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Protecting Transgender Families: Strategies for Advocates

By Taylor Flynn

Divorce is never easy. Your life partner may now be a bitter enemy, your means of economic support may be in jeopardy, and custody of your children may be at risk. How could the stakes be any higher? Ask Michael Kantaras, J'Noel Gardiner, Kristie Littleton, or any of the married transgender women and men in the United States. For a transgender (trans) man or woman, what begins as the dissolution of a relationship may be transformed into a public nightmare in which the individual is forced to defend the authenticity of his or her gender in the face of relentless, brutal, and humiliating questions about the most intimate details of personal anatomy and sexual practices.

In 2002 this possibility became a reality for Michael Kantaras, a transsexual man in Clearwater, Florida. Although born with female genitalia, Michael grew up with a deep-seated identity as a male. In 1985, at the age of twenty-three, Michael went through the difficult process of making his life congruent with his sense of self by undergoing sex-reassignment, including hormone therapy, chest surgery, and surgeries to remove his internal female genitalia. A few years later, Michael fell in love and married Linda Kantaras, after telling her about his transgender status. At the time they married, Linda had an infant son from a prior relationship. Michael adopted Linda's son, and the couple had a second child through alternative insemination. Michael and Linda were married for ten years. When Michael filed for divorce, the court-appointed custody evaluator concluded that he was by far the more stable and qualified parent and recommended that he be given primary custody of the couple's two children.

Instead of focusing on the children's best interests, however, the proceedings



Michael Kantaras (center) with his attorneys from the National Center for Lesbian Rights, Karen Doering (left) and Shannon Minter (right)

very quickly centered on Linda's claim that Michael was legally female, which, if accepted by the court, would have rendered their marriage a legally invalid same-sex union and jeopardized Michael's parental rights. Drawing on anti-gay case law holding that, absent adoption, nonbiological gay and lesbian parents have no legal rights to their children, Linda argued that Michael was not a legal parent of the child born through alternative insemination. Linda also argued that Michael's adoption was invalid because Florida bans adoption by gay and lesbian parents. In short, Michael faced not only the loss of custody but also the loss of any right to be considered a parent in the eyes of the law or to maintain any contact with his children. With a signature from a judge's pen, his marriage, his parenthood, and even his gender could be erased.

In a three-and-a-half-week trial televised on Court TV, Michael and other witnesses were grilled about the appearance of Michael's body, the shape and size of his genitalia, his sexual capacities and practices, his ability to urinate standing up, and the details of his medical diagnosis and treatment as a transsexual person. Fortunately, the trial judge ultimately found Michael to be legally male, affirmed the validity of his marriage, and granted him custody of both children in an 800-plus-page deci-

sion issued on February 21, 2003.

Available at www.transgenderlaw.org. Just a few months later, in April 2003, a trial court in Chicago came to the opposite conclusion in a case involving similar facts. In Chicago, the trial judge ruled that Sterling S., a transsexual man who had undergone extensive medical treatment and lived exclusively as a man for more than twenty years, was nonetheless legally female, that his fifteen-year marriage to his wife Jennifer was invalid, and that he was not a legal parent to the couple's ten-year-old son. Both decisions are now on appeal.

Two other decisions involving transgender spouses have made the headlines in the past few years. Christie Littleton is a transsexual woman residing in Texas. After Christie's husband died in surgery, she filed a medical malpractice claim. The doctor responded by arguing that the couple's marriage was invalid and that she did not have standing to bring a wrongful death claim. The trial court dismissed Christie's claim on that basis. The Texas Court of Appeals affirmed the decision, concluding that "Christie was created and born a male" and continued to be legally male, regardless of her gender identity or how much medical treatment she had undergone. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999). Shortly thereafter, J'Noel Gardiner, a transsexual woman in Kansas, faced a similar challenge to the validity of her marriage, with a similar outcome. When J'Noel's husband died intestate, his estranged son sued to invalidate the couple's marriage in order to inherit their estate. The trial court ruled in the son's favor, and the Kansas Supreme Court affirmed the trial court decision in an opinion that drew heavily upon the decision in *Littleton. Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

As advocates for transgender spouses and parents, lawyers can at least strive to protect their clients from such devastation by educating the court on key issues concerning transgender identity and presenting the court with persuasive legal arguments for relying on a transgender person's gender identity, rather than specific medical treatments, to determine the person's legal sex.

