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Transsexuals take heart from Family Court ruling

NEW deal ... Woodridge couple Jessica Mills and partner Jeffrey Ball, who have planned a marriage ceremony for later this year. Picture: Steve Pohlner

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LEGAL AFFAIRS REPORTER

THE Federal Government has been urged to appeal against a Family Court decision which has re-defined the meaning of marriage and legalised transsexual marriages.

The Full Bench of the court also re-defined the meaning of "man" in the Marriage Act to include "a post-operative transsexual".

It also said procreation was not a principal purpose of marriage and confirmed a marriage did not need to be consummated to be valid.

The case centred on "Kevin", who was born female, and his wife "Jennifer", who asked the court to validate their marriage as "husband and wife".

Kevin underwent a sex change before the marriage and the couple have two children through IVF.

They initially won their case in the Family Court in 1999 but federal Attorney-General Daryl Williams appealed to the Full Bench of the court.

Yesterday the Full Bench, headed by Family Court Chief Justice Alastair Nicholson, threw out the appeal and ruled Kevin and Jennifer's marriage lawful under the Marriage Act 1961.

Last night Mr Williams said he was considering a High Court challenge.

"The Government believes the case raises serious issues concerning the meaning of marriage under the Marriage Act and in particular the role of the parliament in determining the meaning of marriage," he said.

"In light of the importance of these issues, the Government is considering seeking special leave to appeal."

Yesterday's court ruling was applauded by Queensland transsexuals, and couples vowed to marry to take advantage of the decision.

Woodridge couple Jessica Mills, 39, who had a sex change in November, and partner Jeffrey Ball, 52, said they planned a marriage ceremony later this year.

Australian Transsexual Support Association president Gina Mather said she was aware of about a dozen Brisbane couples who were now likely to wed.

"Some have wanted children but they could not adopt children legally but now, because of this decision, the situation has changed."

Shadow attorney-general Robert McClelland said the court had confirmed the validity of a marriage must be decided in a way that did not involve discrimination.

But the Catholic Church, Christian Democratic Party leader Fred Nile and Queensland Opposition Leader Lawrence Springborg said the judgment needed to be overturned in the High Court — especially after it re-interpreted legal tenets of marriage.

"Like the trial judge, we reject the argument that one of the principal purposes of marriage is procreation," the court judgment said.

"Many people procreate outside marriage and many people who are married neither procreate nor contemplate doing so.

"Similarly it is inappropriate and incorrect to suggest that consummation is in any way a requirement to the creation of a valid marriage."

Mr Nile said the Family Court needed new judges.

Dr Warwick Neville, a research fellow with the Australian Catholic Bishops Conference, said he would be "astonished" if the decision was not challenged in the High Court.

"I would encourage the Commonwealth to do so."

Mr Springborg said: "I have a simple view. You are who you are at the time you were born."

Bending the gender rules

Because the husband was once a woman, a couple is fighting a legal battle against the Federal Government for the right to stay married. **Steve Dow** reports

KEVIN and Jennifer consider themselves a normal, married Australian couple. They have two little boys, a mortgage and a loving extended family. Kevin is a keen do-it-yourselfer who likes lots of help from his boys: the elder of them copies Daddy's every move with his own plastic shovels, rake, wheelbarrow, hammer and drill.

This family likes to take trips to the beach. They like playgrounds, barbecues and riding bikes. The boys, aged three and one, love to hose the family car almost as much as they love to hose each other. They remain oblivious to the fact that federal Attorney-General Daryl Williams twice has tried to have their parents' marriage ruled invalid.

Williams fears there is a major principle at stake, for Kevin was born Kimberly. Williams fears that if transsexuals are allowed to marry as the sex they legally become through hormone treatment and surgery, it places a big question mark over the whole idea of marriage — what it means and who is allowed to do it.

But while Williams believes Kevin was born a woman and can thus never qualify as a husband, the Family Court has taken a profoundly different view: that Kevin has always been a man.

Kevin, 37, and Jennifer, 36, met in 1996, the year after Kevin had undergone hormone treatment and irreversible sex reassignment, including breast reduction and a hysterectomy, allowing him to gain a new birth certificate in 1997 declaring he was male.

"I thought all my Christmases had come at once," says Kevin of meeting Jennifer. "I was open and honest with Jennifer about my predicament from the beginning."

JENNIFER says Kevin's transsexual condition didn't make him seem "any less of a man". On their wedding day in August 1999 before a civil celebrant, she had been seven months pregnant with their first child — both their children were conceived through artificial insemination — and admits it was a stressful day, given the legal struggle they knew lay ahead.

The couple, who live in the western suburbs of Sydney and are uncomfortable with the media attention (their names have been changed to protect their identities), vow they will tell their boys the truth about their father when the time is right.

In the past, transsexualism was seen as a psychological condition, and transsexuals were considered to be making a choice to change sex by electing to have sex reassignment surgery. But the weight of recent medical opinion is that transsexualism is biological, and a natural, though uncommon, part of human sexual formation. Transsexualism is thrust upon an individual, not chosen.

In the journal *Nature* in 1995, endocrinologists and sexologists published a paper that established the new concept of "brain sex". Professors Gooren, Diamond, Walters and Walker argued that some people are born with a brain that recognises themselves as a member of the sex opposite to that indicated by their chromosomes, genitals and gonads.

Given the brain sex theory is widely accepted in medical circles — and now by the Family Court in a legal precedent — those cries in the birthing suite of "it's a boy" or "it's a girl" might not always be cut and dried.

