

CAROL R. BISPHAM  
Judge  
JAMES C. EGAN  
Judge  
THOMAS A. MCHILL  
Judge  
DANIEL R. MURPHY  
Judge  
DEANN L. NOVOTNY  
Judge



P.O. BOX 1749  
ALBANY, OREGON 97321-0491  
COURTS (541) 967-3848  
CRIMINAL RECORDS (541) 967-3841  
CIVIL RECORDS (541) 967-3845

CIRCUIT COURT OF OREGON  
TWENTY-THIRD JUDICIAL DISTRICT

January 31, 2013

Susan O'Toole  
Attorney at Law  
208 S.W. First Avenue, #220  
Portland, OR 97204

John Knight  
Senior Staff Attorney  
ACLU-LGBT & AIDS Project  
180 N. Michigan, Suite 2300  
Chicago, ILL 60601

Christina L. Beatty-Walters  
Senior Assistant Attorney General  
Department of Justice  
1515 S.W. Fifth Avenue, Suite 410  
Portland, OR 97201

Re: In the Matter [REDACTED]  
Linn County Case No. [REDACTED]

Dear Counsel:

I apologize for the delay in this case.

[REDACTED] brings to this court a question of the greatest significance. It is important in her life and it raises issues of constitutional law which test the separation of powers. In essence, [REDACTED] is asking this court to overturn an act of the legislature based on the statute's failure to treat her equally with all of the other citizens of the State of Oregon. She also argues that the statute is irrational and vague.

This court issued a series of questions to [REDACTED] in order to ferret out the inconsistencies about which she complains. Some of those answers left the court wanting for information. Again, I reiterate that this is information necessary for the court to make a determination about one of its most significant powers – the power to overturn an act of the legislature. I take this very seriously.

In order to help me with these issues, I asked John Knight, Senior Staff Attorney for the American Civil Liberties Union, LGBT & AIDS Project to brief the issue. Mr. Knight informed me that the ACLU is briefing similar issues and he was willing to submit a brief, amicus curiae, on the issues.

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DEPARTMENT OF JUSTICE  
PORTLAND LEGAL



I had a conversation with [REDACTED]'s attorney and she has no objection to this plan. I accepted the amicus curiae brief from Mr. Knight on October 3, 2011, in order to help the court in the resolution of these issues. As a consequence of the ACLU's briefing, I believe that the Oregon Attorney General's Office took an interest in the case and they submitted their brief on May 24, 2012. Finally, [REDACTED]'s counsel completed a reply brief filed June 29, 2012. I believe that all of the issues have been well vetted.

I am enclosing copies of this opinion to Ms. O'Toole, Mr. Knight, and Senior Assistant Attorney General Beatty-Walters to include the briefing, my questions, and the answers to those questions provided by [REDACTED]'s counsel.

### Facts

[REDACTED] age 37, was born as a male child. Despite her biological gender, she has always felt that she was a female. At age 25 years, she began to live as a female in front of her family, friends, and her community. In 2004, she began hormone treatment to make the change from male to female. This treatment has been confirmed through the report of her health care provider, Maria Clark-Harmon, NP. (Exhibit A and B).

[REDACTED] changed her status from male to female with the Department of Motor Vehicles in 2010 (Exhibit C). When she attempted to change her status with the Social Security Administration, the Government ruled her change in legal status would not be "complete" until she underwent a gender altering surgery or until she secured an order from a court of competent jurisdiction ordering a change in the status of her gender.

This refusal by the Government to recognize the fact that [REDACTED] is indeed now, for all practical purposes, a woman has led to a deprivation of Social Security benefits available only to women. In particular, there are medical treatments and procedures which are unavailable to [REDACTED] because the Social Security Administration simply will not yet recognize the change.

[REDACTED] is a member of a class of citizens in Oregon commonly referred to as transgendered. Medical experts have developed the diagnosis of Gender Identity Disorder (GID) as a part of the process of understanding the transgender experience in an attempt to treat transgendered people. Whether it is a physical or a psychological condition is of no consequence here. Frankly, the title itself is somewhat discriminatory because it assumes that being transgendered somehow requires the classification of "disorder." Although scientists have determined that there is a "treatment" for the disorder, the "treatment" is simply a lesson in humane behavior: allow an individual to participate fully and comfortably in society in the gender role with which he or she identifies.

There is a growing body of literature, both medical and legal, dealing with the issues that arise out of the classification of a people as transgendered. This literature includes but is not limited to medical, psychological, sociological, political, religious, and legal articles, journals, books, treatises, and the like.

[REDACTED] petitioned this court for a General Judgment changing her sex from male to female on her birth certificate. She filed this petition on January 26, 2011. The hearing took place on February 28, 2011. [REDACTED] filed her supplemental affidavit on April 11, 2011. The ACLU submitted its amicus brief on September 28, 2011, and the Attorney General submitted a brief on May 24, 2012. Petitioner's counsel submitted the reply brief on June 29, 2012.

## Analysis

The reading of the plain text of ORS 33.460 and ORS 432.235 requires sexual reassignment surgery (SRS) before a person's legal gender and birth certificate gender marker will be changed. This is certainly a significant hurdle for transgendered people who are attempting to achieve change in status created by the state. This hurdle is financial, psychological, spiritual, and physical. It goes to the core values and fundamental rights of each individual in this situation.

