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Verdict

April 30, 2013

[Joanna L. Grossman](#)

Victor/Victoria: Michigan Court Says Marriage Still Valid Despite Husband's Sexual Reassignment Surgery



A couple married in Michigan in 1984. The wife, Devon, had children from a prior marriage and was in her early fifties. The couple moved to Pennsylvania and lived together as husband and wife for many years. Nineteen years after the wedding, in 2003, the husband underwent sexual reassignment surgery and began to live life as a woman. What effect, if any, did this surgery have on the validity of their marriage? In a recent ruling, *Estate of Burnett*, the Michigan Court of Appeals said, none at all. Although Michigan law prohibits both the celebration and recognition of same-sex marriage, the Michigan court reasoned that a post-marital sex change did not transform a valid heterosexual marriage into an invalid homosexual one. Nor, the court ruled, did granting a divorce constitute the implicit recognition of a same-sex marriage.

The Burnett Marriage: By What Means Should it End?

The appellate ruling mentioned above makes no mention of the husband's condition or the reasons for which he opted for the surgery. Sexual-reassignment surgery, however, is typically performed on individuals who are being treated for gender dysphoric disorder, a condition in which an individual feels a stark disconnect between his anatomical sex and his or her gender. Two years after the 2003 surgery, Devon's husband, now known as Bobbie Eliza, drove his wife to visit her daughter back in Michigan. Devon never returned to Pennsylvania, nor did she ever again live with her husband.

In her late 70s, Devon suffered from dementia and was put under the care of her son and daughter. As her legal guardians, her children filed for divorce on Devon's behalf. Bobbie, the husband, then filed a motion to dismiss the divorce filing on the grounds that guardians and conservators—individuals appointed by a court to care for an incompetent person or her property—cannot file a complaint for divorce on behalf of a “ward.” The trial court rejected this argument, and the appellate court affirmed the trial court's holding. In a prior case, the appellate court had held that guardians do possess this power, and current court rules also provide for it.

After Bobbie's initial motion to dismiss was denied, she filed a second one, arguing that the trial court did not have jurisdiction to grant a divorce because the marriage no longer existed by virtue of her sex change or, if it did

still exist, it could not be recognized by a Michigan court without running afoul of that state's ban on same-sex marriage.

Oddly, these two arguments militate in favor of different outcomes. If Bobbie is right that the marriage between Devon and her is invalid because it now involves two women, then the marriage would be void whether or not any court ever annulled it. If, however, the marriage is not void per se, but the court lacks jurisdiction to grant a divorce, the parties would be forced to remain married. The opinion in the case reveals nothing about the motives on either side. Why did Devon's children want to dissolve the marriage on her behalf? And in particular, why did they continue defending against Bobbie's appeal of the trial-court ruling even after their mother had passed away? Why did Bobbie either want to have that marriage decreed non-existent, or to have it last indefinitely? Many consequences flow from marital status, and one might imagine any number of reasons that this elderly couple's finances or other arrangements would be affected, but the ruling does not reveal the true reason why Devon's children went to court, or why Bobbie objected to the petition for divorce.

Gender Reassignment Surgery and Marriage: When the Sex Change Comes First

As I noted above, at the beginning of this column, Devon and Bobbie's marriage had been a heterosexual union. But there is another related scenario that has arisen: Several courts have been asked to rule on the validity of marriages involving post-operative transsexuals. In most of those cases, one spouse to the marriage had sexual-reassignment surgery before the marriage took place, thus posing the question whether the marriage was ever valid in the first place.

Until 2004, no state permitted people of the same sex to marry, and thus a marriage between two people of the same sex would be void—as if it never happened. So the question in these cases turned on the court's (or the relevant state statute's) view of whether one's legal sex can be changed after birth. If that is not the case, under a given state's law, then the transgender person could only legally marry someone with a different birth sex.

The highest court in Kansas and appellate courts in Texas and Florida have ruled that a person's legal sex cannot be changed, and thus that a marriage between a post-operative transsexual female and a man is invalid as a prohibited same-sex marriage, because the parties share the same birth sex. A trial court in New Jersey, however, held, in a 1976 case, *M.T. v. J.T.*, that a post-operative transsexual could be treated as the changed sex for marriage purposes.

In the Kansas case, *In re Gardiner* (2002), the state supreme court held that sex is fixed at birth, and that the marriage between a transgender female, J'Noel, and a man was invalid. And, thus, when the man died, the Kansas court held that J'Noel was not permitted to claim a spousal share of the man's \$1.25 million estate. **An intermediate appellate court had held (<http://law.justia.com/cases/kansas/court-of-appeals/2001/85030.html>) that chromosomes are only one factor in determining someone's sex at the time of marriage, and that subsequent treatments to harmonize one's psychological and physical self can change one's actual sex. But the state supreme court disagreed (<http://law.justia.com/cases/kansas/supreme-court/2002/85030.html>), holding that chromosomes, which dictate sex at birth, are dispositive on the question of one's legal sex. The court was bolstered by its view of the marriage statute's overall purpose to recognize only "traditional marriage."**

The *Gardiner* court relied heavily on a Texas ruling from three years earlier, *Littleton v. Prange* (<http://statecasefiles.justia.com/documents/texas/first-court-of-appeals/01-08-00499-cv.pdf>) (1999). In that case, the court refused to recognize a post-operative male-to-female transsexual as the surviving spouse of a deceased man for the purpose of bringing a wrongful death claim.

