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# ***KIRK V. ARNOLD:* THE TRANSFORMATION OF TRANSGENDER BIRTH CERTIFICATE REQUIREMENTS IN ILLINOIS**

*by* **BRITTANY KUBES**

“**I**’ve faced a lifetime of incongruence and there’s this piece of paper that is . . . wrong. It says I’m someone I’m not,” stated Karissa Rothkopf, after Illinois refused to amend her birth certificate when she received sex reassignment surgery.<sup>1</sup>

For Karissa Rothkopf and other transgender individuals, a birth certificate is more than just a piece of paper. Throughout the past 40 years, Illinois has permitted individuals who have sex reassignment surgery to change the gender marker, or status, on their original birth certificates.<sup>2</sup> In 2004, however, the Illinois State Registrar of Vital Records (Registrar) changed its interpretation of the law to allow an individual to change his or her birth certificate only if: (1) a U.S. licensed physician performs the sex reassignment surgery,<sup>3</sup> and (2) a female-to-male transsexual has a specific surgery attaching a viable penis.<sup>4</sup>

Victoria Kirk, Karissa Rothkopf and Riley Johnson filed a lawsuit in January 2009 seeking to suppress the Registrar's new interpretation of the law.<sup>5</sup> The future of gender identity for transgender individuals may rely on the outcome of this case.

#### OVERVIEW OF *KIRK V. ARNOLD*

Prior to 2004, the Registrar altered the gender marker on an individual's birth certificate when it received an affidavit from any physician confirming the completion of any gender reassignment surgery.<sup>6</sup> However, after an Illinois case, *In re Marriage of Simmons* (*Simmons*), the Registrar began to interpret the surgical requirements in a more stringent manner.<sup>7</sup> In 2004, the Registrar only accepted a surgery that attempted to "create, attach or form a viable penis" for female-to-male transgender individuals, such as Johnson, and only accepted affidavits from doctors licensed in the U.S.<sup>8</sup>

Following *Simmons*, the three *Kirk* plaintiffs asked the state of Illinois to amend their birth certificates according to their new gender identities in 2008.<sup>9</sup> These requests, however, were initially denied because Kirk and Rothkopf received their surgeries from non-U.S. licensed physicians and Johnson did not obtain genital surgery at all.<sup>10</sup>

On Nov. 18, 2009, the Registrar partially amended the policy it created in 2004 to permit surgeries received from foreign physicians as long as an applicant could verify the surgery's completion via a U.S. physician's affidavit.<sup>11</sup> Though two of the Kirk plaintiffs did not comply with this policy restriction, the state of Illinois agreed to amend their birth certificates according to their appropriate gender identities because of the pending lawsuit.<sup>12</sup>

The plaintiffs considered this change in policy, permitting foreign doctors to perform the requisite surgery, a success.<sup>13</sup> Still, Kirk and Rothkopf are proceeding with their suit in order to change the Registrar's surgical requirement and ensure that other transgender individuals can receive altered birth certificates.<sup>14</sup> According to the plaintiffs, "[c]hanging the name and gender on a person's identity documents is another important aspect of sex reassignment, since those documents are crucial to that person's ability to function successfully in the new gender."<sup>15</sup>

Presently, the Registrar continues to call for the completion of a gender reassignment surgery in order to alter the gender marker on a birth certificate.<sup>16</sup> Johnson, a female-to-male transgender individual, initially contested the requirement that the requisite surgery be one that attempts to "create, attach or form a viable penis,"<sup>17</sup> because Johnson wants his birth certificate to reflect his male identification but does not desire genital surgery.<sup>18</sup>

In 2009, however, the Registrar changed its policy yet again. The definition for gender reassignment surgery now states: "If you have a question as to whether you have completed gender reassignment surgery, contact your physician for clarification."<sup>19</sup> Although Johnson received an altered birth certificate without genital surgery, he is pursuing the lawsuit to clarify what gender reassignment surgery means.<sup>20</sup> Johnson does not think gender reassignment surgery is only completed by the creation of a viable penis, but rather should include the medical treatment most appropriate for each individual.<sup>21</sup>

Pursuant to the plaintiffs' requests, the Registrar recently announced that it will prepare new standards for determining "how much surgery" will be required if an individual wants to receive a gender-altered birth certificate.<sup>22</sup> The plaintiffs want to ensure these new standards give transgender individuals the freedom to choose the surgery most appropriate for them.<sup>23</sup>

