IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

CLARK COUNTY, OHIO

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| IN RE: APPLICATION FOR CORRECTION OF BIRTH RECORD OF | : | CASE NO. 20219090 |
| H. E. A. | : | JUDGE RICHARD P. CAREY |

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This matter came before this Court on November 15, 2021 to consider an Application for Correction of Birth Record filed by, now, H. E. A. concurrently with her Application to change her name from B. E. D. to H. E. A.. Ms. A. appeared with counsel, Attorney Kim Burroughs. The Court did grant her motion to change her name pursuant to her petition.

The issue at bar concerns her request to change what has been described as her gender marker[1] on her birth certificate from "male" to "female". This is a matter of first impression for this Court. R.C. 3705.15 is the applicable Ohio statute and is titled "Correction of Birth Record." That statute provides the following, to-wit:

> "Whoever claims to have been born in this State and whose registration of birth … has not been properly and accurately recorded, may file an application for … correction of the birth record in the probate court in the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth."

[1] Petitioner herein employs the terminology "gender marker" instead of the term found on the birth certificate in question, to-wit: "sex." The two terms are not synonymous. While the term "sex" means historically one of two categories, male or female, on the basis of observable reproductive functions; "gender" is a term used more broadly to denote a range of identities that do not correspond to established understanding of male and female. For this reason, the Court will use "sex marker" to avoid confusion.

Ms. A. testified that she was born on October 15, 1973 and given the name of B. E. D. She testified that she was born with a "boy body" meaning, biologically speaking, that she was born with the male anatomy. This notwithstanding, Ms. A. testified that she has since a very early age, likely as early as age 4, identified as a female. To this day, she identifies "in her heart" as a female. Like many others who find themselves in a similar circumstance, Ms. A. has suffered many challenges throughout her life, and to that end spent much of her life trying to "hide it."

In support of this testimony, Attorney Burroughs also presented the Court with a Plaintiff's Exhibit B which is a letter dated August 9, 2021 signed by clinical psychologist Dr. John P. Layh and clinical intern, William H. Ford. In their letter, they state the following, to-wit:

> "In support of the sexual identity validity of Ms. Hailey DeBoard, I find her to be consistent in mental competency exhibiting true authenticity both in self-awareness and introspection. I, William H. Ford, Sr., MRC, acknowledge and attest to the sexual identity of Ms. H. D. as "female" both psychologically and in lifestyle gender expression."

The Court does not question the sincerity of Ms. A.'s motivations for desiring a change of the sex marker on her birth record. The sole question before this Court is whether or not this Court enjoys the statutory authority to permit it to order such a change. The Court is aware that several probate courts around the State of Ohio have addressed this issue. Several courts have ruled that they do not enjoy the statutory authority to permit an order from their respective courts changing the sex marker on birth certificates. A couple of probate courts have granted the request; nevertheless conceding that they are doing so without said statutory authority.

On this issue, the Court granted the request of Attorney Burroughs to further brief the matter for the benefit of the Court. This, Attorney Burroughs, did on November 24, 2021 with the filing of her post hearing supplemental brief. The Petitioner's well-crafted brief addresses the history of the Ohio Department of Health's approach to this issue prior to 2016 through a 2020 Federal court decision, as well as arguments concerning the statutory interpretation of R.C. §3705.15, constitutional considerations concerning the implementation of this statute, and right of privacy issues, as well as a brief acknowledgement of decisions reached by the probate courts of Allen County, Crawford County, and Mahoning County.

The Petitioner writes that the Ohio Department of Health, prior to 2016, permitted a person to "correct" the person's sex marker upon receipt of an Order penned by an Ohio probate court. Apparently, in 2016, the Ohio Department of Health ended this procedure. The Federal Court for the Southern District of Ohio, Eastern Division, considered this policy change of the Ohio Department of Health and found that it violated the Federal constitutional rights to privacy and equal protection of transgender individuals by adopting a blanket ban precluding individuals from obtaining a correction of the sex marker on their birth certificates "when the basis for that change was that the person was transgender." See *Ray v. McCloud, 507F. Supp. 3rd 925 (2020)* That court concluded that "no portion of the Ohio Revised Code prohibits using 3705.15 to change the sex marker on a birth certificate" and then added "all this court is finding is that a blanket prohibition against transgender people changing their sex marker is unconstitutional." (ID. pg. 26).

This Court has reviewed *Ray v McCloud.* While this Court appreciates the reasoning in that decision, the focus of the decision was on the Ohio Department of Health's policy as opposed to the authority of the Ohio probate courts to issue the order requested. Indeed, the court never pointed out under what authority those probate courts acted prior to 2016. This Court must observe that while nothing in the Code in fact "prohibits" using 3705.15 to change the sex marker on a birth certificate, likewise, nothing in said statute specifically grants the probate court authority to order such a change. This Court must also observe that while the Health Department's policy created a "blanket prohibition" concerning the right of transgender people to change a sex marker, the statute at bar applies not simply to transgender people, but to all people. The fact that the petitioners before the Federal court described themselves as "transgender people" does not transform their case into one of constitutional proportion as it relates to the statute.

