Kevin and Jennifer Revisited

Re: Kevin and Jennifer v Attorney-General for the Commonwealth [2001]: A Critique

by Andrew Sharpe, Senior Lecturer in Law at Macquarie University and author of *Transgender Jurisprudence: dysphoric bodies of law.*
Article appeared in Polare magazine: December 2002 Last Update: October 2013 Last Reviewed: September 2015

Kevin and Jennifer: In deciding that Kevin was a man for the purposes of marriage, Justice Chisholm placed special emphasis that Kevin was perceived to be, and was accepted as, a man by his family, friends and work colleagues.

The struggle of transgender people for legal recognition of their sex claims is not new. In relation to those jurisdictions governed by the common law, which include Australia, this struggle might be dated to the 1957 Scottish decision of Re: X [1] which involved the refusal of transgender sex claims. Since that time two distinct legal approaches to such claims have emerged in the common law world. The first, which has relied heavily on the 1970 English decision of Corbett v Corbett [2], has insisted that sex is determined at birth and by a congruence of chromosomes, gonads and genitalia. This approach, though perhaps on the wane, continues to have considerable purchase in some jurisdictions as rendered evident recently in the Supreme Court of Texas decision in Littleton v Prange [1999] [3]. The second approach has preferred to ignore biological factors as assessed at birth preferring instead to focus on present realities. Here the courts have emphasised the fact of sex reassignment surgery and the need for law to reflect medical and social realities. Within this approach sex reassignment surgery has served as a threshold for legal recognition for a variety of legal purposes including marriage.

> ***Now, in addition to the gaze of medicine and of law, transgender people making legal claims would appear to be subject to the gaze of the community.***

This second approach, which has been premised on the notion of psychological and anatomical harmony effected by sex reassignment surgery, requires further comment. Specifically, it is clear from the case law that sex reassignment surgery is equated with genital change. That is to say, legal recognition has required vaginoplasty/phalloplasty. Moreover, in many decisions the courts have emphasised not only the need for surgery but also that surgery is designed to produce, and indeed must produce, the capacity for heterosexual intercourse [4].

Indeed, in many decisions judges seem to make sense of the desire for surgery only in terms of an outcome that involves heterosexual penetration. More recently, in the New Zealand decision of Attorney-General v Otahuhu Family Court [1995] [5] Justice Ellis, and in contrast to these earlier reform decisions, insisted that post-operative capacity for sexual intercourse was an irrelevant factor for the purpose of determining sex claims in the context of New Zealand marriage law. Nevertheless, his decision reinforces the requirement that genital surgeries take place. In this regard sex (genital) reassignment surgery continues to function as a threshold in legal determinations of sex claims.

The Decision

It is against this background that the recent decision of Justice Chisholm of the Family Court of Australia in Re: Kevin and Jennifer v Attorney-General for the Commonwealth [6] needs to be understood. The decision is significant in a number of respects. First, while the reform approach of psychological and anatomical harmony had already established itself within the Australian context it had not hitherto been extended to marriage. Indeed, there are passages contained within prior Australian reform decisions that appear to insulate marriage law from the effects of those decisions [7]. In Re: Kevin, Justice Chisholm recognised Kevin to be a man and his marriage to Jennifer to be a legally valid marriage for the purposes of Australian marriage law. Thus the decision is significant as the first Australian decision to apply the reform approach to marriage law, an area that historically has proved the most resistant to reform. However, in these respects Justice Chisholm's judgement is not novel. The application of the psychological and anatomical harmony approach to marriage law can be dated to the 1976 New Jersey of M.T. v J.T. [8] There is, however, more to Justice Chisholm's judgement.

The decision in Re: Kevin does not merely endorse a well established reform approach in the Australian marriage context. Rather, it breaks with that approach in a significant respect. In contrast to prior decisions that had looked to sex (genital) reassignment surgery as a threshold requirement, Justice Chisholm recognised Kevin's claim to be a man even though he had not undertaken phalloplasty procedures. In this respect the decision places Australia at the forefront of transgender law reform through common law means. Nevertheless, the decision contains a number of features that, in my view, present difficulties. First, and most obviously, while

abandoning a requirement for genital surgery the decision otherwise retains the link between legal recognition and surgical intervention. That is to say, sex reassignment surgery, which Kevin had undertaken, is still required. The difference is that this does not necessarily entail genital surgeries. To this extent the decision might be viewed as simply an extension of prior reform decisions, whereby harmony, in the context of an approach premised on psychological and anatomical harmony, is re-imagined.