"Kevin was not born a woman," Jennifer says. "That is not the language of our case, world-renowned experts, or any of the judges. To talk about transsexualism from a before/after angle is winding the clock back. A man born a woman belongs on *Jerry Springer*."

> "I rehabilitated my physical characteristics and corrected the mistake of public identity"
> Kevin (previously Kimberly)

The case of the Commonwealth of Australia versus Kevin and Jennifer began in 1998. The couple were making inquiries about their plans to marry when they received an e-mail from the federal Attorney-General's Department.

"I am sorry we are unable to help you," read the e-mail, "but I am concerned that if you attempt to go ahead with the course of action you suggest you are leaving your partner open to criminal charges and the possibility of jail, and I hope you will take this into consideration when making your decision ... Believe me, as a married mother of four, marriage is not all it is cracked up to be."

Jennifer says she found the e-mail "flippant, yet threatening; we were shocked that an employee of the government would casually reveal her own bias, in writing". They also realised that they were going to need a lawyer.

Kevin and Jennifer had their first appointment with Rachael Wallbank on referral some weeks later. Her credentials as a practitioner in family law impressed them. But Wallbank also had every reason to empathise with their case: at birth she had been declared male.

Wallbank does not call herself "a transsexual". She says that description indicates a condition instead of a whole person. She refers to herself as a "person who has experienced transsexualism".

Wallbank accepted the case on a pro-bono basis, and later was funded by the Commonwealth when it became a test case.

"I believed my clients were legally married," she says. "It was clear to me that the law of Australia had not yet been declared on the subject of transsexualism and marriage, that it was open to a court to do so. And if Kevin could be recognised as male under criminal and social security law, then why not under marriage law?"

Wallbank naturally had an interest in the case "because of my own journey". Kevin's plight was in some ways similar to her own. "There was something very special about having experienced transsexualism myself, which enabled me to present the expert evidence about brain sex with certainty. I was also able to express the effect of difference and discrimination upon loved ones, having seen my own family suffer."

When Wallbank changed what she calls her "public sex" at 38, she had a lot to consider.

"I had my own legal practice, was considered a white male, had three beautiful children, a nice house and a relationship with my family that was important to me.

"Why would I put everything I valued in the world at risk? Well, the reason was I could not keep going, trying to manufacture a male persona, when I've known since I was five that I was female. It had become a life-or-death decision."

In 1999, Wallbank applied to the Family Court seeking a judgment validating Kevin and Jennifer's marriage. In preparing the case, Wallbank looked at similar cases overseas, but found that even the most favourable judgments (notably those delivered in New Zealand) had taken the line that transsexualism was a "psychological malady". She wanted to argue otherwise.

RACHAEL Wallbank ... journey.

"I was certain that someone's sex or knowledge of themselves was determined between the ears, as per brain sex, and not between the legs," she says.

"The fact is there is no other explanation for why people like Kevin and I exist. There's no other explanation as to why someone like me would undergo sex-affirmation procedures." Wallbank's argument that transsexualism was an example of natural human diversity, and nothing to do with mental illness, was accepted by the court. In 2001, Kevin and Jennifer were legally confirmed as husband and wife.

The court ruled that because Kevin had undergone irreversible sex reassignment, he could marry as a man.

But that was not the end of it. Because of the potentially far-reaching consequences of the judgment, lawyers for Attorney-General Daryl Williams appealed to the Full Court of the Family Court. The government lawyers in both instances argued that a person's sex for the legal purpose of marriage was determined at birth, and no amount of reassignment surgery could alter that. They also argued a person's brain sex could not alter someone's legal status as a man or a woman for the purpose of marriage.

It was, in part, a technical argument that relied on an English court decision of 33 years ago, a decision that the court ruled was not binding in Australia. Nor did the court accept the argument that the Marriage Act of 1961 was intended as a code to strictly define the terms "marriage", "man" and "woman".

A spokeswoman for Williams says the case raises serious issues about the meaning of marriage, and the role of Parliament in determining that meaning.

The Government might yet appeal to the High Court.

Whatever happens next, there will be a need now, says Wallbank, for the states and territories to clarify their laws on births, deaths and marriages, and on discrimination, so that in the case of transsexualism a person's legal sex as delineated in their original birth certificate can be changed to "correct mistakes".

If that happens, such changes is described by Wallbank as "an act of gender expression". The road ahead is unlikely to be smooth or without confusion.

When Kevin was a very young child and still called Kimberly, his mother would ensure he dressed as a girl on special occasions. She also made him stand next to his father naked, to see how their anatomies differed.

AT SCHOOL, children would tease him for wearing boys' jackets and pants, saying he was a girl.

He fought to defend himself, and his three younger sisters. Family photographs show Kimberly with pistols at the age of three — the age Kevin says he knew himself to be male — and with a soccer ball at the age of eight.

Family Court Justice Richard Chisholm noted in his 2001 judgment a photograph of the four wearing pastel-coloured dresses and sandals, but the eldest is wearing dark trousers and shoes, and what looks like a boy's shirt.

"To my eye," Chisholm said, "despite the shoulder-length hair, he looks as much like a boy as a girl."

There was never any confusion for Kevin, though. "I am a man, nothing more or less, just a man," he says. "I am trans nothing. Just a man who has the medical condition, an example of human variation, known as transsexualism.

"I rehabilitated my physical characteristics and corrected the mistake of public identity. There was no transition for me personally. I have always been, and always will be, male."

"Kevin is a husband, a father, the bloke next door," Jennifer says.

"He's a brother, an uncle, a much-loved son-in-law. He is an admirable male role model. He is

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