The Petitioner, however, asks this Court to find the statute at bar to be ambiguous with respect to the word "sex" and the phrase "has not been properly and accurately recorded." With respect to the word "sex", Petitioner suggests that this Court should give a "technical construction" embracing modern medicine scientific understanding of gender as opposed to the "common construction". This Court, however, finds Petitioner's "technical construction" to be geared more towards "gender identity" as opposed to "sex". The common construction of "sex" has historically been with respect to biology, and here, specifically, based on the appearance of the anatomy. This Court does not find this to be ambiguous.

Nor is this Court compelled to find the phrase "has not been properly and accurately recorded" to be ambiguous. Petitioner contends that the fact that the scriveners of the statute employed the words "has not been" as opposed to "was" suggests an invitation to fluidity. That is, that the sex marker recorded should not be considered to be a fact as much as a suggestion subject to change pending a future decision. This Court is not inclined to believe that this fluidity is a proper alternative to what is otherwise an unambiguous phrase. [2]

The Petitioner also argues that her right of privacy is jeopardized if R.C. §3705.15 is construed to prohibit all sex marker changes. Petitioner cites the *Ray* decision in support of her argument that the risk of victimization to transgender people outweighs the public interest in maintaining the sex marker assigned at birth. The *Ray* court found that the state's interest in maintaining vital statistics must yield to the privacy interests of transgender and gender non-conforming Ohioans. This Court is not so inclined to dismiss the role vital statistics play in our society. The Court is aware that vital statistics play a significant role in medical diagnoses and treatment, in insurance matters, in the criminal justice system, and in the area of competitive sports. To subscribe to the Petitioner's argument would be to find the statute at bar to be unconstitutional. This Court is not prepared to make that leap based on what is before it today.

Petitioner also contends that the rules of statutory interpretation support a finding that R.C. 3705.15 permits applications to correct sex markers on birth certificates.

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[2] The Petitioner speaks of medical advances. And the Court believes that there will be much learned over the course of the next fifty years with respect to the matter of gender identity. But this Court is reluctant to embrace any "science" that prevents a doctor who delivers a new baby into this world from advising the birth parents that the baby is a "boy" or a "girl".

Petitioner argues that this Court should read 3705.15 together with 3705.12 (permitting adoptive children to obtain birth certificates reflecting the names of the adoptive parents and not of birth parents no matter the age of the child), RC 3705.13 (permitting a person who obtained a legal change of name, whether by marriage or not, to obtain a birth certificate that reflects the name change), and RC 3111.18 (requiring the issuance of a new birth record when the identity of the biological parent is established by court order subsequent to birth). In each of those cases, Petitioner contends, the probate court is empowered to issue a "corrected birth certificate based on factual developments that occurred after a child's birth." She contends that a corrected birth record should likewise be issued if a person later believes that their sex marker should be changed.

This final argument embraces the entirety of the matter before this Court. Despite all of her arguments addressing the constitutionality of the matter, alleging the ambiguity of the statute, and analyzing the findings of the Federal court in *Ray v. McCloud*, the Court still is bound by a statute which does not specifically give it authority to do what the Petitioner requests it to do. And, in the final analysis, this is the difference between the statute at bar and the statutes involving adoption, change of name, and changing the birth record upon securing the identity of a biological parent. In all of those instances, the General Assembly has specifically given the Probate Court authority to act. Here, it has not.[3] Here, the Court is limited to "correcting" --- that is remedying or removing error or defect --- and not "changing" the sex marker on the birth record.

[3] Even should this Court concur with the position of the Petitioner and find the statute to be unconstitutional in application, this Court could not simply give itself authority that it does not otherwise enjoy.

The statute authorizes this Court to act when the birth certificate "has not been properly and accurately recorded" and absent such a finding, this Court may not order a "correction" of the same. The Court recognizes that the Petitioner believes that there was an error in the assignment of her sex marker on her birth record. Unfortunately, and by her own admission, her anatomy contradicts this posture. The Court has before it no other evidence that the indication of "male" versus "female" on the birth certificate in question was erroneous. To that end, this Court must find that the birth certificate at bar was "properly and accurately" recorded. Accordingly, it cannot be "corrected."

In returning this decision, this Court takes no satisfaction in frustrating the genuine desire of this Petitioner to change her birth record. This Court, however, is bound to apply the law of the State of Ohio as it currently is written. That law, which is unambiguous, does not authorize this Court to change the sex marker on a birth certificate as requested by this Petitioner. [4] For these reasons, Petitioner's request to correct her birth record is denied.

IT IS SO ORDERED.

**THIS IS A FINAL APPEALABLE ORDER.**

RICHARD P. CAREY, PROBATE JUDGE

[4] Petitioner makes many arguments for consideration by that branch of government which has the authority to address her concerns --- namely, the Ohio General Assembly.