

What is a person's 'legal sex?'

In law, as in biology, the components of sex don't always line up.

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As an attorney who works with children with differences of sex development, I am often asked how the law determines a person's sex.

It comes as a surprise to many that there is no such thing as a "legal sex." Most people assume that a person's legal sex is defined by the "M" or "F" on a driver's license — just as most assume that biological sex can be defined by the equipment between a person's legs. Both assumptions work well enough most of the time. However, those who are familiar with DSD know there are actually several components of biological sex that are not always congruent. Similarly, there are several ways that sex is determined for different legal and administrative purposes. These, too, are not always congruent.

Genitals are not the answer

One thing is clear: In the law, sex is not defined by the appearance of external genitals. Many parents of children with DSD, and even some doctors, have been confused by this. Some seem to think that surgery in cases of genital ambiguity is necessary in order to assign a legal sex. As one surgeon has said, "The child wouldn't really be assigned as male or female at birth if you're delaying surgery." From a legal perspective, this simply isn't true.



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I am aware of no laws that define sex in terms of genital configuration. In cases where sex is in question, generally involving transsexuals, some courts have been emphatic that surgically reconstructed genitals will not be accepted as proof of sex. Other courts have considered genitals as evidence of a person's sex to be factored in with other evidence (such as a diagnosis of Gender Identity Disorder). While there are no decisive modern rulings on the sex of a person with a DSD, it seems unlikely the shape of the genitals would be definitive in such a case.

Determining sex for legal purposes

For most people, the designation of "male" or "female" on the birth certificate is made on the basis of a visual exam of the genitals by the birth attendant. The medical evaluation may be more involved if a DSD is suspected, but ultimately the designation on the birth certificate is left to the medical provider's discretion. Thereafter, there is usually no further questioning of the person's sex in legal contexts; the designation on a birth certificate is considered sufficient proof. The driver's license and other legal documents that recognize sex — social security forms, passport, school records, marriage license — are all based on the birth certificate.

If a person with a DSD or a transsexual person needs to change the sex designation on legal identity documents or if a person's sex is questioned in court, then we begin to see how the components of a person's "legal sex" may not always align. Different states and administrative agencies have different criteria for determining sex when it is in question.

For example, in California a person can change the sex designation on her driver's license from male to female by having her doctor sign a form stating that in the doctor's professional opinion, that person's gender identification and demeanor are female. However, in order to change her sex designation with the Social Security Administration, she will need to send a doctor's affidavit verifying that her "sex change surgery has been completed." While the term "completed" is not defined, it is obvious that some people could meet the standard to change the sex designation on their driver's licenses but not with the Social Security Administration. As a result of this variation in standards, many people end up with different sex designations on different legal documents.

Even within a state, sex may be determined differently for different purposes. In the Texas case of *Littleton v. Prange*, one Texas court found Christie Lee Littleton, a male-to-female transsexual, to be a female for purposes of changing her birth certificate, based on a doctor's affidavit stating that the original sex assignment was "in error." However, another Texas court found her to be male for purposes of marriage, based on her original birth certificate and her anatomy and chromosomes at birth.

Cases like *Littleton* demonstrate that legal criteria for determination of sex can vary widely and that the law is changing rapidly in this area. Much of this change is driven by increased visibility of transsexual people and political concerns about same-sex marriage. It isn't clear yet how laws that apply to transsexual people will be interpreted in cases of DSD. The court in *Littleton* even noted that cases of DSD can complicate simplistic notions of sex determination but declined to state how the law would analyze sex in such a case. (For more on changing sex designation on identity documents of people with DSD, see ["Easing transitions with gender assignment," Endocrine Today, Dec. 10, 2008.](#))

Role of medical experts

As the law develops in this area, courts are increasingly turning to medical experts for guidance on determining sex. Expert testimony can establish that there are many components to sex — chromosomes, gonads, internal and external organs, hormones, secondary sex characteristics, sex of rearing and gender identity — and that these are not always congruent. Doctors can help create a better legal climate for people with DSD by raising awareness of this complexity.

Since many laypeople (including lawyers and judges) falsely assume that sex can be reduced to chromosomes, it is especially important to avoid reinforcing this assumption.

Therefore, in explaining the sex assignment of a person with 46,XX congenital adrenal hyperplasia, avoid saying that her XX genotype proves she is female. This could create bad precedent for, say, a patient with 46,XY androgen insensitivity syndrome who is correctly assigned female although she has an XY genotype.

Courts and lawmakers also need to understand that the medical field now acknowledges the role of identity in determining sex. For example, the most recent consensus statement on treatment of DSD places a high priority on evidence of likely future gender identity in determining sex assignment for children with DSD, and recommends allowing the child to change sex assignment if necessary to correspond with the actual gender identity.

Both human compassion and medical science support recognizing the role of gender identity in determining a person's sex, and medical professionals can help build this recognition into evolving legal standards.

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For more information:

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