IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of: THOMAS T. BEATIE, Petitioner-Appellant/Appellee, v. NANCY J. BEATIE, Respondent-Appellee/Appellant.	Court of Appeals, Division One No. 1 CA-CV 13-0209 Maricopa County Superior Court No. FC 2012-051183

BRIEF OF *AMICUS CURIAE* TRANSGENDER LAW CENTER IN SUPPORT OF APPEAL OF TRIAL COURT´S HOLDING THAT IT LACKS SUBJECT-MATTER JURISDICTION

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INTRODUCTION

Pursuant to the court's minute entry of April 4, 2013 and by the written consent of the parties attached hereto, Transgender Law Center submits this brief amicus curiae in support of petitioner/appellant's appeal.

The trial court below incorrectly concluded that it did not have subject-matter jurisdiction to grant the parties' divorce. Contrary to the trial court´s interpretation, the parties' marriage is a valid opposite-sex marriage under the plain meaning of both Arizona's and Hawaii´s laws concerning who may enter into a lawful marriage and what constitutes a legal change of sex. Prior to entering into their 2003 marriage, Mr. Beatie complied with the statutory and regulatory requirements of Hawaii (and Arizona) law to amend his Hawaii birth certificate to reflect his male sex. Arizona's rules of comity therefore require that this state recognize the parties' marriage for purposes of granting the divorce they both seek. The trial court´s interpretation, without clear authority from the Arizona Legislature, of Arizona's statutes would also infringe upon the fundamental constitutional right of transsexuals to have children. This Court should therefore find that the trial court erred as a matter of law and should remand with instructions to grant the requested divorce.

ARGUMENT

The record confirms that the parties' opposite-sex marriage is valid under the laws of Hawaii as well as the laws of Arizona. Therefore, under Arizona's longstanding rule

of marriage recognition, the Beaties´ marriage should be recognized as valid in this state. It should be noted that both of the parties are in agreement as to this point. Tr. Ct. 1, ¶ 3. Further, the state's Attorney General declined to weigh in on the question of whether the trial court should deny recognition to the parties' marriage. Tr. Ct. 3, n. 6. In exercising its *de novo* review of this question of statutory interpretation, this Court should find that the trial court erred in concluding that it lacked subject-matter jurisdiction to consider and grant the dissolution petition. *See Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, 334, ¶ 10, 198 P.3d 1203, 1206 (2009); *Egan v. Fridland-Horne*, 221 Ariz. 229, 232, ¶ 8, 211 P.3d 1213, 1216 (App. 2009).

I. Arizona's Law of Comity Requires The Courts of This State to Recognize Valid Opposite-Sex Marriages From Other States.

Like all other United States jurisdictions, Arizona follows the general rule of comity that requires its courts to recognize the validity of court orders and administrative legal actions, like marriages, that take place in other states. Arizona's longstanding common-law rule of comity was codified in 1996. The state´s marriage-recognition statute provides that marriages valid by the laws of the place where they are contracted are granted the same legal consequences and effect as if solemnized in the state of Arizona unless specifically prohibited by section 25-101. A.R.S. § 25-112(A). Among other things, section 25-101 prohibits recognition of same-sex marriages. A.R.S. § 25-101(C). The trial court incorrectly held that section 25-101 and its counterpart in the

state Constitution, Article 30, Section 1, barred it from recognizing the parties' lawful opposite-sex marriage.

In every state, including Arizona, when two people have obtained a marriage license and participated in a ceremonial marriage, as the parties did here, the marriage is presumed to be valid in the absence of a law expressly barring the marriage. *See in re Trigg's Estate*, 3 Ariz. App. at 387-88, 414 P.2d at 990-91; *see also, e.g.*, 36 Am. Jur. 2d *Proof of Facts* § 441 ("Once a marriage has been shown to exist, it is presumed to be a legal and valid marriage . . . .This presumption has been variously described by the courts as strong, very strong, extremely strong, and one of the strongest known to the law"). In light of these well-established principles and because the Beaties' marriage was valid in Hawaii where it was contracted, the court below erred in denying recognition to the parties' marriage.

II. Hawaii Law Recognizes Mr. Beatie's Legal Sex as Male and the Parties' Marriage as a Valid Opposite-Sex Marriage.

It is clear that the trial court erred as a matter of law in its reading of Hawaii´s statutes to find that Mr. Beatie had somehow evaded the intent of the statutes to inappropriately obtain an amended birth certificate and, consequently, an opposite-sex marriage license. Tr. Ct. 7. Under the plain meaning of both Hawaii´s birth certificate change statute and its marriage statute, Mr. Beatie met all the statutory requirements to

obtain legal recognition of his sex as male and to wed Ms. Beatie in a lawful opposite-sex marriage.

