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ADVOCATING FOR OUR COMMUNITIES

Transgender Family Law 101:

A resource guide for transgender spouses, partners, parents, and youth

This resource guide is designed to provide basic, California specific information regarding: your ability to enter into or remain in a legally recognized marriage or domestic partnership; maintain custody and or visitation with your children; participate in the adoption or foster care systems as a transgender individual; and, exercise your rights as a transgender person under 18.

This area of law is in a state of rapid development, so it is a good idea to contact a lawyer to answer any specific questions. TLC provides free legal services and can be contacted via the information above.

Section One: Marriage

Because California, at the time of publication, still fails to recognize marriage equality, transgender people and their spouses continue to have questions about whether their marriage is enforceable.

We estimate that thousands of transgender people in CA are married. Sometimes, they are in a marriage that they began prior to transitioning (for instance someone who is male married a non-transgender woman in 1985 and then transitioned in 1995 and the couple remained together). For the sake of simplicity, we refer to these marriages as pre-transition. Other people are in marriages that began after they transitioned (for instance someone who is female to male who married a non-transgender woman.) For the sake of simplicity, we refer to these marriages as post-transition.

Because current law in CA only recognizes marriages between one male and one female, being transgender can raise a lot of questions. Primarily what is the best way to legally protect my family? In the following paragraphs, we have attempted to lay out the basics on this issue. Invariably, your individual situation will require some additional thinking based on your specific facts, so don't hesitate to contact us.

Pre-Transition Marriages

The key question in these situations is whether the marriage survives transition by one spouse or does the fact that the couple is now same-sex in some way void the marriage? At this point, neither the legislature nor any CA court has said anything on this issue. However, in general, CA law on marriage is well settled. A valid marriage can only be terminated through death or divorce. And it can only be voided if the party was ineligible to marry at the time the license was issued (for instance, one partner was still married to someone else). For this reason, it is our strong belief that pre-transition marriages remain valid after transition. A couple in one of these marriages may experience some difficulty in being accepted as a married couple, but the underlying marriage is very likely still valid.

Post-Transition Marriages

In these marriages, the basic question is whether the transgender person who transitioned is now able to marry someone based on their post-transition gender. CA law and public policy strongly support a person's ability to have their post-transition gender recognized as their legal gender. The one court case in CA that we have seen on this issue supported the idea that the husband in the case had legally transitioned from female to male and therefore entered into a valid marriage with a woman. Couples in these marriages can take some basic steps to protect themselves and their families, but should otherwise hold themselves out to be a married couple.

Post-Transition Marriage Check-list:

- ✓ Complete a memo of understanding- a simple contract between you and your spouse-to-be that makes clear that your spouse knew and understood your gender identity prior to the marriage. (See attachment 1)
- ✓ Execute a will or a trust to clarify how your assets are to be distributed upon your death.
- ✓ Sign a medical power of attorney form to give your spouse the power to act on your behalf should you become unable to do so. (See attachment 3)

Special Immigration Issues for Post-Transition Marriages

Many people in bi-national relationships question whether their post-transition marriage is valid for immigration purposes for the non-citizen or resident spouse. Up until the last five years, it was fairly easy to answer this question by stating that so long as the state in which the marriage was performed or in which the couple would be

residing in the United States considered the marriage valid it would be valid for immigration purposes. However, more recently the federal government has begun to deny immigration applications for couples in these marriages regardless of state law. TLC along with other organizations and private attorneys are currently litigating this change in policy and believe that we will eventually win back the right for couples to have their marriages respected.

Section Two: Domestic Partnerships

Due to the lack of marriage equality in CA, a separate legal process called domestic partnership (DP) was created for same-sex couples. Since DP was created primarily as an alternative to people who could not get married, for the most part it reflects the gendered nature of marriage. For couples where both partners are under 62, both people have to be of the same sex. Similar to the way in which the opposite sex requirement for marriage creates uncertainty for transgender people, so too does the same-sex requirement for DP.

Despite the advancements in DP law in CA (outlined below), they are not recognized in the same way that a marriage is. For instance, the federal government will not recognize a DP (for purposes of social security, immigration, etc). Other states are also unlikely to recognize the DP if the couple moves to a new state.

In the following paragraphs, we have attempted to lay out the basics on this issue. Invariably, your individual situation will require some additional thinking based on your specific facts, so don't hesitate to contact us.

