a rather frightening case for transgendered parents who worry about whether they would be able to maintain their relationships with their children in the event that their relationships with their adult partners were to end. Robert Simmons, née Bessie Lewis, had the “outward appearance of a man, which includes facial and body hair, male pattern baldness, a deep voice, a hypertrophied clitoris, and increased muscle and body mass.”129 He and Jennifer had married, and seven years later Jennifer had given birth to a child produced through artificial insemination.130

Simmons had a new birth certificate, although it was issued nine years after the marriage had taken place.131 Further, the surgery providing the basis for the new birth certificate did not occur until six years after the marriage had taken place.132

Thirteen years into the marriage, Robert filed for divorce, seeking custody of their child.133 In her answer, Jennifer argued that their marriage was void ab initio because it was a same-sex marriage, and that Robert had no parental rights because he was neither the biological nor the adoptive parent of the child.134 The court agreed, holding that there was no marriage and that Robert had no parental rights. However, lack of parental rights notwithstanding, the court granted him visitation,135 an award that was not appealed.136

At trial, various doctors testified that there were other procedures to be performed if Robert were to complete his sexual reassignment.137 After considering this testimony, the trial court found that Robert was still

---

127. See Pierre, 898 So.2d at 428 (Kuhn, J., dissenting).
129. Simmons, 825 N.E.2d at 307.
130. Simmons, 825 N.E.2d at 307.
131. Simmons, 825 N.E.2d at 307.
132. Simmons, 825 N.E.2d at 307.
133. Simmons, 825 N.E.2d at 307.
134. Simmons, 825 N.E.2d at 307.
135. Simmons, 825 N.E.2d at 307.
136. Simmons, 825 N.E.2d at 307.
137. Simmons, 825 N.E.2d at 309 (“All of the physicians testified that there were other surgeries which had to be done on petitioner before he could be considered completely sexually reassigned, which would include a vaginectomy, reduction mammoplasty, metoidioplasty, scrotoplasty, urethroplasty, and phalloplasty.”).
a woman, a judgment upheld on appeal.\footnote{Simmons, 825 N.E.2d at 309.} Given the finding that Robert was a woman, the trial court unsurprisingly found that the marriage between Robert and Jennifer was a marriage between two individuals of the same sex and thus was void under Illinois law.\footnote{Simmons, 825 N.E.2d at 309.}

There were numerous bases upon which the trial court might have decided that the marriage between Robert and Jennifer was a marriage between individuals of the same sex. Robert and Jennifer had married before Robert had legally changed his name, before his birth certificate had been amended, and even before he had had the surgery upon which the authorization to amend his birth certificate was based.\footnote{Simmons, 825 N.E.2d at 307.} Assuming that same-sex marriage bans are not constitutionally infirm,\footnote{But see Matthew Coles, Lawrence v. Texas & The Refinement of Substantive Due Process, 16 STAN. L. & POL’Y REV. 23, 55 (2005) ("the exclusion of same-sex couples from marriage is unconstitutional").} and that it is both constitutional and good public policy to require the transgendered to undergo surgery before their birth certificates can be changed to reflect their self-identified sex,\footnote{But see Mark Strasser, Harvesting the Fruits of Gardiner: On Marriage, Public Policy, and Fundamental Interests, 71 GEO. WASH. L. REV. 179, 229 (2003) ("a sex-reassignment requirement would not be necessary if courts would exercise ‘reasoned judgment’ to figure out whether an individual is irreversibly committed to his or her identification with a particular sex") (footnote omitted). Further, not requiring sex reassignment surgery might help transgendered individuals avoid medical complications. Teresa A. Zakaria, Note, By Any Other Name: Defining Male and Female in Marriage Statutes, 3 AVE MARIA L. REV. 349, 361 (2005) ("Marriage laws should not promote SRS [sex reassignment surgery] can result in serious health problems.").} the court's decision was reasonable. Further, Simmons might be read as not changing current law if it is understood to rest on the marriage as having been prematurely celebrated. However, some of the dicta in Simmons would, if adopted, reverse some of the legal gains that transgendered people have already made.

