

northwest

Transgender Couples Find Loophole

Some same-sex couples are pushing the boundaries of marriage law

by Julie Sabatier

Many same-sex couples in Oregon are reeling from the roller coaster ride of obtaining their legal right to domestically partner. But because of a legal loophole, a small number of same-sex couples have been able to marry under state and federal law for some time.

Theresa Mitchell and Ani Haines married six years ago when Theresa still went by “Steve” and was biologically male. At that time, they were one man and one woman, but soon after they were married, Mitchell made the transition from male to female, making them one of the few same-sex couples married in Oregon.

“I suspect that there are some who view me as a man who’s dressing as a woman who’s living with a woman, and I know that there are a lot of people who get it,” she said. “If people ask me respectfully, then I’ll just tell them I’m a different sort of person.”

Mitchell and Haines stressed that their marriage contract meant little more to them than the legal protections it brought with it. Neither of them can remember the exact date they tied the knot. Six years before, they had expressed their commitment to one another through a pagan hand-fasting ceremony, which was much more significant for them.

Haines said the two decided to marry for one reason. “Suddenly, seeing that Theresa’s gender was about to be legally changed, we saw this as a big sort of loophole,” she explained. “It was pretty intriguing.”

When Oregonians passed Measure 36 in 2004, marriage was legally defined as the union of one man and one woman, but there is no state case law to address a marriage like Haines’ and Mitchell’s. It’s unclear just how legal their union actually is.

“That’s a very tough question after Measure 36,” said Mark

Johnson, who practices family law in Portland. “For a transgender couple that got married when they were of opposite sex and then one of them transitioned and now presenting themselves as Oregon residents and asking to have that marriage recognized, I think that’s very problematic after Measure 36.”

According to Johnson, Haines’ and Mitchell’s marriage would not risk being invalidated unless it were challenged in court concerning issues of inheritance, adoption or any other legal benefits they enjoy as a married couple. Even then, a judge might decide to rule in their favor.

Alec Esquivel and his wife, Michele Pearce, face a different set of questions surrounding the legality of their marriage. Esquivel began transitioning from female to male in 2001 with the help of hormones. At 32, he legally changed his gender on his birth certificate with a court order and a letter from the surgeon who performed his double mastectomy. Three years after this legal and physical change, Esquivel married Michele Pearce, a biological female.

“The marriage laws are really a mess,” said Esquivel, who is enrolled at Willamette University College of Law, where he has done some research on the legal ramifications of transgender marriage. Like the many same-sex couples hoping to file for domestic partnerships under Oregon’s new law, Esquivel and Pearce put their union in jeopardy if they leave the state.

“I don’t think that Michele and I could move to Texas,” Esquivel explained. “Texas law would recognize my gender as the gender that I was born with, which would be female. In Texas, I could only marry another male, which is then complicated because the public would then see a same-sex marriage.”

Esquivel and Pearce are both active in the sexual minorities

community but say they are often mistaken for straight allies. “It requires affirmative disclosure on my part for them to understand that I really do understand and I support the sexual minorities community because I lived as a lesbian for 10 years,” said Esquivel.

Johnson said Esquivel and Pearce have a more clear-cut case when it comes to the legality of their marriage. “I think that a couple that is getting married after one party has transitioned, as long as one of them is female on their birth certificate and the other is male on their birth certificate, I don’t think any further questions are going to be asked.”

Trans couples continue to wrestle with vague loopholes in the marriage law, even as same-sex couples navigate the new legal landscape of domestic partnerships. All of them are hoping for a more inclusive future.

“Marriage equality and the right to serve in the military were never my top priorities as a queer person in this society,” said Haines. “That said, if one section of the society gets the goodies—the legal benefits of being married—then that needs to be open to all people.”

This report originally aired on OREGON PUBLIC BROADCASTING in January.

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The marriage between Ani Haines (left) and Theresa Mitchell is a legal gray area since Mitchell’s transition.

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