

A Practitioner's Guide to California Transgender Law

**A Reference Guide for California Lawyers and
Advocates**

**Updated March 2010
Transgender Law Center**



ADVOCATING FOR OUR COMMUNITIES

870 MARKET STREET, SUITE 400
SAN FRANCISCO, CA 94102

(415) 865-0176
(415) 777-5565 (FAX)

WWW.TRANSGENDERLAWCENTER.ORG
INFO@TRANSGENDERLAWCENTER.ORG

PUBLICATION OF THIS GUIDE MADE POSSIBLE BECAUSE OF GENEROUS SUPPORT FROM:

THE ECHOING GREEN FOUNDATION
THE HORIZONS FOUNDATION
THE NATIONAL CENTER FOR LESBIAN RIGHTS
THE VANLOBENSELS/REMBEROCK FOUNDATION

California Transgender Law 101

Introduction

This reference guide is designed to provide a broad overview of California laws affecting transgender people. If you have a question about these laws or other issues your clients are facing, please feel free to contact the Transgender Law Center.

I. Identity Documents

A. State of the law

- California Driver's License – a court order is required to change name using a form DL 44. Gender marker may be changed without a court order provided a doctor or psychologist completes a form DMV 329. People under the age of 18 will need parental support to apply unless person is an emancipated minor. **(Attachment A – DL 329 and instructions; DL 44 is only available at DMV office or by mail)**
- Social Security Number – a court order is required to change name on a Social Security account. Gender marker may be changed with a letter from a surgeon stating that “sex reassignment surgery” has been completed. No guidance is given as to what type of surgery constitutes sex reassignment surgery. To make these changes, complete a Form SS-5 **(Attachment B – Info from SSA website about change of name and gender; Form SS-5 and instructions)**
- Common Law Name Change – This method of changing a person's name remains legally possible, however many organizations and agencies will not recognize it due to concerns about identity theft and immigration fraud. **(Attachment C – Opinion of Attorney General on Common Law Name Changes, June 9, 2000)**
- Court Ordered Name Change – allowed under California law (Cal. Code Civ. Proc. §1275 et seq.). No court can ask if the petitioner has undergone any medical procedure prior to requesting a change of name as no such requirement exists under California law. People under the age of 18 will need parental support to apply unless person is an emancipated minor. People who are on parole will need permission from their parole officer to change name pursuant to Cal. Code Civ. Proc. §1279.5(c). Links to California court forms NC-100, NC-110, NC-120, NC-130 (and additional forms necessary if a minor) are available at www.transgenderlawcenter.org. **(Attachment D – Sample P&As in response to request for proof of medical procedure; Attachment E model parole officer declaration)**
- Court Ordered Gender Change – an individual born in California may change the gender marker on their California birth certificate with an appropriate court order (Cal. Health & Safety Code § 103425 et seq). In 2009, a California Appeals Court determined in *Somers v. Superior Court* that people who were born in California but who currently reside out of state can petition a California court for a gender change order as if they were residents. Because not all jurisdictions

are familiar with the decision in this case, it may be helpful to submit additional paperwork to the court with gender change paperwork. *See Somers v. Superior Court (2009) 172 Cal. App. 4th 1407.* (**Attachment F – Sample brief for out of state petitioner for change of gender on CA birth certificate**)

- California Birth Certificate – name and gender marker may be changed pursuant to a court order. Old birth certificate is sealed and new one is issued (Cal. Health & Safety Code §103425 et seq). (**Attachment G – CA Dept of Vital Records Publication, “Obtaining a New Birth Certificate After Gender Change”**)

- Passport – name may be changed either with a court order or proof that the person has been using the name for the past five years (note: non-court order name changes may be difficult – must show current name use on public records going back five years). Information on name change available at <http://travel.state.gov/passport/>. For gender change, the Passport Agency has a policy requiring “completed” sex reassignment surgery (SRS) for issuance of a 10 year passport. No clear guidance on what this phrase means. As of January 2010, the Passport Agency will issue a 1-year passport in a person’s current gender identity without requiring SRS if the person is going overseas for SRS. (**Attachment H – Letter to Congressman Israel with Passport Bulletin 92-22** *only known written policy providing guidance to Passport Agents*)

- Selective Service – individuals who are assigned male at birth must register with the Selective Service regardless of current gender identity. Individuals who are assigned female at birth are exempt from Selective Service registration, regardless of current gender identity. Transgender men may obtain a waiver from selective service registration. Exemption letters may be obtained at: Request for Status Information Letter, www.sss.gov/PDFs/SILForm.pdf. This exemption letter can also be used for transgender men seeking government financial assistance for federal education loans. (**Attachment I – Request for Status Information Letter**)

- Immigration Service Records and Documents – name and gender may be changed on green card, visa, employment authorization, asylum application, and/or naturalization certificate. However, some confusion exists around what supporting documentation a person would need to do so. (*See Section V for more information about immigration documents.*)

- Non-government records (bank, credit cards, etc.) – each company will have its own policy. Many institutions will only change the name on an account if the account holder produces a court ordered name change.