A. Mr. Beatie Complied Fully with Hawaii´s Statutory Requirements to Amend the Sex Designation on His Birth Certificate.

Hawaii law provides that the sex marker on an individual's birth certificate can be amended upon receipt of "an affidavit of a physician that the physician has examined the birth registrant and has determined that . . . the birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct." Haw. Rev. Stat. Ann. § 338-17.7(a)(4)(B).[1] Mr. Beatie clearly met those requirements, as the Hawaii Department of Health recognized by issuing him an amended birth certificate with his sex correctly designated as male.

As the trial court correctly noted, Tr. Ct. 29, ¶ 3, Hawaii, like Arizona, follows the rule of statutory construction that, where the language is plain and unambiguous, the interpreting court must give effect to its plain and obvious meaning. *County of Hawaii v. C& J Coupe Family Ltd. Partnership*, 119 Haw. 352, 362 198 P.3d 615, 625 (2008). However, the trial court erred in concluding that the "plain meaning" of the statutory term "sex change operation" must necessarily refer to a specific type of surgery that changes the appearance of a person's genitals and/or removes a person´s reproductive

[1] Arizona similarly directs the state registrar to change the gender marker on the birth certificate of a transsexual individual "who has undergone a sex change operation" upon receipt of "[a] written statement by a physician that verifies the sex change operation." A.R.S. § 36-337(A)(3).

capacity.[2] Rather, the statute is silent regarding which specific medical procedures constitute a "sex change operation," instead specifically (and appropriately) deferring judgment of whether a "sex change operation" has taken place to the medical judgment of the examining physician.[3] Haw. Rev. Stat. Ann. § 338-17.7(a)(4)(B).

The Hawaii legislature amended that state's vital statistics statute in 1993 to enable transsexuals to amend the gender markers on birth certificates. 1993 Hawaii Laws Act 131 (H.B. 284). In the twenty years since that legislation was enacted, the Hawaii legislature has not moved to further define "sex change operation" in a way that would require sterilization, nor has the legislature clarified the law to request that any specific surgery must be performed upon on specific sex organs.

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[2] It is unclear precisely which specific sex-change procedure the trial court believes to be required by the ¨plain meaning¨ of the statute—variously seeming to suggest phalloplasty or metoidioplasty on the one hand (procedures that construct a penis), or ooectomy, vaginectomy, or hysterectomy on the other (procedure to remove the ovaries, vagina, or uterus). The trial court makes numerous references to surgery to change the appearance of the genitals, Tr. Ct. 23-25, but also repeatedly expresses the belief that Mr. Beatie´s legal sex must be female, regardless of the terms of the gender-change statute, because he was not sterilized and he maintained his ability to have children. Tr. Ct. 25-27. Many surgeries, including metoidioplasty and phalloplasty, that change the appearance of the genitals, could be performed in a manner that preserves a transsexual man´s ability to have children.

[3] As the trial court noted, Tr. Ct. 18, ¶ 3, Arizona also applies the rule of statutory construction that where the language of the statute is plain and unambiguous, that courts are bound to give effect to the ordinary meaning of that language. *Mathews ex rel. Mathews v. Life Care Ctrs. of Am., Inc.,* 217 Ariz. 606, 608, 177 P.3d 867, 869 (App. 2008). Arizona's birth certificate statute simply requires a "sex change operation," and as with Hawaii, leaves the term "sex change operation" undefined. The Arizona Legislature, like the Hawaii Legislature, has not moved to further define "sex change operation" as any specific or sterilizing procedure, and instead relies upon the professional judgment of a physician to certify that an appropriate "sex change operation" has taken place. A.R.S. § 36-337(A)(3). As a result and in the absence of any further guidance from the Legislature, the plain meaning of the term is that a sex change operation is an operation in furtherance of changing one's sex.

Mr. Beatie complied with the Hawaii statutory requirement when he underwent surgery to remove his breasts and construct the appearance of a male chest, as well as when he began testosterone hormone therapy, which combined to give him an unmistakably male appearance.[4] *See* TR 1, E. 1, p. 3; Haw. Rev. Stat. § 338-17.7. As a result, Dr. Michael Brownstein, Mr. Beatie's treating physician, issued an affidavit accurately explaining that, in his medical judgment, the surgery had effectuated a change of sex from female to male.

