

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

FC 2012-051183

06/26/2012

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT  
C. Vigil  
Deputy

IN RE THE MARRIAGE OF  
THOMAS T BEATIE

MICHAEL P CLANCY

AND

NANCY J BEATIE

DAVID B HIGGINS

ALTERNATIVE DISPUTE  
RESOLUTION - CCC

**Nunc Pro Tunc Order**

This order is prompted by the Court's duty to determine independently whether it has subject matter jurisdiction. *See Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, 88-89, ¶2, 270 P.3d 915, 915-16 (App. 2012) (stating that "[o]ur jurisdiction is provided and limited by statute, and we have an independent duty to confirm whether we have jurisdiction over the case before us" (citation omitted)); *see also* Charles A. Wright, Arthur R. Miller, et al., 13D FEDERAL PRACTICE AND PROCEDURE §3536 (3d ed. 2011) (stating that trial courts "are under the obligation to ensure that they have subject matter jurisdiction over the controversy, even when a party fails to raise the issue"); *see generally Weaver v. Weaver*, 131 Ariz. 586, 587, 643 P.2d 499, 500 (1982) (stating that a dissolution proceeding is "a statutory action, and the trial court has only such jurisdiction as is granted by statute"). As explained below, after further review of the filings submitted by the parties in this matter, this Court has concerns about the subject matter jurisdiction to which the parties have seemingly consented.<sup>1</sup>

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<sup>1</sup> Parties are not permitted to stipulate to subject matter jurisdiction. *Acheson v. Acheson*, 107 Ariz. 235, 239, 485 P.2d 560, 564 (1971); *see also Thomas v. Thomas*, 203 Ariz. 34, 36, ¶9, 49 P.3d 306, 308 (App. 2002).

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On March 8, 2012, Petitioner Thomas Beatie filed a Petition for Legal Separation of a Non-Covenant Marriage with Children that, among other things, alleged that the parties were married on February 5, 2003, in Hawaii. The Response (3/16/12) filed by Respondent Nancy J. Beatie did not contest that allegation. At the same time, Respondent filed a Motion to Convert Case to a Dissolution of Marriage (3/16/12), stating that she “has no interest in staying married” to Petitioner. Petitioner agreed to the requested conversion. [Petitioner’s Response to Respondent’s Motion to Convert Case to a Dissolution of Marriage (4/6/12)]

Petitioner and Respondent maintain that they married before the births of the three children who are the subjects of the parties’ custody and parenting time claims. [(Petitioner’s) Petition for Legal Separation at 1, paras. 5-6; (Respondent’s) Response to Petition at 1, para. 1; Respondent’s Motion for Temporary Orders at 1, para. 2] Petitioner freely concedes giving birth to each of those children. [E.g., (Respondent’s) Temporary Orders Memorandum (5/4/12) at 1; Petitioner’s testimony (5/16/12)] In other words, it appears that, by any reasonable standard, Petitioner was the biological mother of those children at the times they were born. As such, the parties’ marriage was between a female (Respondent) and a person capable of giving birth, who later did so (Petitioner).

Despite an extensive search, the Court has located no authority that defines a man (or male) in terms that contemplate that person’s ability to give birth to children. Thus, this question: are we dealing here with a same-sex marriage? In that regard, see for example, the following: OXFORD ENGLISH DICTIONARY (Online ed.) (defining “woman” as a “female” and defining “mother” as “a woman in relation to a child or children to whom she has given birth”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed.) (defining “female” as a member of the sex that . . . bears young”); WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (defining “female” as “an individual that bears young . . . as distinguished from a man or boy”).<sup>2</sup>

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<sup>2</sup> Although Hawaii permits its Department of Health to establish a new birth certificate that reflects a change in gender for a person who has undergone a sex change operation [Haw. Rev.Stat. §338-17.7(a)(4)(B)], the record here is silent as to whether Petitioner complied or, for that matter, given the three later births, whether Petitioner was eligible for a new birth certificate before the parties married. Moreover, even if Petitioner was eligible and did comply, it appears that significant questions remain, including: (i) Is the issuance of a new birth certificate anything more than a ministerial act that would not, as a matter of law, make Petitioner a male for purposes of this proceeding? [see *In re Marriage of Simmons*, 355 Ill. App.3d at 949, 825 N.E.2d at 310]; and (ii) In any event, under what authority is an Arizona court obligated to accept as dispositive what an out-of-state health department decides to do with a request for a new birth certificate? [see generally *Cook v. Cook*, 209 Ariz. 487, 490, ¶9, 104 P.3d 857, 860 (App. 2005)].

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Arizona does not recognize same-sex marriages. Ariz. Const. art. 30, §1; A.R.S. §25-101(C)). Among other things, that means (to state the obvious) that no court in this State is permitted to do anything that would amount to recognizing, even tacitly, their validity.<sup>3</sup>

To date, neither party has identified any applicable legal authority establishing that Arizona law recognizes the validity of their marriage. The purpose of this order is to request the parties to do so, because if Arizona law does not recognize that marriage, then any dissolution decree in this matter will be meaningless. *E.g.*, *Andrews v. Andrews*, 126 Ariz. 55, 58, 612 P.2d 511, 514 (App. 1980) (declaring judgment void because trial court lacked jurisdiction to enter judgment); *Solomon v. Findley*, 165 Ariz. 45, 46, 796 P.2d 477, 478 (App. 1990) (stating that “any action taken by a court which does not have jurisdiction is void and a nullity”), *approved*, 167 Ariz. 409, 808 P.2d 294 (1991; *see also Acheson*, 107 Ariz. at 239, 485 P.2d at 564 (holding that divorce decree based on stipulated jurisdictional facts that did not exist was void).

Accordingly, any party who wishes to obtain a dissolution decree from this Court is required to file a memorandum that explains the basis for subject matter jurisdiction here, failing which, the Court will have no alternative but to assume that the parties concede the Court’s lack of jurisdiction.

**IT IS ORDERED:**

1. Not later than July 30, 2012, a party seeking a decree of dissolution in this matter must file a memorandum showing that this Court has subject matter jurisdiction to issue that decree. A party wishing to file a response to such a memorandum must do so no later than August 30, 2012. No reply memorandum shall be filed unless requested by the Court.

2. The temporary orders previously issued will remain in effect. Custody and parenting time/visitation orders (and the order to participate in the Family Drug Court program) do not first require a finding that parties have a valid, or for that matter, any marriage, and no such finding

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<sup>3</sup> The same issue presented here has been treated by courts in other states. *See In re Marriage of Simmons*, 355 Ill. App.3d 942, 825 N.E.2d 303 (2005) (concluding that transsexual male’s marriage to wife was invalid as a same-sex marriage); *see also Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004) (holding that marriage between wife and postoperative female-to-male transsexual was void ab initio); *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002) (holding that marriage between a postoperative male-to-female transsexual and a male was void as against public policy); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (finding that marriage between a male and a postoperative male-to-female transsexual was void); *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (1987) (holding that state law did not recognize marriage between a male and a postoperative male-to-female transsexual).

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has yet been made here. And the support orders, if improvidently granted because the parties consented to jurisdiction, can be dealt with by a later reallocation.

3. To allow time for the briefing described above and any necessary events related to it, the following are vacated:

a. The Settlement Conference scheduled for August 1, 2012, before Judge Pro Tempore Clair W. Lane.

b. The trial scheduled for September 18, 2012.

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter>.