II. Marriage and Custody Rights

A. State of the law for marriage rights

- “Pre-Transition” Marriages – while the term “pre-transition” is an oversimplification of the complex process of changing gender, it is used here to designate marriages that were lawfully entered into prior to a spouse changing gender. There is a strong legal presumption that these

marriages remain valid after transition. Although no case law or statute exists that is directly on point, California law is well settled that the only ways to end a marriage are divorce or death. Transition, by itself, does not dissolve a marriage.

- “Post-Transition” Marriages – No explicit prohibitions exist in California or federal law that prevent a transgender person from entering into a heterosexual marriage. However, challenges by private individuals – with mixed results – have been made to the validity of marriages involving a transgender person in a number of cases across the U.S. The one case that has been fully litigated in California found that the underlying marriage was valid. (**Attachment J – Decision in redacted Southern California Case**)

- While we have every reason to believe that the validity of marriages involving transgender people will be upheld in California, it is important that couples preserve as many rights as possible in the event that their marriage is ruled invalid upon challenge. Key steps to doing so include: a memorandum of understanding between the spouses, financial power of attorney, health care directive, and a will. (**Attachment K – Transgender People and Marriage: The Importance of Legal Planning**)

B. State of the law for custody rights

- Biological children – In California, custody determinations are made based upon the “best interest” of the child. (Cal. Fam. Code §3020 et. seq.) No explicit prohibition exists in California regarding the rights of a transgender person to retain custody or visitation rights to their biological child, however, a parent’s transgender identity is often made an issue in custody hearings to the detriment of the transgender parent. (**Attachment L – Redacted Amicus Brief supporting a biological parent’s rights to liberal visitation with her daughter in a Southern California case**)

- Children of a Post-Transition Marriage – many times, the transgender spouse in a post-transition marriage will adopt children of the marriage via spousal rights. Occasionally, one partner will challenge the transgender parent’s rights or responsibilities to that child by attacking the underlying marriage. In addition to the above conclusions found in Attachment L, additional arguments for finding parental rights and responsibilities exist in California law. (**Attachment M – Excerpts from redacted brief in support of parental rights of a transgender father**) (*Also, see Elisa B v. Superior Court 37 Cal.4th 108, 33 Cal.Rptr.3d 46 Cal., 2005 for current law pertaining to the rights and obligations of non-biological parents in California.*)

C. End of Life Issues

- In addition to designating the extent and type of medical intervention desired at the end of life, a transgender person may want to take extra precautions to ensure that their name and gender identity is recognized by doctors or other caregivers. (**Attachment N – Transgender-Specific California Advanced Health Care Directive**)

III. Employment and Housing

A. State of the law

- California – FEHA explicitly protects transgender people due to the passage of Gender Nondiscrimination Act of 2003. (**Attachment O – Developments in State and Federal Employment Law Regarding California Transgender Employees; Attachment P – AB 196: What it Means to You**)
- Federal – the trend in most circuits is toward viewing gender identity discrimination as a form of sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. (see *Schroer v. Billington*, 577 F. Supp.2d 293 (2008) included in *Attachment O*.) Note that “transsexualism” and Gender Identity Disorder are explicitly excluded from protection under the Americans with Disabilities Act.

IV. Public Accommodation

A. State of the law

- California – Explicit protection under the Unruh Act (Cal. Gov’t Code Sec. 51(b), Cal. Civil Code sec 1801 et seq, as clarified by *AB 1400, the Civil Rights Act of 2004*). (**Attachment Q – Decision of the CA Fair Employment and Housing Commission on public accommodation discrimination against transgender woman in Central California.**)
- Federal – no explicit protection as sex is not a protected category in Title II of the 1964 Civil Rights Act.