#### THE VALUE OF BIRTH CERTIFICATES IN ILLINOIS: *KIRK'S* POTENTIAL IMPACT

Gender is the first designation an individual receives when entering the world. Most people will be satisfied with this initial assessment, but others may be uncomfortable with their assigned gender.<sup>24</sup> Kirk, Rothkopf and Johnson contend that individuals may need birth certificates for a variety of reasons: to

marry, to prove employment eligibility, to obtain other identity documents allowing them to vote, to travel, to enter a building or to gain access to government services or benefits.<sup>25</sup>

Accordingly, they believe that an authoritative determination by the court defining the specific surgical requirements for an individual seeking to alter a birth certificate would benefit the larger transsexual community, as well as the state of Illinois in establishing a uniform standard.<sup>26</sup>

The plaintiffs continue to argue against requiring a single surgical procedure for all transgender individuals.<sup>27</sup> Instead, the plaintiffs want Illinois to allow the medical treatment most appropriate for each individual, whether that entails surgery or not.<sup>28</sup> In contrast, the Registrar is attempting to abide by the Illinois Appellate Court's instructive reasoning in *Simmons* that they conduct a more thorough investigation to discern whether an individual has in fact assumed a new gender.<sup>29</sup>

It remains to be seen whether the *Kirk* plaintiffs will prevail on their claim that seeks to abolish or broaden the scope of the surgical requirement or whether the Registrar will answer the court's call for strict surgical requirements in *Simmons*.<sup>30</sup> One thing is for certain: the *Kirk* plaintiffs maintain that this is "not the end of the story."<sup>31</sup> They pledge to guarantee that the Registrar's new regulation is in compliance with the Constitution.<sup>32</sup>

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## NOTES

1 Karissa Rothkopf in *Transgender Rights: Illinois Birth Certificates*, American Civil Liberties Union, [http://www.aclu.org/lgbt-rights\\_hiv-aids/kirk-v-arnold-case-profile](http://www.aclu.org/lgbt-rights_hiv-aids/kirk-v-arnold-case-profile) (last visited Nov. 4, 2009).

2 Press Release, ACLU, Women Ask Court to Order New Illinois Birth Certificates Following Sex Reassignment Surgery Abroad (Jan. 27, 2009), <http://www.aclu.org/lgbt/transgender/38500prs20090127.html>.

3 *Id.*

4 Amended Complaint at 4, *Kirk v. Arnold*, No. 09-CH-3226 (Circuit Court of Cook County, April 7, 2009).

5 American Civil Liberties Union, *supra* note 2.

6 410 Ill. Comp. Stat. 535/17(d) (2002).

7 Telephone interview with John Knight, Plaintiffs' Attorney, ACLU (Nov. 19, 2009).

8 Amended Complaint, *supra* note 4, at 2.

9 *Id.* at 3.

10 American Civil Liberties Union, *supra* note 2.

- 11 Illinois Department of Public Health, *Gender Reassignment*, <http://www.idph.state.il.us/vitalrecords/gender.htm> (last visited Nov. 19, 2009).
- 12 Knight, *supra* note 7.
- 13 *Id.*
- 14 Response to Defendant's Section 2-619 Motion to Dismiss Plaintiffs' First Amended Complaint at 2, *Kirk v. Arnold*, No. 09 CH 3226 (Circuit Court of Cook County, Aug. 3, 2009).
- 15 Amended Complaint, *supra* note 4, at 2.
- 16 Illinois Department of Public Health, *supra* note 11.
- 17 Amended Complaint, *supra* note 4, at 2.
- 18 Knight, *supra* note 7.
- 19 Illinois Department of Public Health, *supra* note 11.
- 20 Response, *supra* note 14.
- 21 Amended Complaint, *supra* note 4.
- 22 Press Release, ACLU, Reversing Two Restrictive Policies, Illinois Issues Accurate Birth Certificates to Three Transgender Persons (Nov. 16, 2009), <http://www.aclu.org/lgbt-rights/reversing-two-restrictive-policies-illinois-issues-accurate-birth-certificates-three-tra>.
- 23 See Dean Spade, *Resisting Medicine, Remodeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 18 (2003).
- 24 Kristin Wenstrom, "What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies, 17 LAW & SEXUALITY 131, 134 (2008).
- 25 Response, *supra* note 14, at 12.
- 26 *Id.* at 11.
- 27 Spade, *supra* note 23, at 19.
- 28 Amended Complaint, *supra* note 4, at 4.
- 29 *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 1st Dist. 2005).
- 30 Reversing Two Restrictive Policies, *supra* note 22.
- 31 Knight, *supra* note 7.
- 32 *Id.*