There are, however, two other features of the decision, previously absent or marginalised within Australian reform decisions, which might be viewed as troubling. First, the decision gives weight to biological considerations and in particular evidence concerning brain sex suggesting that gender identity is linked to the development in utero of a particular part of the brain. It is not my aim here to question the validity of this science. Rather, my concern lies with its relevance. It is clear from transgender reform decisions that the legal determination of sex can not be reduced to scientific understandings of the body. These decisions have instead focused on social policy and human rights considerations. To emphasise biological factors such as brain sex is to re-orient legal analysis away from present reality, a temporal moment around which reform has been built. In other words, it is to reinforce the significance of the birth moment. For those who might think that this has limited practical relevance, imagine that brain sex were to become a crucial ingredient in future legal determinations of sex. Then imagine that a brain sex test became available for living persons (currently determinations as to brain sex, the relevance of which it should be remembered is still currently debated within the scientific community, are only possible post-mortem). It may be that a transgender person whose sex claims are currently recognised would produce a negative test result. This could only serve to undermine his/her sex claims in legal contexts. It is particularly unfortunate that biological has been introduced in the Australian context given its prior irrelevance to reform. It is a step that in an important way undercuts the centrality of the present moment, of lived reality, to reform.

Finally, the decision in Re: Kevin is problematic because, in additional to the biological, it introduces other elements. Specifically, the decision introduces the elements of the social and the cultural. In deciding that Kevin was a man for the purposes of marriage, Justice Chisholm placed special emphasis on the fact that Kevin was perceived to be, and was accepted as, a man by his family, friends and work colleagues. While Kevin is fortunate enough to "pass" as a man and to have supportive family, friends and work colleagues this may not be the experience of many transgender people. It is unfortunate that legal recognition should in any way hinge upon the gaze of "others". Now, in addition to the gaze of medicine and of law, transgender people making legal claims would appear to be subject to the gaze of the community. This aspect of the judgement might be viewed as undermining further self-determination of transgender people and is out of step with human rights jurisprudence.

Notes

[1] Re: X, Petitioner [1957] Scot. L. Rev. 203

[2] Corbett v Corbett [1970] 2 All ER 33

[3] Littleton v Prange 9 v 3d 223 (Tx App. 1999).

[4] See, for example, Re: Anonymous 293 N.Y.S. 2d 834 (1968); M.T. v J.T. 355 A. 2d 204 (1976); R v Harris and McGuiness [1989] 17 N.S.W.L.R. 158; Secretary, Department of Social Security v S.R.A. [1993] 118 A.L.R. 467; M v M [1991] N.Z.F.L.R. 337.

[5] Attorney-General v Otahuhu Family Court [1995] 1 N.Z.L.R. 603

[6] Re Kevin and Jennifer v Attorney-General for the Commonwealth [2001] FamCA 1074

[7] See R v Harris and McGuiness [1989] 17 N.S.W.L.R. 158; Secretary, Department of Social Security v S.R.A. [1993] 118 A.L.R. 467

[8] M.T. v J.T. 355 A.A 2d 204 (1976)

Polare Magazine is published quarterly in Australia by The Gender Centre Inc. which is funded by the Department of Family & Community Services under the S.A.A.P. program and supported by the N.S.W. Health Department through the AIDS and Infectious Diseases Branch. Polare provides a forum for discussion and debate on gender issues. Unsolicited contributions are welcome, the editor reserves the right to edit such contributions without notification. Any submission which appears in Polare may be published on our internet site. Opinions expressed in this publication do not necessarily reflect those of the Editor, The Gender Centre Inc., the Department of Family & Community Services or the N.S.W. Department of Health.