Additionally, prior to his marriage in 2003, Mr. Beatie took further measures to legally change his sex by changing the sex designation on his Hawaii driver's license to "male." *See* TR 2, E. 1, pp. 3-4. He was able to do so pursuant to Hawaii Administrative Rules § 5-22-3(c), which provides that "for those persons desiring alteration of their state identification card based on change of sex, a medical document certifying the completion of a sex change or other certified document indicating the same shall be presented." The Hawaii driver's license regulation, like the Hawaii birth certificate statute, does not mandate a particular procedure, but leaves the determining judgment to a physician as to whether or not an individual has completed a "change of sex." In early

[4] See, e.g., Guy Trebay, *He's Pregnant. You're Speechless*., N.Y. TIMES, June 22, 2008, *available at* http://www.nytimes.com/2008/06/22/fashion/22pregnant.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1378243587-czvbfaTnLdIDOTl4rxeo/Q# (noting Mr. Beatie's "body lacking breasts" and "square jaw unmistakably fringed by a beard"); Alex Tresniowski, *He's Having a Baby*, PEOPLE MAGAZINE, April 2008, *available at* http://www.maryellenmark.com/text/magazines/people_new/918W-000-054.html (reporting, "Thomas is a black belt in karate who can bench 255 lbs. At work, he runs a two-ton T-shirt press, and he drives a Ford truck. He is 5'10" with a trimmed beard, and people say he looks like Mario Lopez.").

2003, Mr. Beatie petitioned for and was granted a legal name change from the traditionally female name of ¨Tracy¨ to the traditionally masculine name of ¨Thomas.¨ *See* TR 2, E. 3. In the same year, he amended the name and sex marker on his United States passport. *See* TR 2, E. 1, p. 4. For each of these processes, he met all of the statutory and/or regulatory requirements necessary to confirm his legal sex as male and was granted the requested changes.

The trial court, however, discounted this significant evidence that Mr. Beatie had engaged in thoughtful, concerted, and protracted efforts to follow every procedure necessary to change his legal sex. Instead, the trial court crudely suggested that Mr. Beatie's efforts were equivalent to the "impulsive" decision by a hypothetical woman who had undergone a traditional double mastectomy—without the contouring and nipple grafting that intentionally created a male-appearing chest— "on a whim," and "demand a new birth certificate" showing a sex of male.[5] Tr. Ct. 19. To the contrary, the Hawaii statute requires that a physician attest that they have "examined the birth registrant and . . . determined that . . . the birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct." Haw. Rev. Stat. Ann. § 338-17.7(a)(4)(B). The hypothetical woman described by the trial court clearly would not have Mr. Beatie´s long-held male gender identity, not have undergone

[5] The trial court also appears to suggest, confusingly, that a man who undergoes a double mastectomy for male breast cancer could also use that fact to justify legal recognition of his sex as male, although it is unclear why such recognition would be necessary in that case. Tr. Ct. 19, n. 64.

extensive hormone treatment, nor would she have undertaken diligent efforts to change every piece of identification to reflect her true gender, and so would plainly fail to meet the statutory requirement.

Indeed, Dr. Brownstein, an expert in gender transition who has performed hundreds of sex-change surgeries, testified that individuals seeking a gender transition must undergo extensive psychological and medical testing prior to surgery to ensure the patient is capable of undergoing an operation. TR 1, p. 27. Patients are also required to receive treatment from a psychotherapist prior to undergoing surgery in order to ensure that the patient's true gender identity is that of their surgical outcome, *Id*. The established medical community standards at the time of his surgery required Mr. Beatie to live as male for one year prior to his surgery. TR. 1, pp. 27-28 . The trial court's suggestion otherwise would be a truly "absurd" result, and one not remotely required or contemplated by Mr. Beatie's position.

B. The Parties' Marriage Is a Valid Opposite-Sex Marriage Under Hawaii Law.

Hawaii only recognizes marriages between different-sex couples and has always prohibited marriage between same-sex couples. *See* Haw. Rev. Stat. Ann. § 572-1 (providing that a valid marriage "shall be only between a man and a woman"). Similarly, as noted, Arizona's marriage recognition law and constitutional amendment both prohibit recognition of marriages between same-sex couples. A.R.S. § 25-101(C); Ariz. Const. Art. 30, § 1 ("Only a union of one man and one woman shall be valid or

recognized as a marriage in this state."). While neither state's marriage law defines "sex" specifically for purposes of eligibility for marriage, Mr. Beatie clearly met the legal requirements for changing his sex to male under all provisions of Hawaii law (and the analogous provisions of Arizona law) that specify requirements for recognition of a person's legal gender by the time of his marriage to Mrs. Beatie on February 6, 2003. As a result, he was able to present valid identification to obtain a valid marriage license demonstrating, accurately, that his sex was male and that his marriage to Mrs. Beatie was opposite sex.[6] As a result, their marriage was valid in Hawaii at the time it was entered into.

