In the Supreme Court of the State of Utah

In the Matter of the Name and Sex/Gender Change of: Sean W. Childers-Gray, f.ka., Jenny Pace, and Angie Rice, f.k.a., Arthur Edward Rice.	**No. 20170046-SC**

Supplemental Brief of *Amicus Curiae* the Office of the Utah Attorney General

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On appeal from the Second Judicial District Court
Honorable Noel S. Hyde, Nos. 163900359 and 163500015

Tyler R. Green (10660)
Solicitor General
Stanford E. Purser (13440)
Deputy Solicitor General
Sean D. Reyes (7969)
Utah Attorney General
P.O. Box 140858
Salt Lake City, Utah 84114-0858
Telephone: 801-366-0533
tylergreen@agutah.gov
spurser@agutah.gov
Counsel for the Office of the Utah Attorney General

Appellants' Counsel

T. Christopher Wharton
Eric Kyler O'Brien
Wharton O'Brien, PLLC
165 South Main St., Ste. 200
Salt Lake City, Utah 84111
chris@wolawutah.com
kyler@wolawutah.com

Troy L. Booher
Beth E. Kennedy
Alexandra Mareschal
Zimmerman Booher
341 South Main St., 4th floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
bkennedy@zbappeals.com
amareschal@zbappeals.com

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Other Authorities

Introduction

This appeal comes to the Court unopposed—no one contests the Appellants' arguments or their underlying petitions for name- and sex-change orders. This, along with the Court's recent opinion in *In re Gestational Agreement*, 2019 UT 40, 449 P.3d 69, prompted the Court to order supplemental briefing on three issues: (1) whether the apparent "lack of adversariness" in this appeal deprives the Court of jurisdiction; (2) did Utah's constitutional framers intend the grant of judicial power to include determining "an application seeking approval of an amendment to a birth certificate," and, if not, "does it resemble other matters our state courts handled at the time of statehood"; and (3) does Utah Code section 26-2-11 violate Utah Constitution article V or other separation-of-powers principles?

The short answer to the first two questions is that name- or sex-change petitions are not necessarily non-adversarial proceedings and potentially satisfy an adversariness requirement. But the Court need not resolve that issue here because Utah courts have been exercising jurisdiction over similar applications since at least 1888. So applying the same analytical approach as *In re Gestational Agreement* based on analogous historical evidence leads to the same conclusion: judicial

power under the Utah Constitution includes jurisdiction over name change and similar applications.

The Attorney General's Office respectfully declines to address the third issue. Statutes are presumed to be constitutional unless clearly shown otherwise. No one—not a single litigant or other interested person—has challenged section 26-2-11's constitutionality. Nor does the statute affect the Court's jurisdiction, which would allow the Court to question sua sponte the provision's constitutionality. In fact, the statute does not require the judiciary to do anything. So section 26-2-11 raises no readily apparent separation-of-powers problem involving the courts.

Argument

I. Any Lack of Adversariness Does Not Deprive the Court of Jurisdiction Over This Matter.

The Court's supplemental briefing order notes that this case is unopposed and therefore raises jurisdictional concerns similar to those addressed in *In re Gestational Agreement*. Supp. Br. Order at 1. So the Court first queries whether "the lack of adversariness" deprives the Court of jurisdiction. It does not.

First, while the instant matter is unopposed, name- or sex-change proceedings are not necessarily non-adversarial. That makes

this case different than the proceedings for approving gestational agreements. Those cases, the Court explained, arise in a "unique posture" because all parties are statutorily required to "*jointly* file a petition with the district court in order to validate a gestational agreement," which the district court may approve "only on a finding that, among other things, '*all parties* have voluntarily entered into the agreement and understand its terms.'" *In re Gestational Agreement*, 2019 UT 40, ¶ 11 (quoting Utah Code § 78B-15-803(2)(e)). "[B]y statutory scheme," then, "no adverse party may exist" and there can be "no controversy between adverse parties." *In re Gestational Agreement*, 2019 UT 40, ¶ 11.

That's not the case with name- (or presumably sex-) change proceedings. Courts may provide notice of the hearing and can grant the name-change request only upon proof offered in open court supporting the petition's allegations and showing "proper cause" for the change. Utah Code § 42-1-2. Prior versions of the statute required public notice before the district court could grant the petition. *See* Revised Statutes of Utah § 1546 (1898) (requiring proof in open court "that thirty days' previous notice of the [name change] hearing thereof has been given in a newspaper published or having a general circulation in the county"); Compiled Laws of Utah § 3863 (1888)

(requiring proof of publication of the name change petition for four successive weeks in local newspaper or at "three of the most public places in the county").