Overview of Terms

Traditionally, "sex" refers to a person's sexual anatomy, whereas "gender" refers to the qualities society considers mascu-

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line or feminine. “Transgender” is an umbrella term that encompasses all people who are gender nonconforming, such as transsexual and intersexed persons, “masculine” women or “effeminate” men, and gay, bisexual, and lesbian people. As the following discussion suggests, however, the distinction is not always clear, and the terms often are used interchangeably. An extensive body of medical and psychological knowledge demonstrates that sex is not a rigid male-female binary but a sum of components, including physical characteristics (external and internal reproductive organs, chromosomes, hormones, and secondary sex characteristics) and gender identity, or a person’s internal psychological identification as female or male. The components typically line up so that birth anatomy corresponds to gender identity.

In transsexual people, the individual’s physical characteristics correspond to one sex while gender identity corresponds to the other. Trans men like Michael Kantaras and Sterling S. are often known as female-to-male transsexuals (FTMs); trans women like Christie Littleton and J’Noel Gardiner may be known as male-to-female transsexuals (or MTFs). In 1979, an international organization of medical and psychological experts began developing a medical protocol, or standards of care, to provide guidelines for the diagnosis and treatment of transsexual people. Available at www.hbgda.org. These guidelines are designed to ensure that each patient receives an individualized assessment to determine which medical treatments, if any, are necessary to bring the person’s gender presentation or anatomy into harmony with his or her gender identity.

Another group of people—estimated at one in 2,000—is born intersexed, which is the contemporary term used to describe people who possess a combination of physical characteristics typically associated with both males and females. For example, intersexed people may have ambiguous genitalia or chromosomes that do not neatly fit into the categories of XX or XY. When a person’s gender identity and phys-

ical characteristics conflict, medical and psychological experts overwhelmingly agree that gender identity is the primary determinant of sex, not anatomy.

A Judicial Split

Judicial approaches to determining a person’s legal sex generally fall into two camps. The majority approach ignores decades of medical and psychological data to conclude that sex is determined exclusively and unchangeably by a person’s genitalia at birth. Courts adopting this approach often invoke God or nature. In Christie Littleton’s case, for instance, the court framed the issue as whether sex is “immutably fixed by our Creator at birth” and concluded, “There are some things we cannot will into being. They just are.” *Littleton*, 9 S.W.3d at 224, 231.

In J’Noel Gardiner’s case, the Kansas Supreme Court case looked to Webster’s Dictionary for the definition of “sex,” concluding that transsexual people do not fit within that definition and hence are not covered by Kansas’s marriage statute. “The words ‘sex,’ ‘male,’ and ‘female’ in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of ‘persons of the opposite sex’ [found in the marriage statute] contemplates a biological man and a biological woman and not persons who are [transsexual].” *Gardiner*, 42 P.3d at 120.

In contrast, a small but growing minority of courts in the United States and internationally have concluded that the legal sex of transgender litigants is the sex corresponding to their gender identity. As early as 1976, a New Jersey court ruled that a transsexual woman was legally female, stating that when birth anatomy and gender identity conflict, the role of anatomy is secondary. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Sup. Ct. 1976). In a more recent decision, an Australian family court similarly upheld the validity of a marriage involving a transsexual man. The court cited expert testimony that “brain . . . or mental sex . . . [is thought to] explain the persistence of a gender identity in the face of . . . external influences” and concluded that the transgender litigant in the case “is and always has been psychologically male.” *Gardiner*, 42 P.3d at 131, 132 (discussing *In re Kevin*).

In *Kantaras*, the Florida trial court reviewed the extensive medical and psychological testimony presented in the case and concluded, based upon that testimony, that gender identity is the primary

determinant of sex. The judge stated, “There should be no legal barrier, cognizable social taboo, or reason grounded in Florida public policy to prevent Michael’s [being declared legally male] . . . From a medical standpoint, Michael is of the male gender and has been his entire life.” As the opinions in these cases suggest, because gender identity is fixed at a young age, trans people do not “change” their sex; rather, they bring their gender presentation or anatomy into harmony with their gender identity.

The Gender Identity Standard

That transsexualism is a recognized medical condition with an established course of treatment raises the issue of whether specific procedures, such as hormone therapy or surgical interventions, will be required for a person to be legally recognized as male or female.

Ideally, courts should apply the standard used by medical and psychological experts: that a person’s sex is determined by his or her gender identity. In *Kantaras*, for example, the trial court rightly concluded that it would be absurd to withhold legal recognition of Michael’s male gender given that Michael’s gender identity was male, that he had undergone extensive and irreversible medical treatments for the purpose of sex-reassignment, and that he was seen and accepted as a man by everyone in his daily life, including family, friends, employers, and acquaintances. Although Michael had not undergone a phalloplasty (the surgical construction of a penis), the court did not find this to be dispositive in view of the uncontested expert testimony that Michael’s gender identity was unambiguously male and that he had completed all of the medical treatments recommended to him by his doctors and therapists.