The trial court seems to suggest that determining the meaning of the word "man" in these marriage laws is a matter of great difficulty, requiring thirty-six pages of footnote-heavy argument. The trial court's view is essentially that in interpreting the marriage laws, the court should consider only the "plain meaning" of the word "man," which it concludes is one who is incapable of becoming pregnant.[7] Tr. Ct. 14-17. This

[6] Hawaii's Department of Health requires that one form of identification be provided when applying for a marriage license, in order to verify eligibility for marriage including proof of age. Acceptable forms of identification can include either a valid I.D., a driver's license, or a birth certificate. *See* Haw. Dept. of Health, *Who is Eligible to Apply for a Marriage License?*, at http://health.hawaii.gov/vitalrecords/marriage-licenses/#eligible (last visited Sep. 3, 2013).

[7] It is interesting to note that the trial court never actually suggests a concrete definition for the word "man," despite its numerous assertions about how simple that matter would be. Instead can only manage to assert that whatever the definition is, it cannot possibly include a person capable of being pregnant. Tr. Ct. 15 (asserting that the actual definition is irrelevant for purposes of ruling on the validity of the parties' marriage). One possible reason for the trial court's difficulty in naming a "plain meaning" definition of a "man" is that **every one** of the dictionary definitions and medical dictionary definitions the trial court cites in its lengthy appendix on the matter would preclude any transsexual male from qualifying, a plainly absurd result directly at odds with the intent of the Hawaii and Arizona

determination of the "plain meaning" of the term is certainly contestable: a mere glance at the numerous news articles from both state and national media describing Mr. Beatie's pregnancy show that virtually all refer to Mr. Beatie as a "man."[8] If, as the trial court asserts, the "average adult Arizona citizen understands 'man' to [exclude] a person capable of bearing children," Tr. Ct. 17, the news media must be grievously misinformed.

The trial court also failed to explain why its preferred definition of a "man" as one who is incapable of becoming pregnant should take precedence over the definition of a legal change of sex in the statutes of both Hawaii and Arizona, described in Part II.A *supra*, neither of which mention pregnancy. As the trial court itself conceded, "[t]he validity of the Beaties' marriage license and their wedding is entirely dependent on the validity of Thomas' birth certificate." Tr. Ct. 8, n.20 (citing *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867

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legislatures in granting recognition of legal changes of sex. Tr. Ct. Appendix 33-36; *e.g.*, International Dictionary of Medicine and Biology ("Male – The sex that 'produces spermatozoa and begets young.'"); Melloni's Illustrated Medical Dictionary (4th ed. 2002) ("Male – 'One who produces spermatozoa"; an 'individual with one X and one Y chromosome.'").

[8] See, e.g., Joe Dana, "*Pregnant Man" Living in Arizona*, 12 NEWS PHOENIX ARIZONA, Nov. 8, 2011, *available at* http://www.azcentral.com/12news/news/articles/2011/11/08/20111108pregnant-man-arizona.html; Aina Hunter, *Pregnant Man, Baby 3: Thomas Beatie Gives Birth to Baby Boy*, CBS NEWS, Aug. 3, 2010, *available at* http://www.cbsnews.com/8301-504763_162-20012474-10391704.html; Guy Trebay, *He's Pregnant. You're Speechless.*, N.Y. TIMES, June 22, 2008, *available at* http://www.nytimes.com/2008/06/22/fashion/22pregnant.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1378243587-czvbfaTnLdIDOTl4rxeo/Q#; Alex Tresniowski, *He's Having a Baby*, PEOPLE MAGAZINE, April 2008, *available at* http://www.maryellenmark.com/text/magazines/people_new/918W-000-054.html; Sarah Hammel, *Pregnant Man Introduces Kids*, PEOPLE MAGAZINE, Oct. 28, 2011, *available at* http://www.people.com/people/article/0,,20540909,00.html.

