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## Family Law: Side-Stepping the Marriage Laws: The Contradiction Created by the Texas Appeals Court in Littleton v. Prange

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**FAMILY LAW – “SIDE-STEPPING” THE MARRIAGE  
LAWS: THE CONTRADICTION CREATED BY THE  
TEXAS APPEALS COURT  
IN *LITTLETON v. PRANGE*<sup>1</sup>**

**I. INTRODUCTION**

Is it our physical appearance, our biological make-up, or how we feel that defines our gender? With the advancement of medical procedures in gender modification, courts are now looking past the outward physical appearance of a person to determine his or her sex.<sup>2</sup> According to the Texas Court of Appeal and its reasoning in *Littleton v. Prange*, a person’s physical appearance no longer defines his or her gender.<sup>3</sup> The Appeals Court defined gender solely by a person’s chromosome makeup.<sup>4</sup> Due to this recent ruling, post-operative transsexuals engaging in what appears to be heterosexual relationships are being denied the right to marry on the grounds that it would actually be a same-sex marriage based on the chromosomes of the two people involved.<sup>5</sup> Therefore, post-operative transsexuals therefore have now joined forces with gays and lesbians in the national debate over same-sex marriages.<sup>6</sup>

Identity is one of the biggest hurdles that transsexuals face with regards to personal and social acceptance.<sup>7</sup> Transsexuals face identity confusion on both social and personal levels.<sup>8</sup> Too often in society,

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<sup>1</sup> 9 S.W.3d 223 (1999) (ruling transsexual wife had no standing in claim for husband’s wrongful death because marriage between post-operative transsexual female and heterosexual male invalid).

<sup>2</sup> *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999) (outlining sex-reassignment surgery).

<sup>3</sup> *Id.* at 230 (post-operative female deemed male with regards to marital and divorce rights).

<sup>4</sup> *Id.* at 227 (fixing biological sexual constitution at birth).

<sup>5</sup> *Id.* at 230-31 (holding post-operative female transsexual has male chromosomes like her husband).

<sup>6</sup> See Mary Coombs, *Transgenderism and Sexual Orientation: More Than a Marriage of Convenience*, 3 N.J.S.O.L. 4, 4-6 (analyzing relationship between transgenderism and homosexuality). The transgender community consists of people who are defined by their “non-normative” position on issues of sexual identity. *Id.* at 6. This community includes transsexuals, both post-operative and pre-operative, transvestites, and cross-dressers. *Id.* at 6.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 5.

transsexuals are confused with homosexual men and women or with transvestites.<sup>9</sup> In actuality, transgenderism is about sexual identity and not sexual orientation.<sup>10</sup> Transsexuals are people who feel that their physical gender attributes do not reflect their internal gender identification.<sup>11</sup> Transsexualism, or gender dysphoria syndrome, is described as a “passionate, life-long conviction that one’s psychological gender, an indefinable feeling of maleness or femaleness, is opposite to one’s anatomic sex.”<sup>12</sup> Many transsexuals seek to align their “inner-self” with their “outer-self” through hormone treatments, psychological therapy, and surgical procedures.<sup>13</sup>

Transsexuals can be described by the steps they have taken to align their “inner” and “outer” selves.<sup>14</sup> Pre-operative transsexuals are preparing for gender re-assignment surgery.<sup>15</sup> Post-operatives transsexuals have already gone through gender re-assignment surgery.<sup>16</sup> The medical field initially developed methods for transforming men into women but lack the ability to provide them with sensation and stimulation.<sup>17</sup> With time, they

<sup>9</sup> *Id.* See also Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box by Closing the Door on Transsexuals’ Right to Marry*, 9 LAW AND SEX 1, 2-12, (1999/2000). Homosexuals are people who are attracted to people of the same sex. *Id.* Transvestites, also referred to as cross-dressers, are people who find pleasure dressing in the clothing of the opposite sex. *Id.* Transsexuals may be transvestites, but not all transvestites are transsexuals. *Id.* Transsexuals can be differentiated from transvestites by a conviction of actually belonging to the opposite sex. *Id.*

<sup>10</sup> *Id.* at 5. See also Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box by Closing the Door on Transsexuals’ Right to Marry*, 9 LAW AND SEX 1, 2-12, (1999/2000).

<sup>11</sup> See *supra* notes 9-10.

<sup>12</sup> Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J. L. AND MED. 53, 54 (1987) (quoting Belli, *Transsexual Surgery: A New Tort?*, 239 J.A.M.A. 2143, 2144 (1978)) (discussing need to legally recognize transsexual’s new sex and identity).

<sup>13</sup> *Id.* at 54-56 (describing “sex change” procedures and inability to create new biological sex capable of procreation).

<sup>14</sup> *Id.* at 54-56.

<sup>15</sup> *Id.* at 54-56 (discussing use of hormone treatments to create male or female gender attributes).

<sup>16</sup> *Id.* at 54-56 (discussing use of plastic surgery in replacement of one genitalia for another).

