

An Analysis of Jurisdictions Which Recognize the Reality of Transsexualism AND Ban Recognition of Homosexual Marriage

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First and foremost, this analysis and chart is *not* intended to be stand-alone legal advice for individuals / couples. The purpose of this is to assist legal practitioners and, more importantly, courts who are faced with an increasingly disjointed - and inaccurate - picture of how transsexuals fit into marital law in the United States in jurisdictions which have enacted a statute / statutes / constitutional amendment against recognition of homosexual marriages. In other words, individuals / couples with concerns about how laws enacted as part of the ongoing backlash to the *gay* marriage movement will affect them should offer this to any attorney that they may be consulting for legal advice. There are many transphobic and/or unethical attorneys out there who do not truly care about your interests and certainly do not care about how a bad decision in your case might establish anti-transsexual precedent in your jurisdiction. However, you must be equally - perhaps even more so - concerned about friendly, otherwise-ethical attorneys who truly do have your best interests at heart yet also truly have no idea of the actual state of transsexual law in 2004. They can do just as much damage.

As for judges - *you* must look beyond the briefs submitted in cases where transsexual identity is an issue. Apart from the statutory chart below, two things must be kept in mind. The first: the leading legitimate American court opinions on transsexualism have come *not* from Texas and Kansas; they have come from Maryland and New Jersey. *In re Heilig*, 816 A.2d 68 (Md. 2003); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (1976). The second: *M.T. v. J.T.* is not a myth. It happened. *In 1976*. However, it is ignored both in modern popular discourse about the institution of marriage *and* by courts seeking to misrepresent the transgender legal landscape. Its existence (*and* the lack of a backlash against it), however, *must* be acknowledged.

If you are faced with a situation where the party seeking to nullify a transsexual's identity / marriage is utilizing a DOMA statute to accomplish the nullification, you **MUST** look at the *actual* legislative history of these statutes - particularly the 1996 federal DOMA, where testimony in committee and floor debate not only is totally devoid of any intent to target heterosexual marriages involving transsexuals but also makes clear that the bill was aimed at something that *had yet to occur*, namely legalized gay marriages. Given that, the 1996 statute could not possibly have been targeting heterosexual marriages involving transsexuals, considering (1) that such marriages had been validated by the appellate courts of New Jersey in 1976 and, in all likelihood, had been validated elsewhere in unpublished trial court decisions; and (2) that, by 1996, all of the statutes noted

below, except Connecticut's, were in existence. In short, if transsexual marriage was considered part of the 'threat' to marriage that was being addressed by Congress in 1996 and other states in the years immediately before it and in the years since, it would have been explicitly mentioned. And, certainly, states which had the right-wing fortitude to enact anti-gay-marriage statutes during the last few years certainly showed that they knew how to act legislatively; had they wanted to attempt to wipe out transsexual existence, they could have done so legislatively.

Courts in Texas, Kansas and Ohio have improperly interpreted DOMA statutes whose clear and unequivocal purpose was to outlaw marriages of homosexual couples, construing them to also nullify heterosexual marriages in which one spouse is a post-transition transsexual and the other is a non-transsexual member of the sex that the transsexual spouse had been designated at birth. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. - San Antonio 1999, pet. denied); *In re Gardiner*, 42 P.3d 120 (Kan. 2002); and *In re Nash and Barr*, Nos. 2002-T-0149 and 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio App. Dec. 31, 2003). And, in Kansas and Ohio, the interpretations were not simply wrong; they were unethical, perhaps even criminal. In both instances, the judge authoring the majority opinion had an undisclosed personal interest in seeing anti-gay-marriage statutes interpreted broader than their clear legislative mandate intended (In Kansas, the judge in *In re Gardiner* claimed to be sorting through legislative history of a 1980 statute to ascertain its applicability to a Wisconsin-born transsexual woman, but does not mention in the opinion that he was a member of the legislature that year and was even a co-author of the bill that became the law at issue; in other words, he either knows or should have known what was said in 1980 about transsexuals - and the extensive evidence I've seen indicates that the word 'transsexual' likely was never even uttered, meaning that he was using his position as a judge to legislate an anti-transsexual clause into the statute. In Ohio, the judge did not mention in the opinion that she was the wife of the state legislator who was a co-author of the DOMA bill - which, at the time of the *In re Nash and Barr* opinion in late 2003, *had not even been enacted yet!*

Moreover, the Kansas and Ohio decisions involved transsexuals who were born in states that have statutes which specifically recognize the modern reality of the concept of sex, embodied, in part, by the recognition of transsexualism. Specifically, these statutes allow post-transition transsexuals to conform their basic identity documentation (birth certificate) to reflect post-transition reality. And, the transsexuals in question had records from their birth states which recognize them as their post-transition sex, necessitating a *legitimate* full faith and credit analysis (which has yet to be done by an anti-transsexual court seeking to ignore the records / judgments of pro-recognition states.)