The potential for notice of the hearing necessarily contemplates that the petition could be challenged by any interested person. The 1888 statute expressly recognized that "objections may be filed by any person who can, in such objections show to the court good reasons against such change of name." Compiled Laws § 3864. And the possibility for a disputed proceeding may be enough to satisfy any adversariness prerequisite to exercise judicial power.

For example, in *Tutun v. United States,* the United States Supreme Court addressed whether federal appellate courts had jurisdiction over orders denying aliens' petitions to become United States citizens. 270 U.S. 568, 574 (1926). Among other things, the relevant statute required that the United States receive notice of these citizenship petitions, but the federal government did not have to and apparently did not always participate. Ann Woolhandler, *Adverse Interests and Article III*, 111 Nw. U. L. Rev. 1025, 1061-62 (2017) (discussing notice provisions and observing that "sometimes even unopposed petitions that the lower court denied showed up in the appellate courts"). The Court held that these naturalization petitions

presented justiciable cases or controversies because, at least in part, the "United States is always a *possible* adverse party." *Tutun*, 270 U.S. at 577 (emphasis added); *see also* Woolhandler, *Adverse Interests*, 111 Nw. U. L. Rev. at 1062-63 (describing *Tutun* as holding that naturalization proceedings "were sufficiently adverse to be Article III cases for appellate review" because the "'United States is always a possible adverse party'" (quoting *Tutun*, 270 U.S. at 577)).[1]

That same reasoning could apply to proceedings for name or sex changes. The notice provisions mean there is at least a possibility for an adverse party to object to the proposed name or sex change. In fact, the State of Utah once filed an amicus brief in an appeal reviewing an order denying an inmate's name change petition. *In re Cruchelow*, 926 P.2d 833, 833, 835 n.3 (Utah 1996). The State appears to have been defending the district court's denial and thereby opposing the petitioner's request. *Id.* at 835 n.3 (noting the State's amicus brief argued that some courts had held that trial courts do not abuse their discretion by denying an inmate's name change petition based on a perceived risk of confusion and record keeping problems at the prison).

[1] While not conceding the point, Professor Woolhandler states that the citizenship petitions are the "strongest example of non-contentious jurisdiction." Woolhandler, *Adverse Interests*, 111 Nw. U. L. Rev. at 1065.

And after remand to the district court, the State intervened and filed a brief opposing the proposed name change. *See generally* Docket, *In the Matter of Name Change of: Cruchelow, Ralph Randall*, No. 953900002 (Third Judicial District Court).[2] Based on the numerous docket entries (indicating discovery requests, expert witness designations, and briefing), the name-change proceeding was anything but non-adversarial. *See id.*

Second, even if this case lacks adversariness, it would not necessarily prevent the Court from exercising jurisdiction. The Court recently concluded that "adversariness does not completely define the scope of [its] constitutional power." *In re Gestational Agreement*, 2019 UT 40, ¶ 13. Courts may properly perform certain functions, though entirely non-adversarial, if the framers intended these functions to be included within the constitutional grant of judicial power. *Id.* And that's the case here, as discussed below in response to the Court's second question.

This case therefore does not require the Court to determine the precise scope of "judicial power" in the Utah Constitution, including the

[2]Available at https://pubapps.utcourts.gov/XchangeWEB/CaseSearchServlet?_=gyRWOWiixsI4V5mQbu4YDfu9rnZGrO3VgLjnWVJvMGKvDcOh%2BQqkGhttTQ7FK8J6kOBxenuqUX9d%0AZPSDQFaHbLZJ%2FLMVJyeZ.

adversariness issues discussed in Associate Chief Justice Lee's and Justice Pearce's concurring opinions in *In re Gestational Agreement*. *See id.* ¶ 18 n.24 (stating the Court takes no position on Justice Pearce's concerns because they were unnecessary to the resolution of the case).

