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Brittany Francois

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FEATURE ARTICLE

**UNANSWERED QUESTIONS:
TRANSSEXUAL PARENTS LACK
EQUALITY UNDER THE
ILLINOIS RELIGIOUS
FREEDOM PROTECTION AND
CIVIL UNION ACT**

by BRITTANY FRANCOIS

Marriage equality continues to be a highly debated issue in America, gaining nationwide attention, as several more states voted to recognize same-sex marriages.¹ So where does Illinois stand in the matter?

Though Illinois still does not recognize same-sex marriage, it has taken steps to recognize same-sex relationships with the Illinois Religious Freedom Protection and Civil Union Act ("Civil Union Act").² The Civil Union Act, which went a long way toward allowing same-sex couples many of the same legal rights as married couples, "was widely seen by LGBT³ advocates to be an important political victory."⁴

DEFINING MARRIAGE

The Civil Union Act has also fallen short of its goals in many ways. Bernard Cherkasov, CEO of the LGBT advocacy group Equality Illinois, stated that the Civil Union Act "has already proven to have substantial weaknesses."⁵ The Civil Union Act's failures are especially apparent when considering how it affects transsexual Illinoisans.

In 1996, Congress passed the federal Defense of Marriage Act (DOMA).⁶ Section 3 of DOMA defines "marriage" as a "legal union between one man and one woman as husband and wife."⁷ It also defines "spouse" as "a person of the opposite sex who is a husband or a wife."⁸

A majority of states, including Illinois, define marriage similarly.⁹ For its part, Illinois refers to marriage as a relationship "between a man and woman."¹⁰ In fact, the Illinois Marriage and Dissolution of Marriage Act (IMDMA) goes even further when it states that "a marriage between 2 individuals of the same sex is contrary to public policy."¹¹

SAME-SEX MARRIAGE IN ILLINOIS COURTS

In *In Re Marriage of Simmons*, a case of first impression in 2005, Illinois courts determined how state marriage laws applied to transsexuals.¹² The petitioner, a transsexual male, and respondent, his female wife, were married and issued a marriage certificate.¹³ After some time, the couple decided to have a child through artificial insemination.¹⁴ The petitioner later filed for dissolution of the marriage and custody of their child.¹⁵

The Illinois Appellate Court ruled the marriage an invalid same-sex marriage by law.¹⁶ Although the petitioner had taken considerable steps to be recognized as male,¹⁷ the court found the marriage invalid and held that the peti-

tioner lacked standing under the Parentage Act of 1984 to seek custody of his child.¹⁸ The rationale, like in many other cases, was that sexuality is determined by genitalia, not preference.¹⁹ Most courts rely on *Corbett v. Corbett*, a 1970 British case that introduced the “true sex” model of sexuality for the purposes of marriage.²⁰ Under this model, each party has a “true sex” of either male or female.²¹

Simmons exemplifies a primary problem faced by transsexuals, which remains unanswered by the Civil Union Act. The Civil Union Act states that its purpose is to “provide adequate procedures for the certification and registration of a civil union (a legal relationship between two people of the same or opposite sex) and provide persons entering into a civil union with the obligations, responsibilities, protections and benefits afforded or recognized by the law of Illinois to spouses.”²²

While the Civil Union Act can be used as a vehicle for transgender individuals to enter into a legal relationship, it still falls short in dealing with important related issues. For example, the Civil Union Act does not address the parental status of transsexual persons.

Transsexual parents fare even worse under the Illinois Parentage Act. Under this Act,

a man is presumed to be the natural father of a child if:

- (1) he and the child’s mother were married when the child was born or conceived,
- (2) after the child’s birth, he married the child’s mother and he is named with written consent as the father on the child’s birth certificate,
- (3) he and the child’s mother signed an acknowledgement of paternity, or
- (4) if the child’s natural father is someone other than the presumed father and an acknowledgement of parentage and denial of paternity is signed.²³

Because a transsexual man cannot legally be “married” to a woman in Illinois, nor be the biological father of her child, the Illinois Parentage Act is not applicable to a relationship like that of the parties in *Simmons*. Under the language of the Illinois Parentage Act, transsexuals may be considered their child’s parent and enjoy the privileges that come with that title. However, they may still not have standing to assert those parental rights in court. This is particularly troublesome should conflict arise between the parents or should one of the natural parents die.

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Thus, while the Civil Union Act is a step in the right direction towards equality for transsexuals, it simply is not enough. There are several ways in which Illinois can move to mend the problems faced by transsexuals.

Courts all over the nation have dealt with transsexual marital issues in many different ways. For example, in *M.T. v. J.T.*, the Superior Court of New Jersey rejected the *Corbett v. Corbett* rationale and emphasized the surgery and sexual functioning of an individual in determining how they should be treated for marriage purposes.²⁴ Likewise, North Carolina recognizes transsexual marriages as heterosexual marriages.²⁵ Maryland law permits a change of a person's legal sex on the basis of sex reassignment surgery, and thus apparently recognizes a marriage between two people born with the same sex, where one has had gender reassignment surgery.²⁶

MOVING TOWARDS EQUALITY

To provide equal rights for transsexual persons, Illinois must make substantial changes in the current law. It must join those states that recognize same-sex marriage and must apply those rights equally among all married couples. Illinois can also amend other related statutes to afford transgender individuals the same privileges granted to heterosexual married couples. Transsexuals are suffering by the application of current Illinois law with respect to parentage, and Illinois legislators must take action in order to apply the law equally to them.