The chart below is a concise comparison between statutes recognizing the modern, scientific reality of sex and statutes outlawing gay marriage. The vast majority of states which have transsexual birth certificate statutes also have anti-

gay-marriage statutes. Courts should not be inclined to interpret the anti-gay marriage statutes as nullifying the transsexual statutes. After all, the typical 'let the people decide, not the courts' mantra which accompanies pro-gay marriage court decisions is simply not applicable. With the exception of Puerto Rico, these are all statutes. The people have decided through their legislatures.

And, this is not a polemically-friendly (either for opponents of transsexuals' identity rights or for supporters) set of states and statutes. In number, they represent approximately half of the state-level jurisdictions in the U.S. They are not all left-coast or liberal northeastern states; and they are not all from one particular time period (Louisiana and Iowa *preceded* California and Massachusetts.) They are in states that are historically liberal, historically conservative, and historically moderate; they are in the deep south, the Midwest, the northwest and the northeast. Some came into existence as part of overall revisions of state vital statistics frameworks; some were enacted as stand-alone bills, apparently to address the perception that transsexual-specific language is necessary.

There is no rationale for viewing anti-gay marriage statutes to affect transsexuals even were there is no transsexual birth certificate statute. The legitimate science regarding transsexualism (as opposed to the recently-gay-approved, non-science of J. Michael Bailey's *The Man Who Would Be Queen*), is only pointing more and more directly at what transsexuals have known all along: that transsexualism is an inherent, biological aspect of a person - akin to, if not a form of, intersexuality, a concept recognized in Anglo-American law as far back as Coke and Bracton.

However, even without delving back into the pre-English days of law, one can reconcile the current state of the law with a pro-recognition stance. Moreover, to be honest in any declaration of adherence to legislative intent, one *actually has to look at that intent*. Despite obscenely conclusory musings of some that transsexual birth certificate statutes are not sufficient to evidence intent of the legislature to actually recognize the change of legal sex of a person, the intent of these laws are self-evident - and actually do perform just such a function: they are a statement by the legislative body of the jurisdiction that transsexualism is real, is legitimate, and should be accommodated (no, not given 'special rights'; simply recognized as existing) in the law.

Legislatures, many having been 'educated' for decades not to include transgendered people in gay rights legislative proposals, *clearly* know the difference between gay and transgender (and transsexual.) If these states (several of which either have had or still have civil rights statutes which cover only a non-transgender-inclusively defined "sexual orientation", and not "gender identity") had intended to ban heterosexual marriages involving transsexuals when they banned homosexual marriages, then they certainly knew how to say so. And, the unimpeachable fact is that none of these states did so legislatively - and it is certainly not the place of the courts to add on anti-transsexual language to anti-gay-marriage statutes.

Jurisdiction	Year of Enactment of Statute Recognizing Transsexualism	Year of Enactment of Statute Attacking the Concept of Gay Marriage	Any Evidence of Any Connection Between the Two so as to Equate Public Policy Against Gay Marriage With a Public Policy Against Transsexuals?
Alabama	1992	1998	
Arkansas	1981	1997	
Arizona	1967	1996	
California	1977	1977 / 2000	<p><u>1977</u>: Concept raised, but transsexuals' marital rights not denigrated by the plain language of the anti-gay bill or the subsequent transsexual birth certificate bill.</p> <p><u>1997</u>: Gender transition recognized at trial court level in <i>Vecchione v. Vecchione</i> divorce action; no appellate or legislative response against it.</p> <p><u>2000</u>: Transsexuals' rights totally absent from Prop. 22 discourse.</p> <p><u>2004</u>: Current discourse regarding San Francisco gay marriages is totally devoid of any mention of heterosexual marriages involving transsexuals.</p>
Colorado	1984	2000	
Connecticut	1975* / 2001	none	
D.C.	1981	1996 (Federal DOMA)	
Georgia	1982	1996	
Guam		1996 (Federal DOMA)	
Hawaii	1973	1998	<p><u>1993-1998</u>: <i>Baehr</i> litigation and its aftermath totally devoid of any reference to marital rights of transsexuals.</p>