F.Supp.2d 1023, 1034 (D. Minn. 2012)) ("The only logical reason to allow the sex identified on a person's original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver's license, passport, or marriage license."). Accordingly, the allegedly "plain" meaning of the term "man" in the marriage laws must give way to this specific statutory definition of a transsexual person's **legal** sex.

Mr. Beatie took each of the necessary steps to change his sex from female to male and to have that change of sex legally recognized across all his identification documents. He was therefore able to enter into a lawful opposite-sex marriage with Mrs. Beatie on February 6, 2003. *See* TR 2, E., p. 4. In sum, Mr. Beatie met all the legal requirements for entering a valid opposite-sex marriage under Hawaii law at the time of his marriage to Mrs. Beatie in 2003. Therefore, under Arizona's rule of comity as codified in A.R.S. § 25-112(A), this Court should recognize the validity of the parties' marriage and grant the requested dissolution petition.

III. Arizona Law Recognizes Mr. Beatie's Legal Sex as Male and the Parties' Marriage as a Valid Opposite-Sex Marriage.

As noted, Arizona, like Hawaii, directs the state registrar to change the gender marker on the birth certificate of a transsexual individual "who has undergone a sex change operation" upon receipt of "[a] written statement by a physician that verifies the sex change operation." A.R.S. § 36-337(A)(3). In this case, as noted, Mr. Beatie's

physician certified that Mr. Beatie had undergone irreversible surgical, hormonal, and psychological treatment to correct his anatomy and appearance, and that his sex should be legally recognized as male. *See* TR 1, E. 1, p. 4; TR 2, E. 2. The process Mr. Beatie underwent to amend his Hawaii birth certificate therefore also complied with the substantively identical requirements of the Arizona birth certificate amendment statute, and he should similarly be recognized under Arizona law as male.

For that reason, the parties' valid opposite-sex Hawaii marriage should also be recognized as a valid opposite-sex marriage under Arizona law. *See* A.R.S. § 25-112(A). Indeed, the state of Arizona has made clear on numerous occasions that it already recognizes Mr. Beatie's sex as male and the parties' marriage as a valid and opposite-sex. Since moving to Arizona in 2010, the parties have enjoyed every benefit accorded to married couples. *See* Decl. of Thomas Beatie, ¶ 29. For instance, the parties have been able to file joint income tax returns with the state of Arizona as a married couple, Decl. of Thomas Beatie, ¶ 30, and they successfully filed a joint petition for bankruptcy in the United States District Court of Arizona in 2011. Decl. of Thomas Beatie, ¶ 31.

Because Arizona recognizes Mr. Beatie's legal sex as male, the parties' marriage is entitled to recognition as a valid opposite-sex marriage. Petitioner's marriage is not a same-sex marriage, as prohibited under A.R.S. § 25-101(A).[9] Arizona law contains no

[9] It should be noted that the trial court relied on the fact that state prohibitions on same-sex marriages, at the time of writing, "ha[d], to date, withstood constitutional challenges in Arizona and elsewhere." Tr. Ct. 10, n.25. The trial court cited the Ninth Circuit's decision invalidating California's prohibition

prohibition against recognition of opposite-sex marriages in which one spouse has legally changed their sex. In the absence of any such statutory prohibition, under Arizona's longstanding rule of comity, the trial court erred in denying recognition to the parties' valid opposite-sex marriage for purposes of granting their dissolution petition.

IV. Other Courts Have Recognized Marriages Following Gender Transition as Valid Opposite-Sex Marriages.

The trial court failed to adequately consider the fact that courts across the country have recognized as validity opposite-sex marriages that include a transsexual spouse. *See, e.g., Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, F.Supp.2d (D. Minn. 2012) (recognizing the validity of opposite-sex marriage involving a male-to-female transgender spouse under Minnesota law); *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005) (recognizing a North Carolina marriage between male-to-female transsexual and male as valid for purpose of a marriage-based visa petition); *Carter v. Carter*, Case Nos. 139,251 and 139,252, Louisiana Family Court, East Baton Rouge Parish (Jan. 16, 2002) (affirming validity of an opposite-sex marriage involving a transsexual spouse); *In re Marriage of Vecchione*,

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on same-sex marriages, *Perry v. Brown*, 671 F.3d 1052, 1064, 1096 (9th Cir. 2012), but noted that "enforcement has been postponed pending Supreme Court review." Tr. Ct. 10, n.25. At this time, however, the Supreme Court has permitted the Ninth Circuit decision in *Perry* to stand, and the Supreme Court has held in *United States v. Windsor* that the U.S. Constitution prohibits the denial of recognition of same-sex marriages. *United States v. Windsor*, 133 S.Ct. 2675 (2013). Therefore, it appears likely that Arizona's constitutional and statutory prohibitions on recognition of same-sex marriages bear the same constitutional infirmity under this now-binding precedent from the Ninth Circuit and U.S. Supreme Court.