Robert had argued that "Illinois has officially acknowledged that he was sexually reassigned when the State Registrar issued him a new birth certificate designating his sex as ‘male.’"\footnote{Simmons, 825 N.E.2d at 309.} However, the court suggested that "the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male."\footnote{Simmons, 825 N.E.2d at 310.} After all, it might be argued, the state would not be committed to recognizing a change of sex designation were that change based on fraud or a forgery.

\footnotetext[138]{Simmons, 825 N.E.2d at 309.} \footnotetext[139]{See Simmons, 825 N.E.2d at 309.} \footnotetext[140]{Simmons, 825 N.E.2d at 307.} \footnotetext[141]{But see Matthew Coles, Lawrence v. Texas & The Refinement of Substantive Due Process, 16 STAN. L. & POL’Y REV. 23, 55 (2005) ("the exclusion of same-sex couples from marriage is unconstitutional").} \footnotetext[142]{But see Mark Strasser, Harvesting the Fruits of Gardiner: On Marriage, Public Policy, and Fundamental Interests, 71 GEO. WASH. L. REV. 179, 229 (2003) ("a sex-reassignment requirement would not be necessary if courts would exercise ‘reasoned judgment’ to figure out whether an individual is irreversibly committed to his or her identification with a particular sex") (footnote omitted). Further, not requiring sex reassignment surgery might help transgendered individuals avoid medical complications. Teresa A. Zakaria, Note, By Any Other Name: Defining Male and Female in Marriage Statutes, 3 AVE MARIA L. REV. 349, 361 (2005) ("Marriage laws should not promote SRS [sex reassignment surgery] can result in serious health problems.").}
Yet, the court's refusal to recognize the effect of the new birth certificate might be read much more broadly than merely as rejecting that the state is committed to recognizing fraudulently obtained records. First, the court did not limit the conditions under which the new birth certificate would be rejected as reflecting reality, e.g., by discussing fraud, bribery or other ways in which the legitimacy of a document might generally be understood to be undercut. Instead, the court suggested that the "issuance of marriage licenses and new birth certificates are ministerial acts that generally do not involve fact-finding," and that courts do fact-finding. But this suggests that courts might as a general matter second-guess the accuracy of records. Second, the court did not qualify its statement by saying that the new birth certificate did not make the petitioner male for purposes of marriage but, instead, left open the possibility that a new birth certificate would not suffice to establish a change of sex for any purpose.

Robert was not only seeking to establish the validity of his marriage—he was also seeking to assure the recognition of his parental rights. He offered various possible bases upon which his parentage might be established, noting, for example, that "a child born from artificial insemination to two married parents retains his right to parentage with both parents even if the marriage is subsequently held invalid." However, the court reasoned that the statute was inapplicable to Robert. Indeed, the court also rejected Robert's contention that he was

145. See Simmons cf. Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (describing the "trial court's role in considering the petition [to amend an original birth certificate] was a ministerial one . . . [which] involved no fact-finding or consideration of the deeper public policy concerns presented").
146. Simmons, 825 N.E.2d at 310 ("The courts, on the other hand, are fact-finding bodies.").
147. Cf. Katie D. Fletcher, In Re Marriage of Simmons: A Case for Transsexual Marriage Recognition, 37 Loy. U. Chi. L.J. 533, 566 (2006) (discussing Simmons and arguing that the case suggests that "[a]bsent a statute or enforcement of an existing statute clearly allowing a transsexual's reassigned sex and/or court decisions recognizing a transsexual's reassigned sex, transsexual marriage rights with respect to their identified sex will continue to be nonexistent").
148. See Rose, supra note 83, at 121 n.79 ("[T]he court also utilized language that, undoubtedly, anti-transsexual forces will cite to denigrate all meaning to all birth certificates issued even to post-op transsexuals pursuant to the Illinois transsexual birth certificate statute").
149. Simmons, 825 N.E.2d at 311.
150. Simmons, 825 N.E.2d at 312. While we agree with petitioner's interpretation of the statute, we must conclude that it does not apply to him. That section, which confers a presumption on a "man" to be the natural father of a child even after a marriage has been declared invalid, is based on the premise that the parties who are involved are a
a de facto parent, and even that Jennifer could or should be estopped from challenging his parentage.