The State makes a key concession in this case. In its brief the Senior Assistant Attorney General for the State of Oregon wrote:

“There undoubtedly are advantages to having a birth certificate on which the designation of sex is congruent with one's gender identity, which is to say, on average, transgender persons who have not had surgery may well derive fewer benefits from birth certificates than everyone else (including transgendered persons who have had surgery).” (State's Brief, p.4, lines 3-7).

The State then goes on to argue that the real question is whether the state issues gender-identity congruent birth certificates to anyone.

Fortunately for this court, the State has answered its own question in this concession. Oregon issues its birth certificates “on average.” In other words, state makes a calculated bet that an individual with a particular set of genitalia will fit neatly into the category of male or female.

Of course, the State does not want to take responsibility for this choice. Like much of the briefing in this case, it tries to reduce the question down to the observable, the categorical, and therefore, the deniable. In this effort, the argument follows a linear path:

“The sex is congruent with the child's external anatomy, but is neither congruent nor incongruent with respect to the child's still non-existent gender identity. Congruence may or may not arise several years later depending on developments beyond the state's control.”

In this argument, the Government necessarily buys into the position that gender identity is non-existent at the time of birth. This trap is just as dangerous when a party argues that gender identity is already established at birth. The fact is that neither the Government nor the Petitioner has any real means way to figure this out.

The real question is not when gender identity is established or whether gender identity is acquired. The issue is who decides what is found on birth certificates and how does the designation of gender affect an individual's rights under the law. The answers are obvious but I will map them out for the sake of this legal decision. The Government decides what information is found on a birth certificates and the designation of gender made by the Government does affect an individual's rights under the law.

The State mistakenly believes that neither Petitioner nor the amicus party argues unequal treatment under the Oregon Constitution. As a matter of fact, Petitioner argues that the statute violates the Oregon Constitution (Hearing Brief P.10, lines 6-10) and the ACLU makes the argument in its brief as well. (Amicus Brief pp. 20-21).

Article I, Section 20 of the Oregon Constitution forbids discrimination against any class of citizens. The Constitution reads:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The State cannot, in good conscience, argue that transgendered people do not meet the qualification of a legitimate "class" of people. Any such argument would be disingenuous as the ORS 33.460 and ORS 432.235 contemplate just such a class. See *State v. Borowski*, 231 Or App 511, 520 (2009) and *Tanner v. Oregon Health Science University*, 157 Or App 502, 521-22 (1998).

ORS 33.460 and ORS 432.235 purport to resolve the issue for the transgendered by offering up a solution -- SRS surgery. In the case at hand, this court can clearly see the burden that is imposed on the transgendered community to acquire the same benefits as are allowed for all other citizens with correct gender identity on their birth certificates. ██████████ said that the surgery is out of her financial reach. That is a burden not imposed on most citizens.

Furthermore, the fact is that some transgendered do not want or seek an SRS surgery. For some, breast implantation or reduction is appropriate. For some, hormone treatment is sufficient. For others, no medical intervention is required at all. A rhetorical question comes to this court's mind. What would the Government argue if a non-surgical hermaphrodite were assigned the wrong gender identity? Would the State require a surgery for a person whose gender was obvious ambiguous at the time of birth and whose identity the State wrongly designated?

Viewed in this light, the surgical requirement itself is unconstitutional. Oregon Courts have repeatedly held that gender is a suspect classification because it is not within an individual's control and it is often associated with offensive social or political premises. More often than not, questions about gender identity are filled with discriminatory intent, stereotypes, and prejudice. See *State v. Borowski*, 231 Or App at 520; *Tanner v. Oregon Health Science University*, 157 Or App at 523; and *Hewitt v. SAIF*, 294 Or 33, 43-46 (1982).

When statutes, such as these, fails to offer a privilege or immunity to members of a suspect class like the transgendered, then the law is inherently suspect and may be upheld only if the failure to make the privileges or immunities available to that class can be justified by a genuine difference between the disparately treated class and those to whom the privileges and immunities are granted. *Tanner*, 157 Or App at 523. As it stands, Oregon law prevents transgendered individuals who have not undergone surgery from the privileges and immunities that are allowed to the transgendered who have undergone surgery. The State has offered not compelling argument for this disparate treatment.

As a matter of fact, the evidence in this case tends to show that ██████████ before surgery would be no different than ██████████ post surgery other than she would have fulfilled the Government's morbid and onerous requirement to amputate a particular digit. As the amicus party indicates in briefing, the growing body of medical evidence shows that surgical history is not an appropriate basis for distinguishing among transgendered people or in determining whether a transgendered person's request for revised identity documents is legitimate.

Some of the argument in this case hinges on the application of the strict scrutiny test. I note that the Court of Appeals stated that suspect classifications such as gender are subject to this test. *Gunn v. Lane County*, 173 Or App 97, 103 (2001). The theory here is that "a more demanding level of scrutiny" applies to desperate treatment of true classes under Article 1, Section 20 jurisprudence. *Morsman v. City of Madras*, 203 Or App 546, 555 (2006). From my perspective, we don't need to go that far. The bottom line is that the State cannot show a rational basis much less withstanding strict scrutiny.

Conclusion and Order

For these reasons, I rule in favor of Petitioner, [REDACTED]. The court will execute an order compelling the State to change the gender marker on her birth certificate. Ms. O'Toole should prepare the order.

Yours very truly,



JAMES C. EGAN  
Circuit Court Judge

JCE/msw