In *Kantaras*, the judge specifically acknowledged and relied upon the extensive medical information presented in the case, including testimony that many medical experts on transsexualism counsel against phalloplasty because it presents risks of permanent loss of orgasmic capability, severe scarring, and irreversible damage to the urethra. Moreover—in addition to the cost, which may exceed \$100,000—medical technology has not advanced to the stage where the procedure results in a functioning penis. Because the medical establishment can surgically construct fully functioning vagi-

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ly law that will promote the best interests of the children involved.

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prongs is entitled to protection under the state disability discrimination provisions. Several state human rights commissions across the country, including Connecticut, Florida, Illinois, Massachusetts, and New Hampshire, have interpreted state disability laws to include transgender people.

Some transgender people experience gender dysphoria (generalized discomfort or unease about birth gender) and, as a result, can easily demonstrate that they have an “impairment” under the terms of the relevant state statutes. At the same time, they may be uncomfortable about embracing a psychiatric diagnosis, which still carries the possibility of stigma in some areas of society. Even among those in the transgender community who reject the psychiatric model, most do not reject the premise that being transgender is likely a medical condition caused by biological factors that are not yet fully understood—and a growing body of scientific research supports this conclusion.

Many transgender employees face discrimination in the workplace. Lawyers may look to several sources of law in order to redress the rights of transgender clients who face adverse treatment in such situations, including transgender-specific nondiscrimination laws, state and federal sex discrimination laws, and state disability laws. Although courts historically have found transgender people excluded from coverage under certain laws, developing case law supports the arguments of transgender employees who face workplace discrimination.

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nas but not penises, reliance on surgery in this situation would have a starkly different impact on trans women than trans men. In view of these considerations, the judge in *Kantaras* declined to hold that phalloplasty is required for a transgender woman to be recognized as legally male, since any such requirement would be at odds with current medical knowledge and practice. In contrast, in the Chicago case, the trial court relied on the “lack” of genital reconstructive surgery to declare Sterling S. to be legally female, despite his male gender identity, extensive medical treatments, and twenty-plus years of living and being accepted as a man.

That the court’s decision in *Kantaras* was shaped by expert medical testimony strongly suggests that providing such medical data is advisable to ensure that courts have the information they need to make informed decisions. The fact that the opinion was 800 pages long raises questions, however. If courts require extensive expert evidence and undertake detailed, individualized inquiries into a person’s medical history, what recourse exists for clients who do not have access to experts or adequate medical care? Will certain surgeries or hormonal therapies become required? What if the client does not believe medical treatment is appropriate for him- or herself?

While courts desperately need the kinds of information provided to the judge in *Kantaras*, that court’s complex, highly medicalized inquiry has the potential to create almost as many problems as it solves. The better approach is for courts to point to the medical standards of care, which conclude that sex is determined by gender identity: the court then needs only to look to the person’s gender identity to determine his or her legal sex. Recognition of gender identity should provide the law with a consistent, relatively simple

approach that accords with medically accepted standards yet at the same time permits the flexibility that the standards of care contemplate.

Annulment of Marriage

Despite excellent lawyering, a court may follow the majority of courts and invalidate the client’s marriage. What does this mean for custody? Under early American law, when a marriage was invalidated or annulled, courts did not divide property or determine custody as they would in a divorce. Instead, these courts attempted to return parties to their “original” positions. This meant that property (which, at the time, included children) was returned to the property holders, who were men. As a result of such injustices, modern doctrine provides that, for purposes of determining property division, support, and custody, annulment should be treated just like divorce. See, e.g., 63 A.L.R.2d 1008 (West 2002). Crucially, then, non-biological, transgender parents should not lose their legal rights to their children simply because their marriage has been annulled.

Advocates representing transgender spouses and parents should be prepared to assert this doctrine in the event that clients are denied legal recognition of their gender. In the worst case scenario, one in which a court rules that a transgender client is not a legal parent, the doctrine of functional parenthood may provide protection if the jurisdiction decides to follow the recent rulings by the highest courts in Massachusetts and New Jersey. Both courts held that, although the litigants had not adopted their partner’s child, the nonbiological lesbian mother in each case was a full legal parent of the child. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 1999). Pointing out that the doctrine applies to any person who meets the criteria, each court arrived at a similar, carefully crafted set of standards for determining functional parenthood—standards that most active parents should be able to meet.

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