The Simmons court noted that the portion of the order granting him visitation rights had not been appealed. However, the court suggested that the Illinois Marriage and Dissolution of Marriage Act “superseded and supplanted the common law of visitation in Illinois and that therefore any standing for visitation must be found solely within that Act,” thereby suggesting that some transgendered parents may have difficulty in assuring continued visitation with the children that they have been helping to raise should this issue come before a court. Thus, although Simmons did not hold that Robert’s visitation rights should be denied, one might read between the lines to see that those rights might well have been denied had that issue been raised on appeal. A transgendered parent having no biological connection to the child whom he or she is helping to raise might well consider adopting that child if such an option is available, especially if the family might be crossing state lines in the future.

We, of course, are not here dealing with a separation agreement. But certainly the document which was signed by the respondent and by which these children were brought into the world gives rise to a situation which must provide these two children with remedies. To hold otherwise would allow this respondent to completely abrogate her responsibilities for the support of the children involved and would allow her to benefit from her own fraudulent acts which induced their birth no more so than if she were indeed the natural father of these children. Of course, the respondent was free to engage and live in any lifestyle which she felt appropriate. However, by her course of conduct in this case which brought into the world two innocent children she should not be allowed to benefit from those acts to the detriment of these children and of the public generally . . . . The contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack of parenthood. This Court finds that under the unique facts in this case, respondent is indeed a “parent” to whom such responsibility attaches.

154. Simmons, 825 N.E.2d at 313 (citing In re Visitation with C.B.L., 723 N.E.2d 316, 320 (1999)).
155. Cf. Mark Strasser, When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood, 23 Cardozo L. Rev. 299, 315–16 (2001) (suggesting that an individual helping to raise a same-sex partner’s child might be well-advised to adopt that child, especially if the family might be changing domiciles in the future).
D. On Custody and Visitation

The difficulty raised in Simmons for transgendered parents will only arise under certain conditions. For example, suppose that a state recognizes de facto or psychological parenthood. In that event, even if the marriage were held to be void and of no legal effect, the (not-legally-recognized) partner might still be granted custody of or visitation with the child whom he or she had been helping to raise, even if that adult did not have a biological or adoptive relationship with that child.156

If the adults' relationship ends and the transgendered parent is related by blood or adoption to the child, then the issue will be how custody and visitation rights and responsibilities should be allocated—the transgendered parent will be treated as any other parent whose custodial and visitation rights must be determined. Basically, the distribution of those rights and obligations will depend upon what arrangement would best promote the interests of the child. Best interests will be used to determine who should have custody,157 as well as whether any restrictions should be placed upon visitation rights.158 That said,

156. Compare Leonard v. Boardman, 854 A.2d 869, 872 n.4 (Me. 2004) ("A court may award parental rights and responsibilities of a child to a de facto parent") (citing Young v. Young, 845 A.2d 1144, 1145 (Me. 2004)), with Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) ("We will not recognize de facto parent status, as set forth in S.F., as a legal status in Maryland. We refuse to do so because, even assuming arguendo that we were to recognize such a status, short-circuiting the requirement to show unfitness or exceptional circumstances is contrary to Maryland jurisprudence.") (citing S.F. v. M.D., 751 A.2d 9 (Md. App. 2000)).


In sum, the need of each child, not Robbie's transgender status, was the court's focus in determining residential placement. The court focused on the children's need for "environmental and parental stability" in granting the majority of residential time to Tracy, a permissible statutory factor addressing the children's emotional needs. RCW 26.09.187(3)(a) M. v. M., Nos. FA 940064700, FA 890050074, 1996 WL 434302, at *7 (Conn. Super. July 11, 1996);

Based upon the information in the evaluation, the children's expressed wishes, and the change in circumstances, Mr. Williams now recommends that the children reside primarily with their biological father, now Mrs. O'N. The girls' father had a gender change operation in 1990 and was married as a female in 1994.