II. Statehood-Era Statutes Show the Framers Intended the Judicial Power to Extend to Cases Like This.

Even though the gestational-agreement statute necessarily results in a lack of adversariness in those types of proceedings, the Court held that state courts have jurisdiction to validate gestational agreements based on the framer's apparent intent. *In re Gestational Agreement*, 2019 UT 40, ¶ 18. The Court pointed to 1884 and 1898 statutes showing state courts had power to preside over non-adversarial adoption proceedings. *Id.* ¶¶ 14-15. These statutes, the Court concluded, suggested that "the founders of the Utah Constitution likely intended the grant of 'judicial power' to include, in addition to the power to hear and decide controversies between adverse parties, the substantive power over the termination and creation of parental rights in non-adversarial matters." *Id.* ¶ 16. And these statutes "show that the courts had sufficient power to participate in proceedings that lacked a dispute between opposing parties." *Id.* The Court then reasoned that

validating gestational agreements is sufficiently like adoption proceedings because both involve the creation and termination of parental rights. *Id.* ¶ 17. So state courts may properly exercise jurisdiction to validate gestational agreements based on the historical evidence. *Id.* ¶ 18.

That analysis finding jurisdiction despite the lack of adversariness leads to the Court's second supplemental question in this case: "[i]s an application seeking approval of an amendment to a birth certificate a matter 'intended by the framers of our constitution to be included in the constitutional grant [of power] to the judiciary,'" and, [i]f not, does it resemble other matters our state courts handled at the time of statehood?" Applying *In re Gestational Agreement*'s framework, the answer is yes: statehood-era statutes suggest the framers intended the courts to have jurisdiction over name-change and similar petitions.

At common law, an individual had the right to change his name at will. *In re Porter*, 2001 UT 70, ¶ 8, 31 P.3d 519; *In re Cruchelow*, 926 P.2d at 834; *Smith v. United States Cas. Co.*, 90 N.E. 947, 950 (N.Y. 1910). Utah, like other states, codified a name-change process that protects the individual and the public by creating a public record memorializing the change. *In re Porter*, 2001 UT 70, ¶ 8; *In re Cruchelow*, 926 P.2d at 834; *see also Smith*, 90 N.E. at 950 (stating

"this legislation is simply in affirmance and aid of the common law to make a definite point of time when the change shall take effect. It does not repeal the common law by implication or otherwise, but gives an additional method of effecting a change of name" (citation omitted)).

Utah's territorial legislature enacted a name-change statute at least by 1888. That law required "[a]pplications for change of names" to be "heard and determined by the district courts." Compiled Laws § 3861. The statute also spelled out the proper district court venue, petition components, and public-notice requirements. *Id.* §§ 3862-63. The district court had to hold a hearing and could question the petitioner, "remonstrants, or other persons," under oath about the application, and then "make an order changing the name or dismissing the application, as to the court may seem right and proper." *Id.* § 3864.

Similarly, in 1898, soon after Utah's Constitution[3] was ratified, the legislature codified another name change statute. Revised Statutes §§ 1545-47. This law again required name-change petitions to be filed in the "district court" of the county where the applicant lived. *Id.* § 1545. The petition had to state the proposed name, the reason why a

[3] As originally ratified, Utah's Constitution specifically prohibited the legislature from "[c]hanging the names of persons." Utah Const. art. VI, § 26(2) (1896).

change was sought, and that the petitioner had resided in the county for a year before filing. *Id.* The court could then approve the name change only after giving the necessary public notice and holding a public hearing at which the petition's allegations were proven and "proper cause" given for the name change. *Id.* § 1546. The statute then expressly noted that a name change would not affect any "legal action or proceedings then pending, nor any right, title, or interest whatsoever." *Id.* § 1547.

The current name-change process, including filing in district court, has remained largely the same since 1898, except public notice is now left to the district court's discretion. Utah Code §§ 42-1-1 to -3.

From 1888 to the present, the court order granting a name change did not and does not approve an amendment to a birth certificate. Supp. Br. Order at 1-2. Indeed, birth certificates as we know them did not exist in 1888. No governmental agencies were required to record births before 1898, though a few cities began voluntarily registering births in the early 1890s. *See* Utah Div. of Archives and Records Serv., *Birth Records*.[4] Instead, the 1888 statutes authorized, but did not require, city councils to "regulate . . . the registration of

[4] Available at https://archives.utah.gov/research/guides/birth.htm#pre.

births and deaths." Compiled Laws § 1755(66). The 1898 code added a requirement for doctors and professional midwives to keep a register of births at which they assisted although the register did not require the child's name. Revised Statutes § 2029. Every quarter, these medical professionals had to give copies of their birth registries to the county clerk, who in turn had to keep his own "register of births" based on the information provided. *Id.* §§ 602(2), 2032-33.