V. Immigration

A. State of the law

- General -- The U.S. Citizenship and Immigration Service (the CIS, formerly the INS) does not bar transgender people from immigrating to the United States. As noted above, people can change the name and gender on their US immigration documents. In 2004, CIS Associate Director for Operations William Yates issued a memo instructing CIS personnel to refuse to recognize transsexual applicants for spousal and fiancé visas. In 2005 the Board of Immigration Appeals issued a strong decision in the case, *In re: Lovo-Lara*, stating that CIS personnel should look to state law in making spousal and fiancé determinations for immigration purposes. This has enabled some post-transition individuals to obtain spousal and fiancé visas where their gender and marriage would valid under their state law. It is unclear if the Yates memo still applies. In early 2009, the CIS updated its Adjudicator’s Field Manual to reflect the holding of *Lovo-Lara* but it added a requirement that the transgender spouse must have completed SRS. (**Attachment**

R – In re: Lovo-Lara; Attachment S – Section 21.3(j) of USCIS Field Adjudicator’s Manual)

- Asylum -- The Ninth Circuit has recognized transgender people’s ability to apply for asylum based on gender identity persecution. (**Attachment T – Excerpts from Redacted Position Statement in Support of an Asylum Application**) *See also TLC publication, “Applying for Asylum Based on Gender Identity and Persecution.”*

VI. Police Conduct and Prison/Jail Conditions

A. State of the law

- Street harassment – some police regulations and policies require officers to address transgender people by their proper name and pronoun. Searches of transgender people can not be done for the limited purpose of determining a person’s “biological gender.”
- Prison/Jail housing – as far as we know all California and federal prisons house inmates based on their “biological gender.” Often times, however transgender prisoners are housed in “soft cell” areas. (**Attachment U – Model Jail Protocols**)
- Access to medicine and medical care - in California prisons, the stated policy of penal facilities is to maintain inmates on any medication they were taking when they were incarcerated. For jails, policies vary from county to county. (**Attachment V – Decision [unpublished disposition] in support of hormone access for MTF prisoner**)

VII. Health Care

A. State of the law

- Private Health Insurance – The *Insurance Gender Non-Discrimination Act* of 2005 made explicit in sections of the Insurance Code and Health and Safety Code that decisions by insurance companies motivated by anti-transgender bias are unlawful. However, some health insurers will often explicitly exclude coverage for transition-related procedures such as hormone replacement therapy or sex reassignment surgeries, and it is legally permissible to do so as a “pre-existing condition.” Other insurance carriers do not explicitly exclude transition-related care, but deny coverage based on claims that such procedures are “cosmetic” or “not medically necessary.” TLC may be able help individuals appeal such determinations to the insurer, and then to the California Department of Managed Care or the California Department of Insurance. (**Attachment W – Cal. Health & Safety Code Sec. 1365.5**)
- Public Health Insurance – Medicare explicitly excludes coverage for transition-related healthcare. Medi-Cal, however, provides coverage for transition-related care on a case by case basis. A person seeking such care must obtain a valid Treatment Authorization Request (“TAR”)

from their provider. Case law supports the position that blanket denial of transition-related care by Medi-Cal is unlawful. (**Attachment X – Redacted Medi-Cal Position Statement opposing denial of TAR for Top Surgery for an FTM client.**) *See also TLC publication, “Medi-Cal and Gender Reassignment Procedures.”*

- Discrimination in the Provision of Care – many transgender people face discrimination from health care providers or staff members at clinics or hospitals. Such discrimination is likely illegal under the Unruh Act, California’s public accommodations anti-discrimination law. (Cal. Gov’t Code Sec. 51(b); Cal. Civil Code sec 1801 et seq, as clarified by *AB 1400, the Civil Rights Act of 2004*).

VIII. Youth Issues

A. State of the law

- In most cases, youth under the age of 18 must obtain the permission of their parents or guardian to access any medical treatment, including treatment for gender transition.
- Youth are protected against gender identity based discrimination and harassment in a school setting (Cal. Educ. Code §200). Depending upon the school district, there may be explicit policies for transgender youth pertaining to restroom and locker room usage. (**Attachment X – San Francisco Unified School District Regulations**, the first in the state to fully implement Educ. Code §200; **Attachment Z – California Safe Schools Coalition Model School District Policy Regarding Transgender and Gender Nonconforming Students**)

This document is intended to convey basic information about laws and regulations affecting our ability to express our gender identity. It is not intended to serve as legal advice. While every effort has been made to provide readers with accurate information, the law is often changing, especially in this area. Anyone with a specific legal question is strongly encouraged to contact the Transgender Law Center or another source of legal information to discuss the facts surrounding your particular circumstances.