<sup>17</sup> Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J. L. AND MED. 53, 54-56 (1987). The procedure for transforming a transsexual male into a post-operative female requires the amputation of the male genitalia. *Id.* at 55-56. Through plastic surgery, an artificial vagina is created from the penis. *Id.* at 56. Surgical or hormonal treatment forms female-like breasts. *Id.* at 56. After successful surgery and hormonal treatment, the body of the post-operative female appears to have regular female form and female organs. *Id.* at 56. A properly constructed artificial vagina can fully accept an erect penis and the post-operative female may have sexual intercourse in the same physical manner as a biological male. *Id.* at 56.

have been able to advance these methods to provide post-operative females with both sensation and stimulation.<sup>18</sup> With further developments in surgical procedures, the medical field has been able to develop methods for transforming women into men but with less success in providing sensation and stimulation.<sup>19</sup> Lastly, non-surgical transsexuals are not looking to use surgical methods to modify their biological gender attributes.<sup>20</sup> No matter what characterization a transsexual fits into, he or she can be faced with three legal hurdles.<sup>21</sup> Cases involving transsexuals typically deal with the amendment of identification records, with discrimination, or with marriages between transsexuals and non-transsexuals.<sup>22</sup>

Many transsexuals seek harmony within themselves and within society by attempting to change their name and/or sex on their birth certificates but are met with considerable resistance.<sup>23</sup> In *Anonymous v. Mellon*,<sup>24</sup> a post-operative female sought to have her name and sex changed on her birth certificate, which showed her as being male and having a male name.<sup>25</sup> The Bureau of Vital Records issued a new birth certificate with her new female name but left no indication of sex.<sup>26</sup> She insisted that the new certificate identify her as female, but these demands were rejected.<sup>27</sup> Petitioner then sued the Bureau, claiming that it acted irrationally, arbitrarily, and without basis in denying her request.<sup>28</sup> The court found that the Bureau had not acted arbitrarily and was within its power to deny modifications to sex on birth certificates in regards to transsexuals.<sup>29</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 56. The surgical procedure for transforming a female into a post-operative male requires amputation of the female breasts, a hysterectomy, and the construction of a penis and scrotum by plastic surgery. *Id.* at 56. As in the case of a post-operative female, the re-allocation of the urethra in the post-operative male requires delicate surgery. *Id.* at 56. After several operations, the post-operative male takes on a masculine form. *Id.* at 56. The post-operative male, however, is unable to achieve erection. *Id.* at 56. Special medical appliances, some of which may be built into the penis, are available to help both post-operative males as well as biological males to achieve an erection and have sexual intercourse. *Id.* at 56.

<sup>20</sup> Mary Coombs, *Transgenderism and Sexual Orientation: More Than a Marriage of Convenience*, 3 N.J.S.O.L., 4, 7.

<sup>21</sup> See *In re Estate of Gardiner*, 22 P 3d 1086, 1100 (Kan. Ct. App. 2001) (validating post-operative female's marriage and rights to deceased husband's estate).

<sup>22</sup> *Id.* at 1100.

<sup>23</sup> See *infra* notes 24-44 and accompanying text.

<sup>24</sup> 91 Misc. 2d 375 (NY Sup. Ct. 1977).

<sup>25</sup> *Anonymous v. Mellon*, 91 Misc. 2d 375, 375 (NY Sup. Ct. 1977).

<sup>26</sup> *Id.* at 376.

<sup>27</sup> *Id.* at 376.

<sup>28</sup> *Id.* at 377.

<sup>29</sup> *Mellon*, 91 Misc. at 380.

In *Matter of Anonymous*,<sup>30</sup> a post-operative female transsexual sought to have the name on her birth certificate changed.<sup>31</sup> Petitioner sought to use a female name for both the psychological gratification and the acceptance by society as a female.<sup>32</sup> The court granted the application and allowed the petitioner to change the name on her birth certificate.<sup>33</sup> But the court also stated that this order shall not be used or relied upon by petitioner as any evidence or judicial determination that the sex of the petitioner has in fact been changed.<sup>34</sup>

In *Hartin v. Director of the Bureau of Records and Statistics*,<sup>35</sup> a post-operative female requested, from the Bureau of Records and Statistics, a new birth certificate that would identify her new name and sex.<sup>36</sup> The Bureau issued a new birth certificate with the petitioner's new female name but omitted any identity of sex.<sup>37</sup> Petitioner sued the Bureau claiming that it abused its discretion and was arbitrary in refusing her request.<sup>38</sup> The court based its opinion on findings made by the Committee on Public Health of the New York Academy of Medicine, and reasoned "that male to female transsexuals are still chromosomally males while ostensibly female and that it is questionable whether laws and records such as birth certificates should be changed and thereby used as a means to help psychologically ill persons in their social adaptation."<sup>39</sup> The court then concluded that the Bureau acted within its power and was not arbitrary in refusing to change the sex to female on the petitioner's birth certificate.<sup>40</sup> The court goes on to state that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."<sup>41</sup>

In *Anonymous v. Weiner*,<sup>42</sup> a post-operative female transsexual requested that the name and sex on her birth certificate be changed to

<sup>30</sup> 64 Misc. 2d 309 (NY Sup. Ct. 1970).

<sup>31</sup> In the *Matter of Anonymous*, 64 Misc. 2d 309, 309 (NY Sup. Ct. 1970).

<sup>32</sup> *Id.* at 310.

<sup>33</sup> *Id.* at 310.

<sup>34</sup> *Id.* at 310.

<sup>35</sup> 75 Misc. 2d 229 (NY Sup. Ct. 1973).

<sup>36</sup> *Hartin v. Director of the Bureau of Records and Statistics*, 75 Misc. 2d 229, 230 (NY Sup. Ct. 1973).

<sup>37</sup> *Id.* at 230.

<sup>38</sup> *Id.* at 230.

<sup>39</sup> *Id.* at 231.

<sup>40</sup> *Hartin*, 75 Misc. 2d at 232.

<sup>41</sup> *Id.* at 231.

