

[1] USA: Kansas Supreme Court says transsexual's marriage invalid
The Associated Press

TOPEKA, Kan. - A marriage between a man and a transsexual woman is not valid in Kansas, the state Supreme Court declared today.

The justices ruled in the case of J'Noel Gardiner, whose right to inherit half of her late husband's \$2.5 million estate has been challenged because she was born a man.

She had sex change surgeries before her September 1998 marriage in Leavenworth County to Marshall Gardiner. He died a year later, and his son challenged the validity of their marriage after discovering J'Noel Gardiner's sex change.

Kansas law declares same-sex marriages invalid, but it does not address the question of whether marriages involving transsexuals are invalid.

In a unanimous opinion, the court said the Legislature decides which marriages are valid and has decided that only traditional marriages are recognized.

The court declared that under Kansas law, J'Noel Gardiner is not a woman and therefore cannot marry a man.

Writing for the court, Justice Donald Allegrucci said the justices had a responsibility to interpret the law, "not to rewrite it."

"The Legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties who are of the opposite sex,' and all other marriages are against public policy and void," Allegrucci wrote. "We cannot ignore what the Legislature has declared to be the policy of this state."

Furthermore, Allegrucci wrote, if marriages involving men and transsexual women are to be valid, "That is for the Legislature to do if it so desires."

J'Noel Gardiner teaches finance at Park University in Parkville, Mo., and Marshall Gardiner was a large donor. They met there in May 1998. She was 40 when they married.

Marshall Gardiner, who was 85 at the time of the marriage, died in 1999 of a heart attack. His son, Joe Gardiner, learned about J'Noel Gardiner's surgery after Marshall Gardiner's death.

The Supreme Court did not answer the question of whether J'Noel could legally marry a woman -- although her attorney has said she would have no desire to do so.

The case had been closely watched by advocacy groups for transsexuals and other transgendered individuals. The Kansas court's ruling is in line with a Texas ruling that the U.S. Supreme Court let stand in 2000.

In the Texas case, that state's Court of Appeals reviewed the case of a transsexual who wanted to sue for the wrongful death of her husband. The Texas court declared her female anatomy "man-made," and said it was up to the Legislature to legalize marriages involving transsexuals.

The U.S. Supreme Court declined to hear that case last year, in effect letting the Texas ruling stand.

A Leavenworth County district judge declared that despite her surgery, J'Noel Gardiner remained a man and the marriage was invalid.

But in May, the Kansas Court of Appeals ruled in J'Noel Gardiner's favor, saying that her sex at the time of marriage was the crucial issue. Advocacy groups praised the decision as a landmark.

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1729 Grand Avenue, Kansas City, MO, 64108
(Fax: 816-234-4926) (E-Mail: letters@kcstar.com) (<http://www.kcstar.com/>)
<http://www.kansascity.com/mld/kansascitystar/2869589.htm>

[2] Kansas Supreme Court rules against transsexual in estate case
By ANNE LAMOY and STACY DOWNS, The Kansas City Star

The Kansas Supreme Court on Friday ruled that transsexual J'Noel Gardiner is a man under Kansas law and thus not entitled to share in the estate of her late husband, Marshall Gardiner of Leavenworth. The 38-page ruling was a victory for Marshall Gardiner's son, Joe Gardiner, who contested J'Noel Gardiner's claim to half of his father's \$2.5 million estate. In its unanimous ruling, the Supreme Court said that while J'Noel Gardiner had "traveled a long and difficult road" that involved sex-change surgery, she remained a man for purposes of marriage.

"The Legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties of the opposite sex,' and all other marriages are against public policy and void," Justice Donald L. Allegrucci wrote. "We cannot ignore what the Legislature has declared to be the public policy of this state. Our responsibility is to interpret (the law) and not rewrite it. That is for the Legislature to do, if it so desires."

Marshall Gardiner was a widower and former stockbroker. He met J'Noel Ball, an assistant professor of finance at Park University, in 1998. He was 85; she was 40. They were married in September of that year. He died in August 1999 and did not leave a will. When someone doesn't leave a will, under Kansas law the spouse gets half the estate and the heirs get half. Joe Gardiner was Marshall Gardiner's only child.

In a recent interview, J'Noel Gardiner said that before the marriage, she told Gardiner that she once had been a man. She said he shrugged, "looked into my eyes and told me he loved me."

Across the nation, conservative and liberal groups watched the case closely. Interest is keen because the implications of "In the Matter of The Estate of Marshall G. Gardiner" are not just legal, they're primordial: What is a man? What is a woman? What is a marriage? Some people on both sides of the political spectrum believed the case might have been a step toward the legalization of same-sex marriages, which are not recognized anywhere in the United States. Vermont recognizes same-sex civil unions, which give couples benefits similar to those that come with marriage.