But again, the court orders approving name changes did not automatically amend these birth registries or the subsequently developed birth certificates. The court orders have always just approved a name change. The legislature enacted separate statutes that permitted, but did not require, the individual to take his court order to the registrar so *the registrar* could amend the birth certificate. *See, e.g.,* 1981 Utah Laws 598 (enacting Utah Code § 26-2-11).

That background provides no fair basis to conclude that the framers intended courts to have jurisdiction over an "application seeking approval of an amendment to a birth certificate." Supp. Br. Order at 1-2. But that does not appear to be the right question anyway because, as explained, that's not how the name-change process has ever worked.

In the Attorney General's Office's view, the question is whether the instant proceeding "resembles other matters our state courts handled at the time of statehood?" Supp. Br. Order at 2. It does. As in *In re Gestational Agreement*, both the 1888 and 1898 statutes discussed above "suggest that the founders of the Utah Constitution likely intended the grant of 'judicial power' to include, in addition to the power to hear and decide controversies between adverse parties, the substantive power," 2019 UT 40, ¶ 16, over name-change petitions. And that power could extend to judicial proceedings to change personal legal designations such as an individual's sex. *See* Utah Code § 26-2-11 (treating court orders granting name- and sex-designation changes the same for birth certificate amendment process); Appellants' Br. at 12-18, 26-30 (discussing similarities between name and sex designations).

For the foregoing reasons, the Court should conclude that it has jurisdiction over this appeal.

III. Section 26-2-11 Is Presumed to Be Constitutional Unless a Litigant Proves the Statute Is Clearly Unconstitutional.

The Court's third question asks whether section 26-2-11 violates article V or other separation of powers principles. The Attorney General's Office respectfully declines to address this issue.

Based on "fundamental" separation-of-powers precepts, *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 96 n.37, 450 P.3d 1092 (Lee, A.C.J., concurring), courts presume Utah's statutes are constitutional and, whenever possible, construe them as complying with the state and federal constitutions. *Vega v. Jordan Valley Med. Ctr., LP*, 2019 UT 35, ¶ 12, 449 P.3d 31; *see also Richards v. Cox*, 2019 UT 57, ¶ 12, 450 P.3d 1074 (the Court will "apply a presumption of validity [to a challenged statute] so long as there is a reasonable basis upon which both provisions of the statute and the mandate of the constitution may be reconciled" (quoting *Bennion v. ANR Prod. Co.*, 819 P.2d 343, 347 (Utah 1991)). Any reasonable doubts about a statute's validity are resolved in favor of constitutionality, and a statute may not be declared invalid unless it *clearly* violates a constitutional provision. *Vega*, 2019 UT 35, ¶ 12. That means "[i]f a party seeking to challenge the constitutionality of a law enacted by the representatives of the people fails to provide a sufficient basis for the establishment of a clear constitutional standard, then the presumption of constitutionality kicks in." *Maese*, 2019 UT 58, ¶ 96 (Lee, A.C.J., concurring). But here, no party or other potentially interested person has challenged the statute's constitutionality, much less overcome the presumption of constitutionality.

Similar separation-of-power concerns also counsel against courts sua sponte raising issues that the parties have not briefed. As this Court has described it, the judiciary's primary function among the three branches of government is to hear and resolve the matters and disputes presented as a neutral decisionmaker. *See, e.g., In re Gestational Agreement*, 2019 UT 40, ¶ 12 (stating "judicial power . . . is generally understood to be the power to *hear and determine* controversies between adverse parties" (emphasis added and omitted) (quoting *Carlton v. Brown*, 2014 UT 6, ¶ 29, 323 P.3d 571)); *Vega*, 2019 UT 35, ¶ 15 (stating "the core judicial function of courts includes 'the power to *hear and determine* controversies between adverse parties and questions in litigation'" (emphasis added) (quoting *Timpanogos Planning & Water Mgmt. Agency v. Cent. Utah Water Conservancy Dist.*, 690 P.2d 562, 569 (Utah 1984)). In other words, courts adjudicate rather than litigate matters. So "if a [party] has not raised an issue on appeal," an appellate court generally "may not consider the issue sua sponte." *State v. Johnson*, 2017 UT 76, ¶ 48, 416 P.3d 443 (quoting *Allen v. Friel*, 2008 UT 56, ¶ 7, 194 P.3d 903). Otherwise, courts become

more advocate or adversary than unbiased adjudicator.[5] *Id.* ¶ 40 ("Any time a judge raises an otherwise overlooked or unargued issue, the judge arguably undertakes an advocacy role to some extent, as it is the parties' duties to raise and argue the issues.").