Pre-Transition Domestic Partnerships

Just as a pre-transition marriage should remain valid, we believe a pre-transition DP will also remain valid. However, now that the couple is opposite sex, they may want to consider getting married. If so, the process for doing so is very simple. The current law allows for a couple to move easily from a DP to a marriage without first ending the DP. So, the couple can simply go get married like any other non-married couple. However, someone who is a DP with one person can not enter into a marriage with another person without first ending the DP.

Post-Transition Domestic Partners

Just like post-transition marriages, we strongly believe that post-transition DPs are valid because both partners are now same sex. Additionally, DPs were created to offer alternatives to people who are unable to get married (if both partners are under 62) so our expectation is that courts will broadly construe who can legitimately enter into DPs.

Changes in DP law

It is important to recognize that CA significantly changed DP law last year. Making DPs closer to marriage, the state changed DPs to include many more rights and responsibilities. The following are two substantial changes that may concern you:

- Ending a DP is much more like divorce than it used to be. The former process for officially ending a DP was to file a declaration of termination with the secretary of state. DPs now must petition the court for termination like a divorce. The divorce may include, if applicable, responsibility to the other partner for spousal support and/or child support.
- Another significant change in the law is the recognition of parentage to the non-biological parent when a child is born to DPs. See the custody section below for more information on this.

Other changes were made to the DP law. It is important to look closely at the new rights and responsibilities before deciding if a DP is right for you. You can find more info at: <http://www.ss.ca.gov/dpregistry/>

Section Three: Child Custody for Transgender Parents

Transgender parents who have or establish a legally recognized relationship to their child should not have that child taken away or their custody or visitation lessened solely as a result of their gender identity. However, due to a lack of experience with transgender parents on the part of judges, transgender parents may face difficulty solidifying their rights.

Or, it is just as often the case that some transgender parents (especially those in a pre-transition marriage) may give up too much of their parental rights due to feelings of guilt or shame. While minimizing or giving up your parental rights altogether may feel like the best thing to do at the time, many people regret doing so months or years after the court proceeding. And, unfortunately, once you have given up parental rights it is

incredibly difficult to get them back. If you are negotiating custody and visitation be sure that you have an advocate who understands your identity and can make sure you and your child's best interest are being served.

Becoming Legal Parents

Transgender people can become parents in a number of different ways: biologically having a child with another person; being the "presumed" parent due to being married or being in a DP; adopting a spouse or DP's child through a step-parent adoption; and/or adopting a child that has no biological ties to either spouse or DP (or doing so as a single person).

If you have any questions about being a legally recognized parent, we recommend that you take steps to be sure that you have firm legal recognition of your parental rights such as calling TLC or a private lawyer who understands transgender family law issues. The following paragraphs should give you some ideas about your rights, in general, though.

Biological Parents

If you are a biological parent, you may face challenges to your legal relationship with your child from the child's other biological parent. Under CA law, your gender identity should have no impact on your ability to be a good parent, including having primary physical custody of your children. However, because the child's other parent may try to use your gender identity against you, it is especially important to make sure your lawyer understands your rights and can enlighten the court regarding your rights.

"Presumed" Parentage

"Presumed parent" is a legal term used for a person whose spouse or DP has a child while the two people are married or in a DP. The spouse or DP does not have a biological connection to the child, but the law presumes them to be the child's other parent simply because they are married or in a DP at the time of the child's birth. The problem with this kind of parentage is that it potentially relies on the validity of the marriage or DP in order for the parent to have their parental rights respected. While you can likely establish parental rights even if the marriage or DP is held to be void, it may involve a costly legal battle. However, completing the steps listed above under post-transition marriage will help you in any legal battle that does arise.

“Step Parent” Adoption

As written above, if you are in a DP your partnership rights will not necessarily be respected outside of CA. For that reason, it is important to consider going through a step parent adoption. This is a fairly inexpensive and minimally invasive way to get a court decree that you have a legal relationship with your child. This way, if you move to a new state, you’ll have significantly more ground to argue that your parental rights need to continue to be respected.

General Adoption

If you wish to adopt as a single adult or you and your spouse or DP wish to adopt a child to whom neither of you have biological ties, you should not be prohibited from doing so simply because you are transgender. Also, your parental rights should be respected if you and your spouse or DP separate because you are a legally recognized adoptive parent.

Section Four: Foster Care System

Transgender people participate in the Foster Care system in a number of different ways: as youth in the system, as providers, and as people working in the system. All three categories of people are protected from gender identity discrimination under CA law. No one can be denied services, rejected as a foster care family, or fired from the system simply for being transgender.