<sup>42</sup> 50 Misc. 2d 380 (NY Sup. Ct. 1966). Petitioner, a transsexual, sought to consummate her change in sex by applying for the issuance of a new birth certificate from the New York Bureau of Records and Statistics. *Id.* at 381-82. She wanted the new birth certificate to reflect both her new gender and her new name. *Id.* at 382. The application was denied. *Id.* at 382.

coincide with her new identity.<sup>43</sup> Using the same reasoning and report as the *Hartin* court, the New York Superior Court supported the Bureau's denial of changing both the petitioner's name and sex.<sup>44</sup>

In addition to the resistance that transsexuals face in trying to change their genders, they are also faced with prejudice and intolerance because of their changes.<sup>45</sup> Due to their inability to fall into the socially prescribed "norm," many transsexuals are forced to deal with discrimination in a number of forums, like the workplace and sports.<sup>46</sup> With the ongoing debate over same-sex marriages and the government's ability to define marriage, the biggest and most pressing hurdle that transsexuals currently face is their right to marry their partners.<sup>47</sup>

Although the decision in *Littleton* has closed the door on some types of post-transsexual marriages, it has opened the door to others.<sup>48</sup> Post-transsexuals engaging in what appears to be homosexual relationships are now enjoying the rights of marriage.<sup>49</sup> For instance, transgender females, who were born men, are legally marrying their female partners.<sup>50</sup> What appears to be a same sex relationship is actually a heterosexual relationship based on their chromosomes.<sup>51</sup>

With no case law or legislative support, the Texas Appeals Court faced making a precedent on the legality of transsexual marriages.<sup>52</sup> This Note analyzes the questions posed to the Texas Court of Appeals, how the Court answered those questions, and the effect that those answers have had

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<sup>43</sup> *Anonymous v. Weiner*, 50 Misc. 2d 380, 381 (NY Sup. Ct. 1966).

<sup>44</sup> *Id.* at 382-83.

<sup>45</sup> See *supra* notes 23-44 and accompanying text. See also *infra* notes 46-47 and accompanying text. See also, generally *Hartin*, 75 Misc. 2d 229 (NY Sup. Ct. 1973).

<sup>46</sup> See *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1081 (1984). In *Ulane*, a post-operative female transsexual was fired after undergoing sex reassignment surgery. *Id.* Plaintiff sued for discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. §§ 2000e-2000e-17. *Id.* at the trial court level, the plaintiff was awarded reinstatement and back pay. *Id.* But upon appeal, the court reversed the decision reasoning that transsexuals are not a protected class under Title VII and, therefore, have no standing for a discrimination action. *Id.*; See also *Richards v. United States Tennis Assoc.*, 93 Misc. 2d 713 (NY Sup. Ct. 1977). In *Richards*, a post-operative female, who was once an accomplished male tennis player, was prevented from qualifying and/or playing in the U.S. Open as a woman after she was required to take a sex-chromatin test. *Id.* at 714. The plaintiff sued the tennis association for discrimination under the Human Right Law of New York, §§290, 296. *Id.* at 722. Having found in favor of the plaintiff, the court reasoned transsexuals were protected under the "sex" class of anti-discrimination statutes. *Id.* at 722.

<sup>47</sup> See *In re Estate of Gardiner*, 22 P. 3d 1086, 1100 (Kan. Ct. App. 2001).

<sup>48</sup> *Prange*, 9 S.W.3d at 231.

<sup>49</sup> PlanetOut News Staff, *Texas Trans-Marriage Two Step*, (8/30/2000), available at PLANETOUT.COM (using Texas Appeals Court ruling to gain license for another transwoman's marriage to woman).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Prange*, 9 S.W.3d at 231.

on the growing controversy over marriages that do not fall within the heterosexual norm.<sup>53</sup> Part II of this Note examines the *Littleton v. Prange* case and the facts that lead up to it.<sup>54</sup> Part III explores the reasoning used in the *Littleton* decision and other similar decisions around the world.<sup>55</sup> Part IV examines the current trends that have stemmed from the *Littleton* case and how they work into the current debate over same-sex and transsexual marriages.<sup>56</sup> The Note concludes with a discussion of what the future holds for transsexuals and their place in society.

## II. *LITTLETON V. PRANGE*: THE FACTS AND LEGAL HISTORY

Lee Cavazos, Jr. was born in San Antonio, Texas in 1952.<sup>57</sup> When he was born, Lee was male by all medical reasoning and observation.<sup>58</sup> Early on in his childhood, Lee began to feel more and more like a little girl than a little boy.<sup>59</sup> To combat these conflicting feelings, Lee's parents took him to a pediatrician who placed Lee on additional male hormones.<sup>60</sup> Even with these prescribed hormones adding to his naturally produced testosterone, Lee identified more with the female gender than the male gender.<sup>61</sup> Around the age of seventeen, Lee began researching physicians and procedures for changing his gender identity.<sup>62</sup>

Within five years, Lee began psychological and psychiatric counseling in preparation for his change from male to female.<sup>63</sup> At the age of twenty-five, Lee Cavazos, Jr. legally changed his name to Christie Cavazos.<sup>64</sup> At this time, Christie started undergoing various treatments and receiving female hormones.<sup>65</sup> After twenty-seven years, Christie was finally allowed to become the person she had felt like since she was a small boy.<sup>66</sup> Christie went through three surgical operations that removed all her male physical attributes and replaced them with female counterparts.<sup>67</sup>

Shortly after her surgery in 1989, Christie married Jonathan Mark Littleton in Kentucky and became Christie Littleton.<sup>68</sup> Jonathan was aware

<sup>53</sup> See *supra* notes 1-51 and accompanying text.