Case No. 96D003769 (Cal. Super. Ct. Oct. 22, 1998) (same); *M.T. v. J.T.*, 140 N.J. Super. 77, 355A.2d 204 (App. Div. 1976) (same).

For example, in *Radtke*, the Federal District Court of Minnesota concluded that a marriage involving a transsexual woman and a non-transsexual man was valid as a different-sex marriage under Minnesota law, which prohibited recognition of marriage between same-sex couples. Minn. Stat. Ann. §157.01 (repealed 2013).While Minnesota had no statute that specifically authorized opposite-sex marriage for transsexual people post-gender-transition (in fact, no state has such a statute), the court found conclusive the fact that the state had adopted no statute to prohibit marriages involving transsexuals:

> The fact that some other states, such as Texas and Kansas, do not recognize marriages such as the Radtkes' is irrelevant to this analysis. Once even one state—New Jersey—did recognize such marriages, Minnesota was aware of the issue and of the fact that such marriages would be recognized in Minnesota unless the legislature acted. The Minnesota legislature chose not to act.

Radtke, 2012 WL 1094452 at *12.

In the absence of specific statutory guidance on the definition of a "same-sex" marriage, the Minnesota court held that the state's marriage laws must be interpreted in conformity with the birth-certificate-change statute to permit a transsexual person who has changed his or her sex to marry as a member of the sex to which he or she has transitioned. It concluded, "The only logical reason to allow the sex identified on a person's original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as

obtaining a driver's license, passport, or marriage license." *Id.* at *11. In that case, the transsexual spouse had been recognized as female by the state of Minnesota and the federal government for purposes of her driver's license, passport, etc. The court held that "[t]here is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes—birth records and driver's licenses, but not for others—marriage certificates." *Id.*

Similarly, here, Mr. Beatie has been issued a birth certificate, driver's license, and U.S. passport all recognizing his legal gender as male. *See* TR 2, E.5; TR 2, E.1, pp. 3-4; TR 2, E.1, p. 4. The trial court plainly erred in denying legal effect to all of these documents that demonstrate Mr. Beatie's legal sex as male in conformity with the well-established standards set forth by Hawaii, Arizona, and federal law.

While a few courts have declined to recognize marriages involving a transsexual spouse, those decisions are distinguishable from the instant case in that the marriages in question generally took place in states that did **not** permit transsexual individuals to legally change their sex. The Ohio court in *Ladrach* specifically held that "[i]t seems obvious . . . that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled." *Ladrach*, 32 Ohio Misc. 2d at 9, 513 N.E.2d at 831.

In contrast, under Hawaii (and Arizona) law, a transsexual individual like Mr. Beatie can change his sex decades after birth to reflect a legal sex change. *See* Haw. Rev. Stat. Ann. § 338-17.7 (a) (4)(B); A.R.S. § 36-337(A)(3). Under the plain logic of the Ohio decision in *Ladrach*, it therefore "seems obvious . . . that" because Arizona "permits such a change of sex on the birth certificate of a post-operative transsexual, . . . then a marriage license, if requested, must issue to such a person . . . ." *Ladrach*, supra, 32 Ohio Misc. 2d at 9, 513 N.E.2d at 831. Since Arizona expressly permits an individual legally to change his or her sex, and would itself issue a marriage license to the parties if they sought to marry here, Arizona must recognize the Beaties' valid marriage from Hawaii under the rule of comity.

V. The Trial Court's Denial of Recognition of Mr. Beatie's Legal Sex and His Opposite-Sex Marriage Based on His Decision to Bear Children Violates the Constitutional Right to Procreation.

The trial court's determination that the parties' marriage is an invalid same-sex marriage was predicated upon Mr. Beatie's ability, and his ultimate decision, to bear children. This interpretation of Arizona's birth certificate change statute, A.R.S. § 36-337(A)(3), would functionally require that a transsexual individual be sterilized in order for his or her gender identity to be legally recognized.