Illinois	1961	1996	
Iowa	1976	1998	
Kentucky	1990	1998	
Louisiana	1968	1999	
Maryland	1995	1973	
Massachusetts	1975* / 1981	none	<u>2001-2004</u> : <u>Goodridge</u> litigation completely devoid of any reference to marital rights of transsexuals.
Michigan	1977	1996	
Missouri	1984	1996*** / 2001	
Nebraska	1994	2000	<u>2000</u> : Discourse regarding the anti-gay-marriage Initiative 416 appears to have totally ignored the issue of marital rights of transsexuals.
New Mexico	1981	none	
New Jersey	1976** / 1984	none	<u>1976</u> : No indication of any popular link between the issue of gay marriage and the recognition of gender transition in <i>M.T. v. J.T.</i> ; news coverage is scant, but respectful; the decision is viewed as recognition of the reality of sex, not a threat to the institution of marriage. <u>2001-present</u> : Ongoing gay marriage litigation attacks the pro-transsexual <i>M.T. v. J.T.</i> decision for its holding that marriage is limited to opposite-sex couples.
North Carolina	1975	1996	
Oregon	1981	none	<u>1998</u> : Failed anti-gay marriage ballot initiative called 'The Family Act' would have mandated that "gender is determined at the moment of conception."
Puerto Rico	2000*	1996	

		(federal DOMA)	
Utah	1981	1995	
Virginia	1979	1997	
Wisconsin	1985	none	<p><u>1997</u>: A proposed amendment to a DOMA proposal would have clarified that the bill would not have adversely affected heterosexual marriages involving transsexuals.</p> <p><u>2003</u>: Vetoed DOMA bill had no language aimed at heterosexual marriages involving transsexuals.</p>

* The non-transsexual-specific birth certificate statutes in Connecticut and Puerto Rico were held by court decision to be inclusive of transsexuals' identity rights. *Darnell v. Lloyd*, 395 F.Supp. 1210 (D. Conn. 1975); *Ex Parte Torres*, 2000 JTS 120, 2000 TSPR 109 (P.R. 2000). The decisions have never been overturned by statute or subsequent court decision. Moreover, Connecticut has since amended its vital statistics statutory framework to address "gender change," 2001 Conn. Acts Ch. 01-163, § 32; after briefly having a statute only addressing only gender changes related to "hermaphroditism." 1997 (June 18 Sp. Sess.) Conn. Acts. 97-10, § 3; 1997 (June 18 Sp. Sess.) Conn. Acts. 97-8, § 44.

The then-non-transsexual-specific birth certificate statute in Massachusetts was construed in an attorney general's opinion to be inclusive of transsexuals' identity rights. 1975 Mass. A.G. Op. 62. It was amended to be transsexual-specific in 1981 (the year *after* Barney Frank left the Massachusetts legislature to go to Congress.) 1981 Mass. Acts. Ch. 684.

** Transsexuals' identity AND post-transition marital rights were recognized in 1976 by a court decision specifically upholding the concept of opposite-sex-only marriage. *M.T. v. J.T.*, 140 N.J. Super. 77; 355 A.2d 204 (N.J. Super. App. Div. 1976), *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976). This decision has not only never been overturned, but a statute specifying that New Jersey-born transsexuals can correct their birth certificates to reflect post-transition reality was enacted in 1984. 1984 N.J. Laws Ch. 191.

*** The 1996 Missouri DOMA was declared unconstitutional for violating the anti-logrolling provision of the Missouri Constitution. *St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. 1998). However, there is no indication whatsoever that *either* enactment had any target other than *homosexual* relationships.

Relevant Statutes, Legislative Materials and News Articles

P.L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7; and 28 U.S.C. § 1738C).

Defense of Marriage Act, H. Rep. No. 104-664 (1996), *reprinted in* 1996
U.S.C.C.A.N. 2907.

*Hearing Before the Subcommittee on the Constitution of the Committee on the
Judiciary*, House of Representatives, 104th Cong., 2nd Sess., on H.R. 3396 (May
15, 1996) (Serial No. 69).

Hearing Before the Committee on the Judiciary, Senate, 104th Cong., 2nd Sess.,
on S. 1740 (July 11, 1996) (Serial No. J-104-90).

1992 Ala. Acts No. 92-607, § 19.

1998 Ala. Scts. No. 98-500.

Ala. Stat. § 30-1-19 (2003).

1967 Ariz. Laws Ch. 77, § 2.

Ariz. Rev. Stat. § 36-326 (A) (4) (2003).

Ariz. Rev. Stat. §§ 25-101, 25-112 (2001).

1981 Ark. Acts. No. 120, § 12.

Ark. Code. Ann. § 20-18-307 (d) (West. 2003).

1977 Cal. Laws Ch. 339.

1977 Cal. Laws Ch. 1087.

Vote to Let Transsexuals Adjust ID, SAN FRANCISCO CHRONICLE, Sept. 13, 1977 at
3.