<sup>54</sup> See *infra* notes 57-78 and accompanying text.

<sup>55</sup> See *infra* notes 79-176 and accompanying text.

<sup>56</sup> See *infra* notes 177-191 and accompanying text.

<sup>57</sup> *Prange*, 9 S.W.3d at 224.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Prange*, 9 S.W.3d at 224-25.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Prange*, 9 S.W.3d at 225.

<sup>68</sup> *Id.*

of Christie's personal and medical history when they were married.<sup>69</sup> Jonathan lived with and loved Christie as his wife until his death in 1996.<sup>70</sup> Shortly after his death, Christie filed a medical malpractice lawsuit under the Texas Wrongful Death and Survival Statute against Jonathan's doctor, Mark Prange, M.D.<sup>71</sup> Dr. Prange filed a motion for summary judgment arguing that Christie had no standing to bring the claim.<sup>72</sup> In his motion, Dr. Prange argued that Christie was actually a man and, therefore, her marriage to Jonathan was illegal.<sup>73</sup> According to the Wrongful Death and Survival Statute, Christie would have no standing as a wrongful death beneficiary if she were not actually Jonathan's spouse.<sup>74</sup> The trial court granted Dr. Prange's motion for summary judgment and declared Christie and Jonathan's marriage illegal.<sup>75</sup>

Upon the trial court's dismissal, Christie filed an appeal.<sup>76</sup> The appeals court was faced with two issues: the narrow issue of same-sex marriages in Texas and the broader issue of transsexual gender identification.<sup>77</sup> In a two-to-one decision, the Texas Appeals Court found that Christie's gender status in relation to Texas's Wrongful Death and Survival Statute was a legal issue and, therefore, susceptible to summary judgment.<sup>78</sup>

### III. REASONING BEHIND THE APPEALS COURT DECISION

Texas, like most states, specifically prohibits marriages between people of the same sex.<sup>79</sup> Only two states, Vermont and Hawaii, have case law and/or statutes that allow same sex marriages or unions.<sup>80</sup> On the national level, The United States Congress enacted the Defense of Marriage Act (DOMA)<sup>81</sup> to "protect the institution of marriage."<sup>82</sup> DOMA

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Prange*, 9 S.W.3d at 225.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Prange*, 9 S.W.3d at 225.

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

<sup>79</sup> Julie A Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 759-60 (2000) (quoting statutes of twenty-eight states).

<sup>80</sup> *Id.*; See also *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999). Under the Vermont Constitution, same-sex couples cannot be deprived of the statutory benefits and protections afforded to persons of the opposite sex who choose to marry. *Id.*; *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993) (holding that state has no compelling interest in restricting marriage to only heterosexuals).

<sup>81</sup> Defense of Marriage Act, 28 U.S.C. 1738C, 110 Stat. 2419 (1996).

<sup>82</sup> See 1 U.S.C. § 7 (Supp. 1997). According to its legislative history, DOMA has

defines marriage for federal purposes as a legal union between one man and one woman.<sup>83</sup> DOMA also provides that no state shall be required to recognize, in any way, a relationship between a same sex couple that is deemed a legal union by another state.<sup>84</sup> This issue is further complicated with respect to transsexual relationships and is less obvious.<sup>85</sup> Courts must first decide whether the person is a male or female and then they must determine the legality of the couple's marriage.<sup>86</sup> Given the lack of case law and legislative support on transsexual marriages throughout the country, the Texas Appeals Court based its opinion on earlier cases involving transsexual gender determination.<sup>87</sup>

Two methods for determining gender have been developed in response to this legal question.<sup>88</sup> The first method, which was used by the Texas Appeal Court, focuses on chromosomes and birth genitalia.<sup>89</sup> Under this method, Christie is a male because she was born with male genitalia and although it may have been changed, she still has male chromosomes in her genetic makeup.<sup>90</sup> The second method focuses on self-identification.<sup>91</sup> Self-identification is how the person feels and which gender he or she identifies with.<sup>92</sup> Under this method, although Christie was born a male, she would be considered a female because for most of her life she has felt more like a woman and strongly identifies herself as female.<sup>93</sup> An important step to understanding the court's reasoning and interpretation of transgender people and their relationships is to review the history of case law that addresses this issue.<sup>94</sup>

As early as 1970, England determined the legitimacy of a marriage between a transgender female and her male partner with the decision in

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two primary purposes, "to defend the institution of traditional heterosexual marriage" and "to protect the rights of the states to formulate their own public policy regarding the legal recognition of same-sex marriages." 28 U.S.C. § 1738C (West Supp. 1998).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 758-60 (2000) (explaining sex designations on official records as possibly inconsistent with marrying sex role).

<sup>86</sup> *Id.*

<sup>87</sup> *Prange*, 9 S.W.3d at 226-29.

<sup>88</sup> *Id.*; See also Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 754-55 (2000) (reviewing Justice Hardberger's opinion and discussion of case law).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Prange*, 9 S.W.3d at 226-29; See also Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 754 (2000).

<sup>94</sup> See *infra* notes 92-120 and accompanying text.