The Court has nonetheless outlined some limited situations where it may appropriately raise issues sua sponte. *Id.* ¶¶ 48-52. But none of those exceptions exists here. For example, section 26-2-11's validity does not implicate the Court's subject matter jurisdiction, an issue that courts can properly raise sua sponte at any time. *Johnson*, 2017 UT 76, ¶ 50 (explaining that "it is always appropriate for an appellate court to raise possible issues concerning subject matter jurisdiction or joinder of a necessary and indispensable party, regardless of whether such issues were argued on appeal or preserved in the trial court"); *Brown v. Cox*, 2017 UT 3, ¶ 6 & n.3, 387 P.3d 1040 (noting the Court may raise jurisdictional issues sua sponte and that it had asked the parties to brief whether an election code provision "unconstitutionally expanded this court's jurisdiction"). The statute does not raise a jurisdictional question because it outlines only what a

[5] This problem persists regardless of whether the Court takes any mitigating steps, like supplemental briefing. *Johnson*, 2017 UT 76, ¶ 40 n.8.

person "may" do *after* receiving a court order approving a name or sex change and what the registrar "shall" do upon receiving the change application (with the court order attached). Utah Code § 26-2-11.

At most, the statute merely assumes that courts have preexisting jurisdiction to address name- and sex-change petitions. *See, e.g., In re Heilig*, 816 A.2d 68, 84 (Md. 2003) (noting that a Maryland statute similar to section 26-2-11 "does not purport to grant any new jurisdiction to the Circuit Courts . . . and therefore must be taken as a recognition that such jurisdiction already existed"). So even if section 26-2-11 were somehow invalid on separation-of-powers or other grounds, it would not affect the courts' jurisdiction over name- or sex-change proceedings. *See, e.g.,* Utah Const. art. VIII, § 1 ("The judicial power of the state shall be vested in a Supreme Court, [and] in a trial court of general jurisdiction known as the district court . . . ."); *id.* art. VIII, § 5 ("The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute . . . ."); Utah Code § 78A-5-102(1) ("The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law."); *id.* § 42-1-1 ("Any natural person, desiring to change his name, may file a petition in the district court of the county where he resides . . . ."); *see also Frehner v. Morton*, 424 P.2d 446, 448

(Utah 1967) (Utah district courts have "jurisdiction of both equity and law matters"); *In re Heilig*, 816 A.2d at 85 (concluding petitions to change a person's sex designation fall "within the general equity jurisdiction of the court").

The absence of any litigant challenging section 26-2-11's validity poses another problem. Addressing the Court's question would require the Attorney General's Office to identify and articulate a specific separation-of-powers concern and then offer a counterargument explaining why the concern would not actually create a separation-of-powers violation. That would place the Office in the difficult position of attacking and defending the statute. And it would do so even though it's not immediately clear how the statute poses any separation-of-powers problems. The statute simply outlines what a person with a name- or sex-change order must do so that the registrar can in turn amend the person's original certificate. Utah Code § 26-2-11. Those actions do not pose any readily apparent separation-of-powers problem—let alone one that compels the judiciary to do something it cannot or should not otherwise do.

For these reasons, the Attorney General's Office respectfully declines to substantively answer the Court's third question.

Conclusion

For the foregoing reasons, the judiciary has jurisdiction to address petitions to change an individual's name or sex designation.

Respectfully submitted,

/s/ Stanford E. Purser
Tyler R. Green
Utah Solicitor General
Stanford E. Purser
Deputy Solicitor General
Sean D. Reyes
Utah Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, UT 84114
Counsel for the Utah Attorney General's Office

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s/ Stanford E. Purser

Certificate of Service

I hereby certify that on 5 December 2019 a true, correct, and complete copy of the foregoing Supplemental Amicus Brief of the Office of the Utah Attorney General was filed with the Court and served via electronic mail as follows:

T. Christopher Wharton
Eric Kyler O'Brien
Wharton O'Brien, PLLC
165 South Main St., Ste. 200
Salt Lake City, Utah 84111
chris@wolawutah.com
kyler@wolawutah.com

Troy L. Booher
Beth E. Kennedy
Alexandra Mareschal
Zimmerman Booher
341 South Main St., 4th floor
Salt Lake City, Utah 84111
tbooher@zbappeals.com
bkennedy@zbappeals.com
amareschal@zbappeals.com

s/ Stanford E. Purser