Such a requirement would violate Mr. Beatie's fundamental constitutional right to procreation under both the Arizona Constitution and the Fourteenth Amendment to the United States Constitution. The right to choose whether or not to have children, and

specifically the right to be free from forced sterilization, has been recognized by both the U.S. Supreme Court and the Arizona Supreme Court as an integral part of the fundamental right to privacy, which includes the right to autonomy in making personal decisions about marriage, child-bearing, and child-rearing. *See, e.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that states cannot sterilize individuals as a consequence of committing a crime); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (striking down a law that prohibited the use of contraceptives by married couples).

This right to privacy "emanat[es]" from several provisions of the United States Constitution, including the Due Process Clause of the Fourteenth Amendment. *Soos v. Superior Court*, 182 Ariz. 470, 474, 897 P.2d 1356, 1360 (App. 1994). In the Arizona Constitution, the even-stronger right to privacy is made explicit in Article II, Section 8. *See Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 457, 56 P.3d 28, 31 (2002) ("Unlike the federal constitution, our constitution confers an explicit right of privacy on our citizens."); *Rasmussen v. Fleming*, 154 Ariz. 207, 215, 741 P.2d 674, 682 (1987) (recognizing state constitutional right to privacy in an individual's right to refuse medical treatment). These constitutional provisions "protect 'individual decisions in matters of childbearing from unjustified intrusion by the State.'" *Soos*, 182 Ariz. at 474, 897 P.2d at 1360 (quoting *Carey v. Population Ser. Int'l*, 431 U.S. 678, 687 (1977)). Preserving personal autonomy in these areas is essential because "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Soos*,

182 Ariz. at 474, 897 P.2d at 1360 (quoting *Skinner*, 316 U.S. at 541). They are therefore among the most important personal rights guaranteed by the Constitution to all citizens.

The United States Supreme Court has specifically held that, because of the importance of these rights, a state cannot impose sterilization on an unwilling individual, even as punishment for a crime. *Skinner*, 316 U.S. 535. Such a deprivation causes "irreparable injury, . . . forever depriv[ing the individual] of a basic liberty": the ability to procreate. *Id.* at 541. The Supreme Court held that the right to procreate is "one of the basic civil rights of man" guaranteed by the Constitution. *Id.*

Arizona also prohibits the conclusive step of requiring sterilization without specific statutory authority because of the serious constitutional issues that would raise. *Smith v. Arizona*, 262 Ariz. 67, 725 P.2d 1101 (1986). Because A.R.S. § 36-337(A)(3) does not plainly require sterilization as a precondition for a legal change of sex, this Court should not require sterilization for legal recognition of an opposite-sex marriage. Doing so would raise serious constitutional questions regarding privacy and personal autonomy.

The right to privacy is of course not unlimited, as the U.S. Supreme Court noted in *Roe v. Wade*: "[D]ecisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." 410 U.S. 113, 154 (1973). With respect to abortion, for instance, states "may properly assert important

interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* Here, however, no state interests are advanced by peering into which spouse bears the couple's children during the marriage in order to determine whether a lawful marriage between a man and a woman should be or can be dissolved. Regardless of their personal choices with respect to procreation, all couples should be afforded the same marital rights, including the right to dissolution, as are given to every other different-sex married couple in this state.

The state's responsibility to refrain from interference with the right to procreate extends beyond refraining from inflicting sterilization on those under its custody, as in *Skinner*. It is well established that the state also may not constitutionally withhold access to a statutory right or benefit to those who decline to forego a fundamental constitutional right, particularly with respect to a right as fundamental as procreation. *Simat*, 203 Ariz. at 463, 56 P.3d at 37. Simply put, courts cannot impose consequences on individuals for the private exercise of how they choose to have, or not to have, a family. In *Simat*, the Arizona Supreme Court held that "the state cannot deprive a woman of the right of choice by conditioning the receipt of benefits upon a citizen's willingness to give up a fundamental right" – in that case, the right to terminate a pregnancy. *Id.*

Here, if A.R.S. § 36-337(A)(3) is interpreted to require transsexual individuals not only to undergo irreversible medical treatment to physically transition to their new sex, but also to be sterilized and forego forever the opportunity to bear biological children, it

would unconstitutionally infringe upon the most-fundamental of rights. The Legislature may not empower or require the courts of this state to evaluate how a lawfully married couple exercises their right to bear children in determining whether to grant a dissolution of a marriage.