*Corbett v. Corbett*.<sup>95</sup> Several doctors testified during the trial and, based on their testimony, the court focused on four criteria for determining a sexual identity.<sup>96</sup> In evaluating a person's gender, the court relied on chromosomal, gonadal, genital, and psychological factors in reaching its conclusions.<sup>97</sup> The court reasoned that one's biological makeup is fixed at birth and cannot be changed either by the natural development of opposite sex organs or by medical or surgical procedures.<sup>98</sup> So, like *Littleton*, the English court stated that the transsexual's operation and changing of sex organs did not affect her true sex and, therefore, she could not legally marry her male partner.<sup>99</sup> The court stated specifically that individuals cannot determine their own sex by their own acts or by medical operations.<sup>100</sup>

The first case dealing with transsexual marriages in the United States arose out of New York in 1971.<sup>101</sup> The case of *Anonymous v. Anonymous*<sup>102</sup> was somewhat complicated because, at the time of the marriage ceremony, the defendant's sex had not yet been changed through operative procedures.<sup>103</sup> In addition, the husband was not aware that his wife was actually a man.<sup>104</sup> The court found the marriage to be void, reasoning that "marriage is and always has been a contract between a man and woman."<sup>105</sup>

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<sup>95</sup> See *Corbett v. Corbett*, [1970] P 83, [1970] 2 All ER 33, [1970] 2 WLR 1306, (48 MLR 82). Petitioner sought to have his marriage invalidated because his wife, at the time of the ceremony, was actually a man. *Id.* at \*3. Respondent denied the allegation that she was a male at the time of the wedding ceremony. *Id.* at \*3. She admitted that for many years she had been regarded as male but had undergone an operation for the construction of a vagina before the ceremony. *Id.* at \*3. She then argued that petitioner was not entitled to nullity of the marriage because he was fully aware of the circumstances well before the ceremony occurred. *Id.* at \*3.

<sup>96</sup> *Id.* at \*12.

<sup>97</sup> *Id.* at \*15.

<sup>98</sup> *Id.* at \*16-17.

<sup>99</sup> *Id.* at \*16-17.

<sup>100</sup> *Corbett*, at \*16-17.

<sup>101</sup> *Anonymous v. Anonymous*, 67 Misc. 2d 982, 983 (NY Sup. Ct.1971). Plaintiff sought to have his marriage invalidated after discovering that his wife was actually a man. *Id.* at 983. Plaintiff argued that he didn't know at the time of the ceremony that the defendant was actually a man. *Id.* at 983. The defendant argued that, at the time of the ceremony, he intended to have an operation to change his sex and then informed the plaintiff when the operation had been completed. *Id.* at 983-84. The court decided that no marriage contract had been created and the subsequent surgery was irrelevant. *Id.* at 983-84.

<sup>102</sup> 67 Misc. 2d 982 (NY Sup. Ct.1971).

<sup>103</sup> *Id.* at 983.

<sup>104</sup> *Id.* at 984.

<sup>105</sup> *Id.* at 984.

A few years after *Anonymous*, New Jersey, in *M.T. v. J.T.*,<sup>106</sup> took a step toward validating a marriage between a transsexual wife and her husband.<sup>107</sup> Upon their separation, the wife sued for support and maintenance in an attempt to exercise her rights stemming from their marital union.<sup>108</sup> In response to the suit, the husband argued that the marriage was null and void because his wife was actually a man.<sup>109</sup> The wife argued that at the time she and her husband first met, she was a man living as a woman.<sup>110</sup> After dating for some time, he helped her “become a woman” and they subsequently were married.<sup>111</sup> During the trial, the wife’s doctor testified that “gender identity is a sense, a total sense of self as being masculine or female; it pervades one’s entire concept of one’s place in society”.<sup>112</sup> The court found for the wife reasoning:

if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus sideshow? What harm has said person done to society? The entire area of transexualism is repugnant to the nature of many people within our society. However, this should not govern the legal acceptance of a fact.<sup>113</sup>

The court also affirmed the lower court’s decision in stating that there are no legal or public policy reasons to deny the person’s gender identification.<sup>114</sup>

In 1987, Ohio had its chance to choose between validating or invalidating a post-operative female’s marriage.<sup>115</sup> Unfortunately, in *In re Ladrach*,<sup>116</sup> Ohio followed the *Anonymous* case by rejecting the reasoning

<sup>106</sup> 355 A.2d 204 (NJ Super. Ct. 1976).

<sup>107</sup> *M.T. v. J.T.*, 355 A.2d 204, 211 (NJ Super. Ct. 1976) (considering plaintiff member of female sex for marital purposes). See also *Anonymous v. Anonymous*, 67 Misc. 2d 982, 983 (NY Sup. Ct. 1971).

<sup>108</sup> *M.T.*, 355 A.2d at 205.

<sup>109</sup> *Id.* at 204.

<sup>110</sup> *Id.* at 205.

<sup>111</sup> *Id.* at 205.

<sup>112</sup> *M.T.*, 355 A.2d at 205-6.

<sup>113</sup> *Id.* at 207.

<sup>114</sup> *Id.* at 210-11.

<sup>115</sup> *In re Ladrach*, 513 N.E.2d 828, 828, (OH Sup. Ct. 1987). Petitioner initially requested a name change from Edward Franklin Ladrach to Elaine Frances Ladrach which was granted. *Id.* at 829. Petitioner then applied for a marriage license for her and her fiancé which was denied. *Id.* at 829.