The Gardiner case has drawn national media attention. The New York Times, The Wall Street Journal and magazines published articles about the court proceedings. Bill Duncan, director of Catholic University of America's Marriage Law Project in Washington, D.C., said the issue of gender will come up again because cases are popping up across the nation. "We have a mission to reaffirm the legal definition of marriage as a man and a woman," Duncan said. "But we haven't thought that much about what makes a man a man and a woman a woman."

In a prepared statement, J'Noel Gardiner's lawyer, Sanford P. Krigel, said he and his client were disappointed at the ruling: "We believe that the Kansas Supreme Court's decision is a step in the wrong direction." Krigel said an appeal to the U.S. Supreme Court was possible. His client also could request another hearing before the state Supreme Court. Neither J'Noel Gardiner nor Joe Gardiner could be reached Friday.

Joe Gardiner's attorney, William M. Modrcin, said: "We're obviously pleased. We think the court, given the statute it had to interpret, made the right decision."

The state Supreme Court's ruling overturned a May decision by a three-judge panel of the Kansas Court of Appeals. The appellate court had held that there was more to gender than "simply what the individual's chromosomes were or were not at the time of birth." The appellate court had ordered the case back to Leavenworth County District Court, where in 2000 a probate judge had ruled in favor of Joe Gardiner, 54. The appellate court directed the district court to consider several factors when deciding a person's sex. Those criteria included gender rearing, sexual identity and sex-change surgery.

The Supreme Court rejected those criteria, focusing instead on the letter of the law. The Supreme Court opinion included definitions of "male" and "female" according to a 1970 Webster's dictionary. The definitions hinge on men's and women's ability to reproduce. The Supreme Court's reliance on those definitions drew either satisfaction or ire from legal experts, depending their viewpoints. "There are many people who can't produce babies," said Anne Coughlin, a University of Virginia law professor. "Women in Kansas who have had hysterectomies or who are post-menopausal are going to be flipped out that they're not considered a woman. And a man who can't produce sperm isn't a man? Unbelievable."

Coughlin said the institution of marriage, according to Kansas law, seems to exist for reproductive function rather than other common reasons, such as companionship and financial security. On the other hand, Lynn Wardle, a Brigham Young University law professor, applauded the court for allowing the legislature, as representatives of the people, to decide whether transsexuals can marry a person of their original sex. Marriage, Wardle said, "is the

core unit of social organization. When marriage becomes confused and unclear, as it has in our society, people suffer."

While rebuffing J'Noel Gardiner's main arguments, the Supreme Court went out of its way to say that it was not dismissing her claim lightly. The ruling noted that J'Noel Gardiner had undergone electrolysis, thermolysis, tracheal shave, hormone injections and extensive counseling, in addition to sex-change surgery in 1994. "Unfortunately, after all that, J'Noel remains a transsexual and a male for the purposes of marriage," Allegrucci wrote. "We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal.

"However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the Legislature and not by this court."

To reach Anne Lamoy, call (816) 234-5994 or send e-mail to: alamoy@kcstar.com
To reach Stacy Downs, call (816) 234-7716 or send e-mail to sdowns@kcstar.com

THE LAW

The Kansas Supreme Court based its ruling on two sections of Kansas' marriage laws.

Section 23-101. Nature of marriage relation. The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

Section 23-115. Validity of marriages contracted without state. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

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[3] Letter: 'Intersexuality' part of nature

The Star rightly notes that some human beings at birth are neither clearly male or female (3/3, A-1, "He or she' ruling in Kansas to have legal, social effects.") Anne Fausto Sterling, geneticist and professor of science at Brown University, in "The Five Sexes - Why Male and Female Are Not Enough" in the March-April 1993 journal *The Sciences*, wrote that the "standard medical literature uses the term intersex as a catch-all term for three major subgroups with some mixture of male and female characteristics." She notes that some have "one testes and one ovary"; others "have testes and some aspect of the female genitalia but no ovaries." Still others "have ovaries

and some aspects of the male genitalia but lack testes."

Professor John Money of Johns Hopkins University suggests that these intersex individuals "may constitute as many as four percent of births." Some obstetricians change or seek to change an intersex birth into either male or female by altering genitalia. Such infants are at some point entered into a program of hormonal treatment. However, this is not always successful. If this intersexuality has occurred for thousands of years as scientists indicate, it is an aspect of nature, and not something willed by an embryo or fetus. It may, however, be something an adult may wish to change given the prejudices of society. It is interesting to note that among some American Indians, a homosexual or an intersexual person is likely to be a shaman or "medicine man" or "medicine woman" regarded as having the wisdom of both sexes. The truly religious or moral person will not discriminate against or seek to punish these people.