2000 Cal. Proposition 22 (ballot initiative).

Cal. Health & Saf. Code § 103425 (2003).

Cal. Fam. Code § 308.5 (2003).

1984 Colo Laws Ch. 206.

2000 Colo. H.B. 00-1249.

Colo. Rev. Stat. Ann. §§ 14-2-101, 14-2-110 (West 2003).

Colo. Rev. Stat. Ann. § 25-2-115 (4) (West 2003).

1997 (June 18 Sp. Sess.) Conn. Acts. 97-8, § 44.

1997 (June 18 Sp. Sess.) Conn. Acts. 97-10, § 3.

2001 Conn. Acts. 01-163, § 32.

Conn. Gen. Stat. § 19a-42 (a) (2003).

1981 D.C. Laws No. 4-34, § 18.

D.C. Code § 7-217 (d) (2003).

1982 Ga. Acts. No. 1216, § 1

Ga. Code Ann. § 31-10-23 (e) (West 2003).

10 Guam Code Ann. § 3222 (e) (West 2003).

Haw. Const., art. I, § 23.

1973 Haw. Acts. No. 39.

1998 Haw. H.B. 117 (constitutional amendment ballot question).

Haw. Rev. Stat. Ann. § 338-17.7 (West 2003).

Haw. Rev. Stat. Ann. § 572-3 (West 2003).

1961 Ill. Laws p. 2935, § 17.

1996 Ill. Pub. Acts No. 89-0459

410 Ill. Comp. Stat. § 535/17 (West 2003).

750 Ill. Comp. Stat. §§ 5/212, 5/213.1 (West 2003).

1976 Iowa Laws Ch. 1111.

1998 Iowa Laws Ch. 1099.

Iowa Code § 144.23 (3) (2003).

Iowa Code § 595.2 (2003).

Iowa Code § 595.20 (West 2003).

1990 Ky. Acts. Ch. 369, § 23.

1998 Ky. Acts Ch. 258.

Ky. Rev. Stat. Ann. § 213.121 (5) (2003).

1968 La. Acts. No. 611.

La. Rev. Stat. § 40:62 (West 2001).

1973 Md. Laws Ch. 213.

1995 Md. Laws Ch. 97.

Md. Health Code Ann § 4-214 (b) (5) (2003).

1975 Mass. A.G. Op. 62.

1981 Mass. Acts. Ch. 684.

Mass. Gen. Laws Ann. 46 § 13 (e) (2003).

1978 Mich. Pub. Acts. No. 368

Mich. Comp. Laws Ann. § 333.2831 (c) (West 2003).

1984 Mo. Laws, S.B. 574.

1996 Mo. H.B. 1637.

1996 Mo. Laws, S.B. 768.

1999 Mo. Laws, S.B. 328

2001 Mo. Laws, H.B. 157.

Mo. Stat. Ann. § 193.215 (9) (West 2003).

1994 Neb. L.B. 886.

Hearing Before the Nebraska Legislature, Committee on Health and Human Services, 93rd Leg., 2nd Sess., on 1994 L.B. 886 (Jan. 26, 1994).

2000 Neb. Initiative 416 (constitutional amendment ballot question).

Neb. Rev. Stat. § 71-604.01 (West 2003).

Steven Ford, *Gender Change Legalized*, THE EVENING TIMES (Trenton, N.J.), March 22, 1976 at A1.

Sex Change no Barrier to Alimony, THE EVENING TIMES (Trenton, N.J.), March 23, 1976 at A3.

Joshua McMahon, *Transsexuals Granted a Full Range of Rights*, STAR-LEDGER (Newark, N.J.), March 23, 1976 at 1.

1984 N.J. Laws Ch. 191.

N.J. Stat. Ann. 26:8-40.12 (West 2003).

1981 N.M. Laws Ch. 309, § 19.

N.M. Stat. Ann. § 24-14-25 (D) (West 2003).

1975 N.C. Laws Ch. 556.

1996 N.C. Laws Ch. 588.

N.C. Gen. Stat. Ann. § 51-1.2 (2003).

N.C. Gen. Stat. Ann. § 130A-118 (b) (4) (2003).

1981 Or. Laws Ch. 221, § 1

Or. Rev. Stat. § 33-460 (West 2003).

1981 Utah Laws Ch. 126, § 3.

Utah Code § 26-2-11 (2003).

1979 Va. Acts Ch. 711.

1985-86 Va. A.G. Op. 182.

Va. Code Ann. § 32.1-269 (West 2003).

1997 Wis. A.B. 104.

2003 Wis. A.B. 475.

2003 Wis. S.B. 233.

Wisc. Stat. Ann. § 69.15 (4) (b) (West 2003).