<sup>116</sup> 513 N.E.2d 828 (OH Sup. Ct. 1987).

used in *M.T.*<sup>117</sup> The court determined the transsexual's gender based on her anatomical status at birth.<sup>118</sup> The transsexual in *Ladrach* was not legally able to marry another male because she had been born a male.<sup>119</sup> The court deferred to the state legislature in its decision noting that the state legislature was better suited to debate and decide the issue.<sup>120</sup>

New Zealand has approached this issue of transsexual marriage from a different perspective.<sup>121</sup> In a non-reported case, a court in New Zealand was more concerned with the contradiction created by a decision outlawing transsexual marriages than a decision allowing transsexual marriages.<sup>122</sup> The concern was that:

if a post-operative transsexual female was deemed a male, she could marry a woman, in what would to all outward appearances be a same-sex marriage. The question would then become whether courts should approve seemingly heterosexual marriages between post-operative transsexual female and a genetic male, rather than an apparent same-sex marriage between a post-operative transsexual female and a genetic female.<sup>123</sup>

Unfortunately, the United States has been unable to avoid this contradiction and is now faced with couples that appear to be same-sex legally attaining marriage licenses while other same-sex and transsexual couples are denied this same right.<sup>124</sup> Not only are states responsible for this contradiction, they have added to the confusion by allowing post-operative transsexuals to legally change their name and amend their birth certificates.<sup>125</sup> The *Littleton* court was aware of this disparity and chose to overlook it.<sup>126</sup> Some Justices on the Texas Appeals Court voiced their

<sup>117</sup> *In re Ladrach*, 513 N.E.2d at 832; *See also M.T.*, 355 A.2d at 211; Anonymous v. Anonymous, 67 Misc. 2d 982, 984 (NY Sup. Ct. 1971).

<sup>118</sup> *In re Ladrach*, 513 N.E.2d at 832.

<sup>119</sup> *Id.* at 832.

<sup>120</sup> *Id.* at 832.

<sup>121</sup> *M. v. M.*, N.Z.L.R. 30 May 1991, S. Ct. of NZ; *See Littleton v. Prange*, 9 S.W.3d 223, 229 (Tex. App. 1999) (quoting Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 250 & n. 137 (1998)).

<sup>122</sup> *M. v. M.*, NZLR, 30 May 1991, S. Ct. of NZ.

<sup>123</sup> *Id.*

<sup>124</sup> *Prange*, 9 S.W.3d at 229-33; *See also* Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 754 (2000); PlanetOut News Staff, *Transwoman Skirts Marriage Law*, (10/17/2000) available at PLANETOUT.COM.; PlanetOut News Staff, *Texas Licenses Lesbian Marriage*, (9/7/2000), available at PLANETOUT.COM.; PlanetOut News Staff, *Texas Trans-Marriage Two-Step*, (8/30/2000), available at PLANETOUT.COM.

<sup>125</sup> *See supra* notes 23-41 and accompanying text.

<sup>126</sup> *Prange*, 9 S.W.3d at 229-33.

concerns over the failure of the majority to recognize transsexuals in the way by which they identify themselves.<sup>127</sup> However, these concerns were unconvincing to the majority of the court.<sup>128</sup> In her dissenting opinion in the *Littleton v. Prange* case, Justice Lopez stressed that Christie's gender status is a factual question and, therefore, should be presented to and determined by a jury.<sup>129</sup> Justice Lopez was focused on avoiding the contradiction created by this decision.<sup>130</sup>

The *Littleton* court reasoned that sex labels for transsexuals should be determined by their birth gender.<sup>131</sup> In essence, this is a decision to be made by an attending nurse upon a baby's delivery.<sup>132</sup> The nurse examines the child at that time and notes the child's gender on the birth certificate accordingly.<sup>133</sup> If the baby has a penis and scrotum, it is a male; if it has a vagina, it is a female.<sup>134</sup> Until recently, there was no examination of chromosomes or DNA.<sup>135</sup> Most states, however, have come to realize that there is some inaccuracy in gender determination and, therefore, allow people to amend their birth certificates based on chromosomal makeup.<sup>136</sup> Once the birth certificate is amended, it voids the original.<sup>137</sup> Justice Lopez argued that it was unjust for the Appeals Court to recognize Christie as a male when the state of Texas recognized her as a female.<sup>138</sup> Furthermore, if the gender of a baby is determined by examining the child's genitalia, a visual examination should also be done to determine the gender of a transsexual.<sup>139</sup>

Most people are unaware of the state's power to determine an individual's gender and actual identity.<sup>140</sup> The state has a formal role in deciding who will be mothers, fathers, wives, and husbands.<sup>141</sup> Each of these "identities" has serious legal and social implications.<sup>142</sup> It is typically obvious and non-controversial when the state identifies an individual's gender.<sup>143</sup> In the case of transsexuals, however, it is far from obvious and

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<sup>127</sup> *Id.* (Lopez, J. dissenting opinion).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 232 (Lopez, J. dissenting opinion).

<sup>130</sup> *Id.*

<sup>131</sup> *Prange*, 9 S.W.3d at 232 (Lopez, J. dissenting opinion).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 232-33.

<sup>134</sup> *Id.* at 233.

<sup>135</sup> *Id.* at 233.

<sup>136</sup> *Prange*, 9 S.W.3d at 233 (Lopez, J. dissenting opinion).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52

FLA. L. REV. 745, 757 (2000).

<sup>141</sup> *Id.* at 758.

<sup>142</sup> *Id.* at 758.