-- John M. Swomley, Emeritus professor, social ethics, Saint Paul School of Theology, Kansas City

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COMMENTARY:

FWD from PR Frye - Please feel free to forward to other lists.

[4] Kansas Joins List of States Approving Same-Sex Marriages

Today, the State of Kansas joins the growing list of states that have approved legalized same-sex marriage.

<http://www.kscourts.org/kscases/supct/2002/20020315/85030.htm>

The Kansas Supreme Court ruled that a person with a surgically created vagina is legally male for the purposes of marriage. Therefore, once again, any vaginaed transgendered woman can legally marry another originally vaginaed lesbian woman, and any penisid transgendered man can legally marry another originally penisid gay man.

When the Texas 4th Court did that in Littleton, we began to push through such transgender-lesbian marriages. For details on the STUPIDITY of it all, go to my website at <http://transgenderlegal.com> and read about the Wick's same-sex marriages. Also, read about the legality of same-sex marriages in 64 Albany Law Review 1031 (2001) which is posted on my website.

In reaching its conclusion, the Kansas Supreme Court could have easily been preparing a Sunday sermon for the members of any religious right, so-called christian church.

It was a religious decision!

The Kansas Supreme Court embraced the STUPID AND OUTDATED Corbett case out of

England that relied on the medical science of the late 1960s. Let us hope that the medical profession in the State of Kansas does not use medical science of the late 1960s. Alyson Meiselman, Katrina Rose and I trounced this STUPID AND OUTDATED thinking in the recent law review that is cited as 2 Georgetown Journal of Gender and the Law 735 (2001). I wish it was on my website, but my webmistress has been busy. Hopefully soon.

The Kansas Supreme Court left the legal plight of the intersexed in limbo as it trashed Professor Julie Greenberg's law review article found in 52 Florida Law Review 745 (2000) which is frequently cited in my "Cider House Rules" law review article found on my website at <http://transgenderlegal.com> and discussed at length in the Littleton appeal to the Texas Supreme Court that was done by Alyson Meiselman and Me and is on my website for you to review.

The Kansas Supreme Court embraced the Karen Ulane vs Eastern Airlines DECADES-OLD ruling which stated that while discrimination on the basis of sex is illegal, discrimination on the basis of change-of-sex is not. This STUPID AND OUTDATED reasoning was chewed up over ten years ago by the brilliant (and unfortunately deceased) Oregon TG lawyer, JoAnna McNamera, who pointed out that a person who was discriminated against on the basis of change-of-religion would certainly not suffer such a STUPIDLY REASONED fate. The details of her analysis are related in detail in my "Cider House Rules" law review article that is found on my website at <http://transgenderlegal.com> or as is cited as 7 William and Mary Journal of Women and the Law 133 (2000). The McNamera logic was also argued in the Littleton appeal that Alyson Meiselman and I made to the US Supreme Court (which is also available in our Writ for Certiorari found on my website at <http://transgenderlegal.com>).

That the Ulane decision was referred to recently in disparaging terms by the Schwenk Court seemed to have no effect upon the STUPID AND OUTDATED Kansas Supreme Court. The details of that analysis are related in detail in my "Cider House Rules" law review article that is found on my website at <http://transgenderlegal.com> or as is cited as 7 William and Mary Journal of Women and the Law 133 (2000).

Although it is a sad ruling for my people, I can certainly understand it.

Until more transgenders come OUT, get politically active, and FIGHT, FIGHT, FIGHT for their dignity, more of this so-called christian, religiously based legal-drivel will emerge.

SURELY WE DON'T THINK THE BIGOTS ARE GOING TO JUST BE NICE AND GIVE US OUR RIGHTS BECAUSE WE SAY PLEASE!

I suggest we take the STUPID AND OUTDATED Kansas Supreme Court ruling and shove it down their throats!

How?

I hope that transgendered women and their lesbian lovers, and transgendered men and their gay lovers will go to Kansas -- with full media attention -- and get legally married the same way we did it in San Antonio, Texas (see my website at <http://transgenderlegal.com> and read about the

Wick's same-sex marriages). Also, read about the legality of same-sex marriages in 64 Albany Law Review 1031 (2001).

If anymore transgendered women and their lesbian lovers, and transgendered men and their gay lovers want to get legally married in San Antonio, Texas, let me know. The media there is very good to us.

UNTIL THEN, IF YOU ARE TG AND STILL CLOSETED, ----- THEN SHAME ON YOU. YOU ARE THE PROBLEM!

Phyllis Randolph Frye
a.k.a. the Phyllabuster
<http://transgenderlegal.com>