Gender Reassignment Surgery and Marriage: When the Marriage Comes First

In the *Burnett* case that I discussed at the beginning of this column, the husband did not have sexual-reassignment surgery until after the couple married. Yet, she argues that the surgery rendered his marriage a prohibited same-sex marriage, and therefore invalid. The Michigan appellate court, however, did not buy this argument. His "post-operative status," the court explained, did not "magically dissolve[] what was otherwise a valid marriage."

In this ruling, the court was correctly applying annulment law, which invalidates marriages based only on legal defects that exist at the time a marriage is celebrated. Annulment is the cure for marriages that were contracted by a couple who were ineligible to marry—or at least ineligible to marry each other. Thus, for example, a marriage by a minor below the minimum age to marry can be annulled—wiped off the books entirely—by a court. And for more serious defects, the marriage is invalid whether or not a court ever formally annuls it. A bigamous marriage (where one party already has a living spouse), for example, is void per se.

But marriages do not become invalid or defective over time. The annulment, or recognition that the marriage is void or voidable, is just a retroactive remedy for a defect that should have prevented the marriage from occurring in the first instance. Thus, while mental incompetence is typically a ground for annulment, if a spouse becomes incompetent after getting married, annulment is not the appropriate remedy if the other party wants to dissolve the marriage. Divorce is. Thus, the *Burnett* court was right to conclude that the defendant's gender reassignment surgery “does not impact the undisputed fact that when the marriage contract was entered into, plaintiff was a woman and defendant was a man.”

Transgender Marriage and Divorce

Bobbie's alternate argument is that no court in Michigan can grant his wife Devon a divorce, because, in doing so, it would be at least indirectly giving effect to a same-sex marriage, which Michigan law prohibits. Michigan is one of more than forty states that passed laws to prevent the celebration and recognition of same-sex marriage when it appeared possible that some states might choose to authorize it. And Michigan voters went so far in 2004 as to amend the state's constitution to add the following provision:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Does the granting of a divorce constitute the kind of recognition that is prohibited by such a law? Some courts have taken that position with respect to a marriage that involved parties of the same sex. A court in Texas, for example, refused to grant a decree of divorce to a gay male couple who married while living in Massachusetts (where same-sex marriage has been legal since 2004) and then moved to Texas. The court ruled, in *In re Marriage of J.B. and H.B.* (<http://law.justia.com/cases/texas/fifth-court-of-appeals/2010/december/>), that it would violate the state's ban on recognition of same-sex marriage to consider the couple's petition for divorce. As I have [written about](http://writ.news.findlaw.com/grossman/20100913.html) (<http://writ.news.findlaw.com/grossman/20100913.html>) elsewhere, the lack of recognition for same-sex marriage meant the court did not have jurisdiction to dissolve such a marriage.

But the Michigan court in the *Burnett* case did not take this tack. First, it suggested in a footnote that one's legal sex cannot be changed for marriage purposes – “it would appear that defendant is not a woman under the marriage amendment and marriage statutes because he still has an X and Y chromosome pair and cannot—and never could—bear children.” The Michigan court noted approvingly the ruling in *Gardiner*, discussed above, and a similar ruling from an intermediate appellate court in Florida, *Kantaras v. Kantaras* (<http://law.justia.com/cases/florida/second-district-court-of-appeal/2004/2d03-1377.html>) (2004). In this view, the marriage did not become a same-sex marriage because Bobbie did not become a woman.

The court, however, said that it did not have to reach the question of whether legal sex can be changed for marriage purposes, or more generally. Instead, it focused on marriage as an agreement—the language used in the anti-same-sex-marriage amendment—and the point that the nature of the marriage was determined when it was first celebrated. Thus, whether or not Bobbie's sex changed later (and the court was dubious that such a thing is possible), the marriage was not a same-sex marriage within the meaning of Michigan law. Thus, the court reasoned, it was not “contrary to Michigan law” for a court to grant the divorce.

The Progress of Transgender Law

The *Burnett* court is just one of many that have been asked in the last decade to consider the rights of transgender individuals, an increasingly open group. Employment discrimination claims have comprised a large number of

these cases, but questions of family status—marriage and parentage, namely—are recurring as well.

These cases often come down to the issue of legal sex: Can it be changed, or not? In many states, the legislature expressly allows for such change—and the issuance of a new birth certificate, bearing the reassigned sex, once certain indicia of physical change are proven. But in states without express legislative authority for legal sex changes, courts have been hesitant to adopt a doctrine that allows a change in legal sex. The court in *Burnett* was wise to dodge this question—especially since it seemed poised to get it wrong—and to take this case for what it was—a marriage in which one spouse changed, perhaps in a way that was disappointing to the other spouse, and for which the appropriate remedy was divorce.



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