<sup>143</sup> *Id.* at 758.

very controversial.<sup>144</sup> As noted previously, many state legislatures have adopted guidelines that allow people, like post-operative transsexuals for example, to change their gender status on official documents such as birth certificates and passports.<sup>145</sup> When we step into the “sacred institution of marriage,” however, those guidelines and changes are ignored.<sup>146</sup> States argue that they have an interest in limiting marriages to heterosexual unions and are, therefore, allowed to ignore such guidelines and changes.<sup>147</sup> Every state, except Hawaii and Vermont, has adopted statutes that prohibit same-sex marriages.<sup>148</sup> Congress further solidified this societal interest by enacting DOMA, which refers to a spouse as a person of the opposite sex only.<sup>149</sup>

When the courts and legislatures decided to prohibit same-sex marriages and to define the parties eligible to get married, they were only thinking of gay and lesbian unions.<sup>150</sup> The growing presence and acknowledgement of post-operative transsexuals is a fairly new occurrence in society due to advances in medical procedures.<sup>151</sup> Now that transsexuals have been added to the ban on same-sex marriages, it is important to examine the reasons behind this limitation.<sup>152</sup>

The same-sex marriage has become an increasing topic of debate in both today’s society and today’s politics.<sup>153</sup> An open and visible gay and lesbian community is growing and becoming a stronger force in today’s society and politics.<sup>154</sup> More and more gay men and women are no longer hiding in the closet and are getting involved in fighting for their right to marry.<sup>155</sup> As seen in Hawaii and Vermont, society is starting to take steps to acknowledge and accept the presence and rights of gay men and

<sup>144</sup> *Id.* at 758.

<sup>145</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 758 (2000).

<sup>146</sup> *Id.* at 759.

<sup>147</sup> *Id.* at 759.

<sup>148</sup> *Id.* at 759; *See also* 15 V.S.A. §1201 (2001); 5 H.R.S. §572-1 (1985).

<sup>149</sup> *Id.* at 759.

<sup>150</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 760 (2000).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See* Julie A. Greenberg, *When is a Man a Man and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 762-63 (2000); *See also* Phyllis Randolph Frye, Alyson Dodi Meiselmann, *Symposium: “Family” and The Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Article Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001).

<sup>154</sup> Greenberg, Julie A., *When is a Man a Man and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 763-64 (2000).

<sup>155</sup> *Id.*

woman.<sup>156</sup> Many states, however, still make the traditional arguments against same-sex marriages.<sup>157</sup>

The traditional arguments made by courts and politicians against unions between people of the same sex fall into four categories:

(1) marriage has always been a union between one man and one woman and same sex marriages violates the tradition and morals of society; (2) traditional marriage is both a core of our civilization and an institution currently under threat; putting same sex relationships on the same level as traditional marriages would undermine the status that is necessary to preserve traditional marriage; (3) marriage is a vehicle for procreation; the essence of marriage is the potentially procreative marital sexual act; and such an act cannot occur in a same-sex relationship; and (4) same sex marriages pose a risk to children because of a threat to moral values and the possibility that children would be raised in less than an ideal household arrangement containing a mother and father.<sup>158</sup>

Applying these concepts, it is difficult to rationalize and understand the *Littleton* decision.<sup>159</sup>

The Texas Appeals Court in *Littleton* arguably invalidated a marriage that “appeared” to be heterosexual--a union that would likely have had less effect on traditional marriage views.<sup>160</sup> Consequently, the court’s ruling allows for the validation of what now looks like a same-sex marriage.<sup>161</sup> The court’s decision has put post-operative transsexual homosexual marriages on the same level as traditional marriages.<sup>162</sup> For this reason, the arguments against same-sex marriages shed little light on the *Littleton* decision and reasoning.<sup>163</sup> The Texas Appeals Court and many other courts across the country have failed to analyze the values that they are looking to preserve in addition to the ramifications of their decisions and reasoning.<sup>164</sup> Some judges have also failed to look at the potential good that may result from legalizing a transsexual’s marriage.<sup>165</sup>

<sup>156</sup> *Id.*; See also 15 V.S.A. §1201 (2001); 5 H.R.S. §572-1 (1985).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Prange*, 9 S.W.3d at 229-31.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Prange*, 9 S.W.3d at 229-31.

<sup>165</sup> *Id.*; See also Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 765-6 (2000).

By validating Christie's marriage to Jonathan, the court could have helped remove some of the conflicting perspectives between the medical field and the legal field with regards to transsexuals.<sup>166</sup> In essence, the law could conform to what medicine is saying about transsexuals.<sup>167</sup> Currently, the areas of medicine and psychology argue that gender identity is more than chromosome and genitalia.<sup>168</sup> These fields of science have created and improved methods for helping transsexuals attain the physical and psychological gender that they identify with.<sup>169</sup> These methods include therapy, hormone treatments, and surgery.<sup>170</sup>

By allowing transsexuals to marry, the court also could have made some consistency in the law.<sup>171</sup> A reasoning that found Christie to be a female would have conformed with the legislature's position on permitting transsexuals to change their birth certificates.<sup>172</sup> By stating that Christie was, factually and legally, a female, the court would have more accurately represented society's view on same-sex marriages.<sup>173</sup> Like gay men and women, transsexuals desperately seek acceptance and acknowledgment in society.<sup>174</sup> They seek to have their gender recognized by society but are too often forced to live in the closet and hide who they truly are.<sup>175</sup> Most importantly, the court could have made a positive social impact on Christie and other transsexuals.<sup>176</sup>

#### IV. CURRENT TRENDS STEMMING FROM THE *LITTLETON* DECISION

Like all other U.S. citizens, transsexuals can be involved in two types of marriages: same-sex marriages or opposite-sex marriages.<sup>177</sup> As a

<sup>166</sup> *Prange*, 9 S.W.3d at 229-31; *See also* Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 765-6 (2000).

<sup>167</sup> *See* Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 765-6 (2000).

<sup>168</sup> *Id.* at 765.

