CITATION: VAOPGCPREC 15-90
Vet. Aff. Op. Gen. Couns. Prec. 15-90

DATE: 05-25-90

TEXT:

Benefit Determinations Involving Validity of Marriage of Transsexual Veterans

QUESTION PRESENTED:

Is a transsexual veteran, who undergoes sexual reassignment surgery and then marries a member of the veteran's original gender, entitled to the additional VA benefits normally provided on account of a spouse?

COMMENTS:

1. The question herein arose when a transsexual veteran married an individual of the same pre-surgical sex as the veteran. Developments in medical science have created a new sexual classification termed "transsexual." FN1 The transsexual, who has undergone sex-reassignment surgery, is not easily categorized as a member of either sex, and therefore any benefit decision which stems from a transsexual veteran's sexual status, in particular, determination of the validity of a post-surgical marriage, is complicated. This opinion analyzes the necessary criteria for making VA benefit decisions for post- surgical transsexuals.

2. The facts giving rise to this issue are as follows. The veteran was born * * * (a female) on March 7, 1958. The veteran entered service on March 24, 1976, and on March 21, 1977, married a male, assuming the husband's surname. Following the veteran's honorable discharge in August of 1977, the veteran assumed the full identity of a male. During the period 1983-1985, the veteran had a hysterectomy and a total mastectomy and began hormonal treatments which resulted in the appearance of male characteristics. On October 13, 1986, the veteran obtained a legal name change to * * *. In July 1987, the veteran applied for a marriage license under the name * * *. The license was granted on July 31, 1987, and the veteran married a female on August 1, 1987.

3. Following the marriage, a claim was filed by the veteran requesting additional VA benefits on account of the veteran's spouse. FN2 The veteran appeared at the Houston VA Regional Office on June 29, 1988, to present evidence as to why entitlement to additional VA benefits for a dependent should be granted. The Houston Regional Office determined that the veteran's marriage was not valid for VA benefit purposes as Texas law prohibits the marriage of two people of the same sex. The veteran appealed the decision of the Regional Office to the Board of Veterans Appeals (BVA). A hearing was held before BVA on the issue

of the veteran's entitlement. BVA remanded the case to the Regional Office and requested review of additional evidence presented by the veteran. The evidence submitted includes statements from both a medical doctor FN3 and a social worker FN4 regarding the veteran's treatment and sexual status. The veteran has also submitted a court order dated March 9, 1989, issued by the District Court of Harris County, Texas, which directed that the veteran's birth certificate be amended to reflect both the name change and the change in gender. On May 10, 1989, the Texas Department of Health, Bureau of Vital Statistics, issued a "Certification of Birth" which indicated the veteran's sex as "male". The letters received from the social worker and the physician indicate that the veteran should be considered "from all aspects, psychologically, hormonally, and sexually to be a member of the male sexual gender." Following remand, the adjudication officer requested an opinion as to the legal effect of the new evidence.

4. This issue turns on whether the veteran's second "marriage" is valid. The law that governs Department of Veterans Affairs (VA) determinations of marital status has, as one of its fundamental principles, that a veteran's spouse is a person of the opposite sex. See 38 U.S.C. § 101(31). Under 38 C.F.R. § 3.50(a) and (c), a spouse is "a person of the opposite sex" "whose marriage to the veteran meets the requirements of § 3.1(j)." As defined in 38 C.F.R. § 3.1(j), "marriage" means "a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued." In this case, it is clear that the applicable state law must be examined in order to reach a decision on the validity of the veteran's marriage, and the law of Texas is the relevant state law. In Texas, there is a strong presumption in favor of the validity of a marriage. See Tex. Fam. Code Ann. § 2.01 (Vernon 1975). Neither the Texas statutes nor the Texas case law directly address the issue of the validity of a transsexual marriage. Pursuant to Tex. Fam. Code Ann. § 1.01 (Vernon 1975), "a license may not be issued for the marriage of persons of the same sex." FN5 The prohibition against same sex marriages was cited in the case Stayton v. State, 633 S.W.2d 934, 937 (Tex.Ct.App.1982). The court in Slayton examined whether a criminal indictment alleging indecency with a child was defective due to failure to allege that the defendant was not married to the victim. FN6 The court found that the indictment was sufficient, stating that " i n Texas, it is not possible for a marriage to exist between persons of the same sex. They may not marry one another, either with or without formalities of law." Id. While Texas does not permit two people of the same sex to marry, it does allow a person to change the sex designation listed on his or her birth certificate. See Tex. Health & Safety Code Ann. §§ 192.011 and 192.028 (Vernon 1990).