Sacha Coupet, Associate Professor of Law at Loyola University Chicago School of Law, would advise legislators to adhere to the spirit of the law by focusing on the relationship between the "parents" to determine parental status.²⁷ She believes "the marital presumption of parentage should extend to same-sex as well as transgendered partners who consent to the conception of a child."²⁸ Prof. Coupet also proposes that the gendered terms of the Parentage Act of 1984 be removed and be combined with the Illinois Parentage Act and the Gestational Surrogacy Act, which taken together would "produce a comprehensive set of rules that would favor intended parents."²⁹

Thus, all considered, there are several ways Illinois can ensure its transsexual citizens are afforded equal rights. It should explore these options in order to truly provide marriage equality.

NOTES

- 1 States that recognize same sex-marriages include: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire and New York. Washington and Maryland recently signed legislation recognizing same-sex marriage that will go into effect in June 2012 and January 2013 respectively. *See also Gay Facts and Statistics in 2011 and 2012* (Oct. 3, 2010), <http://www.gaylawreport.com/gay-facts-statistics-2011/>; *Washington Gay Marriage: Governor Chris Gregoire Signs Bill Allowing Same-Sex Couple to Wed into Law*, HUFFINGTON POST GAY VOICES (Feb. 13, 2012, 4:25 PM), http://www.huffingtonpost.com/2012/02/13/washington-gay-marriage-video-chris-gregoire_n_1274393.html?view=print&comm_ref=false; *Maryland Gay Marriage: Governor O'Malley Signs Bill Allow Same-Sex Couples to Wed*, HUFFINGTON POST GAY VOICES (Mar. 1, 2012, 5:39 PM), http://www.huffingtonpost.com/2012/03/01/maryland-gay-marriage-martin-o-malley-signs-bill_n_1314352.html.
- 2 Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/5 (2011).
- 3 "LGBT" stands for "lesbian, gay, bisexual, and transsexual."
- 4 *Illinois Gay Marriage Bill Introduced: State Lawmakers Aim For Marriage Equality*, HUFFINGTON POST CHI. (Feb. 2, 2012, 3:54 PM), http://www.huffingtonpost.com/2012/02/08/illinois-gay-marriage-bil_n_1263318.html?view=screen.
- 5 *Id.*
- 6 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738(C) (1997)).
- 7 *Id.*
- 8 *Id.*
- 9 Wisconsin, Texas, Utah, Idaho and Kentucky only recognize marriages between one man and one woman. WIS. STAT. ANN. § 13 (2006); TEX. CODE ANN. § 32 (2005); UTAH CODE ANN. § 29 (2005); IDAHO CODE ANN. § 32-201 (1996); KY. REV. STAT. ANN. § 402.005 (1998).
- 10 Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/201 (1977).
- 11 *Id.*; 750 ILCS 5/213.1.
- 12 Katie D. Fletcher & Judge Loa Maddox, *In Re Marriage of Simmons: A Case For Transsexual Marriage Recognition*, 37 LOY. U. CHI. L.J. 533, 555 (2006).
- 13 *In re Marriage of Simmons*, 355 Ill. App. 3d. 942, 945 (2005).
- 14 *Id.*
- 15 *Id.* at 946.
- 16 *Id.* at 948.
- 17 The petitioner had taken testosterone since he was 21 years old, looked like a man, underwent a total abdominal hysterectomy, had his female organs removed and was issued a new birth certificate designating his sex as "male in October of 1994." *Id.* at 944-48.
- 18 *Id.* at 950-52. The petitioner in this case argued that the Illinois Parentage Act of 1984 granted a presumption of parenthood, as a child born from artificial insemination of two married parents retains rights to parentage with both parents even if the marriage is subsequently held invalid. *Id.* at 951.
- 19 Indeed, the *Simmons* Court emphasized the fact that the petitioner did not complete reassignment surgery and possessed his external female genitalia as a basis for finding the marriage invalid. *Id.*
- 20 Audrey C. Stirnitzke, *Transsexuality, Marriage and the Myth of True Sex*, 53 ARIZ. L. REV. 285, 286 (2011).
- 21 Corbett and Corbett, 2 All E.R. 33 (1970).

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- 22 Illinois Religious Freedom Protection and Civil Union Act, 750 ILCS 75/5 (2011).
- 23 Illinois Parentage Act, 750 ILCS 45/5 (2007).
- 24 *M.T. v. J.T.*, 355 A.2d 204, 208-11 (N.J. Sup. Ct. 1976).
- 25 *Spouse Visas and Transgender Marriages*, <http://www.powervisa.com/spouse-visas-and-transgender-marriages.html> (last visited Mar. 19, 2012).
- 26 *Id.*
- 27 Email interview with Sacha Coupet, Assistant Professor of Law, Loyola Univ. Chi. Sch. of Law (Mar. 19, 2012).
- 28 *Id.*
- 29 *Id.*