<sup>169</sup> *Id.* at 765.

<sup>170</sup> *Id.* at 765.

<sup>171</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 765-66 (2000).

<sup>172</sup> *Id.* at 766. *See also* *Prange*, 9 S.W.3d at 229-31.

<sup>173</sup> Julie A. Greenberg, *When is a Man a Man and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 766 (2000). *See also* *Prange*, 9 S.W.3d at 229-31.

<sup>174</sup> Julie A. Greenberg, *When is a Man a Man and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 766 (2000).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 765; *See also* *Prange*, 9 S.W.3d at 229-31.

<sup>177</sup> *See* Frye, Phyllis Randolph, Meiselmann, Alyson Dodi. *Symposium: "Family" and The Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Article Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 Alb. L. Rev. 1031, 1033-45 (discussing Texas Appeals Court reasoning and legal definition of sex).

result of the *Littleton* decision, however, the legality of these marriages has been switched.<sup>178</sup> Unlike citizens, transsexuals that physically appear to be in an opposite-sex union have been denied the right to marry.<sup>179</sup> Meanwhile, transsexuals that appear to be a same-sex union have been granted the right to marry.<sup>180</sup> “As an unintended result of the Fourth Court’s ruling that voided the straight-appearing, opposite-sex appearing, heterosexual-appearing marriage of Mrs. Littleton, some same-sex appearing marriage within the jurisdiction of the Fourth Court became legal.”<sup>181</sup> When a man marries a post-operative female, the marriage is void because according to many courts’ reasoning, the post-operative female is still a male and, therefore, part of a homosexual union.<sup>182</sup> When a woman marries a post-operative female, however, the marriage is valid because, according to the same reasoning, the post-operative female is still a male and, therefore, part of a legal heterosexual union.<sup>183</sup>

Recently two states, Florida and Texas, have licensed lesbian transsexual marriages.<sup>184</sup> On September 16, 2000, Ms. Jessica Wicks and Ms. Robin Manhart Wicks were legally married in San Antonio, Texas.<sup>185</sup> Jessica’s original birth certificate identifies her as a male and Robin’s original birth certificate identifies her as female.<sup>186</sup> Jessica underwent sex reassignment surgery and became a post-operative transsexual female.<sup>187</sup> In Florida, on October 15, 2000, Ms. Bonnie Earle and Ms. Donna Schwartz were legally allowed to marry each other.<sup>188</sup> In 1997, Florida enacted a law denying the legal rights of marriage to same-sex couples.<sup>189</sup>

<sup>178</sup> *Id.* at 1038; *see also* Prange, 9 S.W.3d at 229-31.

<sup>179</sup> *See* Phyllis Randolph Frye, Alyson Dodi Meiselmann, *Symposium: “Family” and The Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Article Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1035 (discussing Texas Appeals Court reasoning and legal definition of sex).

<sup>180</sup> *Id.* at 1038-39.

<sup>181</sup> *Id.* at 1033.

<sup>182</sup> *See* Phyllis Randolph Frye, Alyson Dodi Meiselmann, *Symposium: “Family” and The Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Article Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1037-40.

<sup>183</sup> *Id.* at 1038.

<sup>184</sup> PlanetOut News Staff, *Texas Licenses Lesbian Marriage*, (9/7/2000), available at PLANETOUT.COM (reporting on legally licensed couple Jessica Wicks and Robin Manhart Wicks); PlanetOut News Staff, *Texas Trans-Marriage Two-Step*, (8/30/2000), available at PLANETOUT.COM (reporting on transwoman’s same-gender marriages).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> PlanetOut News Staff, *Transwoman Skirts Marriage Law*, (10/17/2000) available at PLANETOUT.COM (reporting valid marriage of Bonnie Earle and Donna Schwartz in Daytona Beach, Florida).

<sup>189</sup> *Id.*

Schwartz, as a postoperative female transsexual, was legally deemed male and, as such, was able to marry her female partner.<sup>190</sup> With these marriages and changes in social views, transsexuals are making progress in being accepted in society.<sup>191</sup>

## V. CONCLUSION

This whole issue, unfortunately, boils down to semantics. How do we define a male, a female, a heterosexual union, and a homosexual union? And more importantly, what defines a man and what defines a woman? With the constantly changing world of medical technology, the traditional methods of determining sex are becoming outdated. We can no longer determine another's gender strictly through his or her appearance. The way a person looks and the makeup of a person's DNA are no longer individually sufficient factors for determining that person's gender. Consequently, these same methods are no longer sufficient in determining a person's legal and civil rights. Gender determination must also take into account psychological perspectives and differences, like those held by transsexuals. Society is structured in such a way that sex determines certain paths of life and certain roles to be played. But it is constitutionally important to make sure that these determinations do not lead to discrimination. Although a transsexual may not follow his or her socially prescribed, traditional path of life, he or she should not be discriminated against. Transsexuals go through a lifetime of angst and confusion before they even reach the age of majority. With help and support, transsexuals can align their inner-self with their outer-self and, therefore, live a life less confusing and more satisfying. As these people put their lives in order, they need continued support and acceptance. Hopefully, the courts will begin to provide some of that support and acceptance by increasingly recognizing the transsexual's apparent or identified sex as opposed to the transsexual's chromosomal sex.

*Shawn Richard Perreault*

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<sup>190</sup> *Id.*

<sup>191</sup> See *In re Estate of Gardiner*, 22 P.3d 1086, 1100 (Kan. Ct. App. 2001); see also *supra* notes 181 and 187 and accompanying text.