5. Other jurisdictions have examined the issue of the significance of a change of birth certificate for purposes of whether the legal sex of a transsexual can be considered to have changed. The Probate Court of Stark County, Ohio, in the case In re Ladrach, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987) examined this situation. The issue in Ladrach surfaced when a postoperative male to female

transsexual requested that a county clerk issue a marriage certificate to permit the applicant's marriage to a biological male. The clerk contacted the probate court judge who examined the issue of "whether a post-operative male to female transsexual is permitted under Ohio law to marry a male." 513 N.E.2d at 830. In reaching a decision, the court referenced the fact that the birth certificate of the applicant still referred to the applicant as a "male" and that Ohio law did not permit persons of the same sex to marry. The court stated that " i t is the position of this court that the Ohio correction of birth record statute, R.C. 3705.20, is strictly a 'correction' type statute, which permits the probate court when presented with appropriate documentation to correct errors such as spelling of names, dates, race and sex, if in fact the original was in error." The Ohio probate court cited the holding of the Supreme Court of Oregon in the case, K. v. Health Division, Department of Human Resources, 277 Or.371, 560P.2d 1070 (1977), which reversed the Oregon Court of Appeals decision reported at 26 Or. App. 311, 552 p.2d 840 (1976), permitting the issuance of a new birth certificate to a post-surgical transsexual. In reversing, the Supreme Court of Oregon found that " i n our opinion ... it was the intent of the legislature of Oregon that a 'birth certificate' is an historical record of the facts as they existed at the time of birth, subject to the specific exceptions provided by statute." Id. at 313, 560 P.2d at 72. FN7 The court in Ladrach also stated that "it seems obvious to the court 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." 513 N.E.2d at 831.

6. The significance of Ladrach is that, unlike Texas, Ohio only permits birth certificates to be changed for the correction of errors in the original entry of data. Similarly, until 1981, Oregon had a strict correction statute, as reflected in the Health Division decision. Texas statutes, on the other hand, while not mentioning modifications based on surgical change of sex, do permit the modification of birth certificates for correction of records "proved by satisfactory evidence to be inaccurate." See Tex. Health & Safety Code Ann. § 191.028 (Vernon 1990). Here the veteran has, pursuant to a court order, obtained a new birth certificate which indicates that he is a male. It would therefore seem that Texas recognizes the veteran as a male, and that he should be treated as such for all purposes under Texas law. The complicating element is when the veteran's sex actually changed in relation to when the marriage took place.

7. When the anatomical reassignment can be deemed to have taken place was addressed in a leading case on the validity of a post-surgical transsexual marriage, M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (1976). The legal issues appeared in the context of a support and maintenance action when the defendant/husband raised the defense that the wife/plaintiff was a male and therefore their marriage was void. Testimony established that the "wife" underwent sex-reassignment surgery in 1971 and that the couple were married approximately one year later. The court specifically addressed the issue of

whether the marriage of a male to a postoperative female transsexual was a lawful marriage of a man and a woman. The court began with the premise that a lawful marriage requires two persons of the opposite sex. The court then rejected a pure biological approach FN8 and adopted a dual test based upon anatomy and gender, holding that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche, or psychological sex, then identity by sex must be governed by the congruence of those standards." Id. at 87,355 A.2d at 209. The court in M.T. concluded by stating:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.