In re Custody of T.J., No. C2-87-1786, 1988 WL 8302, at *3 (Minn. App. Feb. 9, 1988) (affirming custodial award to transgendered father because there was "no evidence which would lead the Court to believe that providing primary parenting responsibilities to a gender dysphoric father would cause future problems for T.J.").

158. Boswell v. Boswell, 721 A.2d 662, 667 (Md. 1998). We seek to clarify that only one standard is used in determining whether to restrict parental visitation in the presence
however, the best interests analysis might include, for example, adjustment difficulties that the children might have if the parent transitions, which might even result in the parent's losing rights of visitation in extreme cases.

**CONCLUSION**

Current law in many states is indeterminate with respect to whether or under what conditions a transsexual can marry someone of his or her birth sex. This is not simply a matter of determining the conditions under which a modification to a birth certificate will be permitted, because in some states an individual can be of one sex for certain purposes and a different sex for other purposes. Matters become even more complicated when families travel through or move to other

---

of non-marital partners, bests [sic] interests of the child, but we also want to emphasize that when a court is engaging in a best interests analysis, reasonable maximum exposure to each parent is presumed to be in the best interests of the child.

159. See Daly v. Daly, 715 P.2d 56, 58 (Nev. 1986), overruled on other grounds by In re Termination of Parental Rights as to N.J., 8 P.3d 126, 132 (Nev. 2000), NRS 128.107 provides that the child’s desires regarding the termination should be a specific consideration, if the child has sufficient capacity to express his or her desires. Considering Mary’s age and intelligence, the lower court found her to have the requisite capacity. We agree with the court’s finding. In the present case, Mary told Dr. Weiheir and the trial judge that she did not want to see her father. Mary also said it would be disturbing to visit with her father and made it graphically clear that she didn’t want to see him again. Cf. M.B. v. D.W., 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (“Although one professional opined that the entire family mishandled informing and supporting M.B., we cannot say that the circuit court erred in holding the appellant primarily responsible for [daughter] M.B.’s emotional injury.”); but cf. Christian v. Randall, 516 P.2d 132, 134 (Colo. App. 1973).

In the meantime, given the circumstances concerning Mary’s view of Suzanne and the extent of her opposition to further ties with a vestigial parent, it can be said that Suzanne, in a very real sense, has terminated her own parental rights as a father. It was strictly Tim Daly’s choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter. The evidence shows that, subsequent to the 1964 divorce, the respondent has been going through a transsexual change from female to male, that the respondent’s name was legally changed from Gay Christensen Christian to Mark Avle Randall, and that subsequent to the filing of the petition respondent married a woman. 1971 Perm. Supp., C.R.S.1963, 46-1-24(2), specifically directs that, in determining best interests, ‘The court shall not consider conduct of a proposed custodian that does not affect his relationship with the child.’ (emphasis supplied) The record discloses that the above circumstances did not adversely affect respondent’s relationship with the children nor impair their emotional development. Christian, 516 P.2d at 135 (“The judgment of the trial court is reversed, and the cause is remanded with directions to enter an order denying the petition for modification of custody.”).
states with differing rules regarding marriage or birth certificate modifications.

Thomas Beatie made headlines as the first man to give birth to a child. But many transgendered individuals are parents, and the current lack of clarity with respect to which families will be legally recognized puts families at risk in ways that simply cannot be justified—courts can hold spousal and parent-child relationships void and of no legal effect years after the marriage was celebrated, thereby unsettling justified expectations and destroying relationships whose preservation would benefit both children and adults. Either Congress or the states must act to rectify the current situation by making policies which account for the needs of the transgendered community and which assure that individuals will not be of one sex for certain purposes and of a different sex for others, or be of one sex in one state but of a different sex when crossing state lines. The current system imposes unjustifiable burdens on the transgendered and their families and must be corrected at the earliest opportunity.