Mr. Beatie's irreversible surgery to change the appearance and function of his body from female to male met the statutory requirements for a legal change of sex under both Hawaii and Arizona law, entitling him to be legally recognized as male. Haw. Rev. Stat. Ann. § 338-17.7 (a)(4)(B); A.R.S. § 36-337(A)(3). Both states' statutes respect a person's fundamental right to conceive children and neither require that a person be sterilized or have surgery on particular sex organs in order to change the sex on a birth certificate. *See id.* Sterilization or genital surgery are also not required under contemporary medical standards to effectuate a change in sex from female to male; rather, chest reconstruction surgery like that undertaken by Mr. Beatie can be sufficient to complete an individual's transition. *See* World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 57 (2011), available at http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf (hereafter "WPATH Standards of Care").

Indeed, studies show that as few as 2% of female-to-male transsexuals undergo phalloplasty (construction of a phallus), and only 21% undergo hysterectomy. *See* J.M.

Grant, L.A. Mottet, J. Tanis, J. Harrison, J.L. Herman, M. Keisling, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 79 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Therefore, in absence of language to the contrary and in order to avoid the constitutional issues that would be raised, the best reading of the Hawaii and Arizona gender-change statutes is that a transsexual individual must demonstrate only that they have undergone a surgical procedure sufficient to change their sex in accordance with the recommendations of their doctor and contemporary medical standards, rather than any specific genital surgery or sterilization.

Therefore, this Court should interpret Arizona's statutory scheme as not requiring transsexual individuals to undergo forced sterilization, so as to avoid the conclusion that the statutory scheme is unconstitutional. "When considering a statute we are required to give it, if possible, a constitutional interpretation. In a circumstance 'where alternate constructions are available, [the court] should choose that which avoids constitutional difficulty.'" *Cook v. Cook*, 209 Ariz. 487, 493, 104 P.3d 857, 863 (Ct. App. 2005) (internal citations omitted) (quoting *Slayton v. Shumway*, 166 Ariz. 87, 92, 800 P.2d 590, 595 (1990)).

For all the reasons set forth previously, the most logical and internally consistent interpretation of all the relevant statutes is to recognize Mr. Beatie's legal sex as male, and the parties' marriage as a valid opposite-sex marriage under the laws of both Hawaii

and Arizona. Accordingly, this Court should hold that the trial court erred as a matter of law in denying recognition to the parties' marriage solely because Mr. Beatie preserved his constitutional right to bear children.

CONCLUSION

Mr. Beatie has met all the legal requirements under both Hawaii and Arizona law to legally change his sex. He has made a permanent commitment to irreversibly change his sex by undergoing irreversible hormone treatment and chest reconstruction. As a result, Mr. Beatie was able to legally amend his birth certificate, change his name, and amend other critical documents including his driver's license, passport, and Social Security card. Because Mr. Beatie was legally recognized as male in Hawaii he was able to obtain a marriage license for his marriage to Mrs. Beatie as a valid opposite sex-marriage. The parties' marriage is not void or prohibited under any Arizona statutory provisions. Therefore, under this state's longstanding rule of comity, A.R.S. § 25-112(A), this Court should find that the trial court erred in denying recognition to Mr. Beatie's legal change of sex and valid opposite-sex marriage.

Moreover, the trial court erred as a matter of law in denying recognition of the parties' marriage because the couple elected to have biological children the only way that they could. Such an interpretation of the relevant statutes, if accepted by this Court, would unconstitutionally deprive the Beaties and countless other transsexual people of their fundamental right to bear children and raise families. The Court should instead

interpret the statutory scheme in a manner consistent with the state and federal constitutional guarantees of family privacy, remanding with instructions to recognize the parties' marriage as valid and grant the dissolution sought by both spouses.

RESPECTFULLY SUBMITTED this 5th day of September, 2013.

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CERTIFICATE OF COMPLIANCE

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, the undersigned hereby certifies that the foregoing brief is double spaced, except for footnotes, extended quotes and topic headings, which are single spaced. The brief was prepared using a proportionate typeface of 14 points and contains 6,149 words.

DATED this 5th day of September, 2013.

By: */s/ Claudia D. Work*
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CERTIFICATE OF SERVICE AND
NOTICE OF ELECTRONIC FILING

I, certify that the foregoing Brief of Amicus Curiae Transgender Law Center in Support of Appeal of Trial Court's Holding that it Lacks Subject-matter Jurisdiction was electronically filed this 5th day of September, 2013 using the AZ TurboCourt electronic filing system and was served by mailing two copies of the Brief of Amicus Curiae Transgender Law Center in Support of Appeal of Trial Court's Holding that it Lacks Subject-matter Jurisdiction to the following:

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