... Consequently, plaintiff should be considered a member of the female sex for marital purposes.

Id. at 88-89, 355 A.2d. at 210-11.

The significance of the above discussion is to provide a reference point for making benefit determinations. The discussion by the court in M.T. highlights the importance of analyzing the facts in making status decisions relating to transsexuals.

8. Here, the available facts raise several areas of concern which may require additional development by the Adjudication Officer. First, it is important to develop some information to verify that the veteran was divorced from the previous spouse at the time of the second marriage. Furthermore, while the veteran obtained a marriage license in July of 1987, the court order directing the change of gender did not issue until March of 1989. The information provided in the form of statements from both a physician and a social worker does not clearly indicate when the veteran had the surgery which resulted in the veteran's sex organs being modified from female to male. Additional information from the veteran or the veteran's physician would clarify the veteran's sex at the time of the marriage. Such clarification is necessary in light of a prior General Counsel opinion on this subject.

9. The General Counsel, applying state law (Minnesota), FN9 has held that a pre-surgical marriage by a transsexual veteran will not be recognized for benefit purposes as a valid marriage under Federal law because, at the time of the ceremony, the “spouse" was not a person of the opposite sex. Op. G.C. 1-80 (4-18-80). If the present claim is to be distinguished from the factual situation presented in Op. G.C. 1-80, then it is important that the "sex" of the veteran at

the time of the marriage ceremony be verified.

10. Accordingly, the application of Texas law, as required by 38 C.F.R. § 3.1(j), appears to permit a determination that the veteran is now a male who is legally married to a female. However, a decision on this issue will depend on whether the adjudication officials are satisfied that the veteran was in fact a "male" at the time of the veteran's second marriage. We note that, if benefits are denied, the veteran could create a valid marriage by going through another marriage ceremony with the current spouse. In addition, common-law marriages are recognized in Texas. See Tex. Fam. Code Ann. § 1.91 (Vernon 1975). The veteran's current relationship appears to meet the qualifications of such a marriage under Texas Law. Id. See also Collora v. Navarro, 574 S.W.2d 65, 68 (1978). It follows then that regardless of the decision reached as to whether the veteran previously entered into a valid marriage, the veteran's current status may nonetheless permit a finding that benefits are due. While many factors should be considered in making a decision as to this veteran's entitlement to additional vocational benefits, the answer will primarily result from a detailed factual review by adjudication personnel within the framework of the above-described legal principles.

HELD

Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse.

1 See Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 Cornell L. Rev. 963, 963 n. 1 (1971). "A transsexual is an individual anatomically of one sex who firmly believes he belongs to the other sex. This belief is so strong that the transsexual is obsessed with the desire to have his body, appearance, and social status altered to conform to that of his 'rightful' gender."

2 Section 1508(b) of title 38, United States Code, authorizes additional vocational rehabilitation benefits for a veteran with a dependent spouse.

3 The physician issuing the correspondence is the Chief of Gynecology at both the Ben Taub General Hospital and the VA Medical Center in Houston, Texas.

4 The social worker issuing the correspondence indicates that she possesses a master's degree in social work along with State of Texas certification as an Advanced Clinical Practitioner.

5 An opinion by the Texas Attorney General on the validity of a transsexual marriage was requested by the Houston Regional Office. The Texas Attorney

General's Office has declined to render an opinion, stating that that office is precluded by statute from issuing opinions to individuals who are not authorized by Texas law to request such opinions.

6 The defendant and the victim were both male.

7 The Oregon legislature revised the applicable statutes in 1981 to specifically provide for a legal change of sex following sex-change surgery. See Or. Rev. Stat. § 33.460 (1985).

8 Compare the English case Corbett v. Corbett, 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A.1970), where the court, in a descriptive opinion involving very unusual facts, found that biological sex is determined at birth and cannot be changed by natural or surgical means.

9 While the state code of Minnesota does not specifically prohibit same-sex marriages, the Supreme Court of Minnesota has determined that same-sex marriages are void. Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972).

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