For youth in the system, this also means that you can’t be denied the right to transition simply because you are in foster care. If you are placed with a family and the family is unsupportive of your transition, you can request a new placement. If you’re in a facility, the staff at the facility should be required to work with you through your transition and make sure that your identity is respected.

Section Five: Transgender Youth

More youth are coming out as transgender, gender variant, or questioning than ever before. And they are doing so at younger ages than before. CA has a number of laws that protect transgender youth (the foster care law mentioned above, for example), but still treats youth as not being able to make some decisions without the approval of their parent(s) or guardian(s).

Below are some key areas important to many transgender youth. As always, this information is just the barest outline of the relevant needs and the law. Specific questions can be directed to TLC.

ID Documents

In order to change your name officially on your drivers license or state ID, you will need permission from your parent(s) or guardian(s), unless you are an emancipate minor. With your parent(s) or guardian(s) permission, though, you can get a court ordered name change as well as get a drivers license or state ID with the correct name and/or gender marker (as long as you otherwise qualify).

Harassment at School

Transgender students are protected against gender identity based discrimination and harassment in public school settings. Clearly this means that a student can't be expelled or disciplined for being transgender. Some school districts have also interpreted the law to mean that transgender youth must be referred to by their post-transition name and/or gender, must have access to correct restroom, and must be included in any gender segregated activity according to their post-transition gender.

Emancipation / Guardianship

If you are a transgender youth who is facing abuse at home or if you are kicked out of your home for being transgender, you can consider creating a different kind of family for yourself. Someone else (a family friend or other relative) can ask the court to make them your guardian. Or, if you are old enough and can show a judge that you can support yourself, emancipation may be an option. Emancipation means that even though you are not 18, you are considered to be an adult and can make choices for yourself. Both of these options are serious and have many consequences. You should not go into either one without first talking to a lawyer and making sure that the option is right for you.

Special Custody Issues for Parents of Transgender Youth

As more transgender youth come out an earlier age, sometimes parents disagree about whether to support their children. If the parents are not married nor in a DP, this disagreement can lead to a renewed custody challenge. The parent who does not want their child to transition (or even talk openly about questioning their gender) may possibly try to get the court to limit the custody or visitation rights of the parent who is

supportive. Again, under CA law, this tactic should not work. However, due to the lack of information or experience on these issues, some judges may make bad decisions. If you are in this situation and want to support your child, please contact TLC or another knowledgeable legal source prior to taking any significant steps.

Attachments

1. Model Memorandum of Understanding
2. Durable Power of Attorney for Finances
3. California Advanced Health Care Directive
4. Adoption Agency Resource List
5. Information on Foster Care Anti-Discrimination Law

This document is based, in part, on information from the National Center for Lesbian Rights. However, TLC is solely responsible for any inaccuracies.

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.

Memorandum of Understanding

This memorandum is entered into on the date shown below between _____ (“Husband”) and _____ (“Wife”).

I. Recitals

- A. The parties, upon entering into marriage, desire to establish that both have knowledge that XXXXXX is transgender.
- B. By entering into this memorandum, XXXX and YYYY wish to make clear that they both understand that XXXXX was identified as [male/female] at birth.
- C. By entering into this memorandum, XXXX and YYYY wish to make clear that they both understand that XXXX is actually [female/male].
- D. By entering into this memorandum, both parties make clear that they each fully accept the rights and responsibilities typically associated with marriage in California, despite the fact that XXXX is transgender.
- E. Both parties agree that in the event that this marriage is dissolved, neither party will make arguments -- based on XXXX being transgender -- denying the other’s rights or their own responsibilities typically associated with marriage in California.
- F. By entering into this memorandum, both parties have full knowledge that because XXXX is transgender they will be unable to conceive a child together.

Representations and Waivers

- A. Each party has in good faith fully disclosed all relevant information concerning XXXX’s status as transgender.
- B. Each party has in good faith fully answered all questions presented by the other about XXXXX’s status as transgender and the possible effects of said status on their marriage.
- C. Neither party has any remaining questions about XXXXX’s status as transgender and the possible effects of said status on their marriage.
- D. Each party recognizes that this Memorandum may alter rights each would otherwise have under California law.
- E. By entering into this memorandum, each party expressly waives such rights.
- F. This memorandum takes effect at the time when a marriage license is issued.
- G. The later invalidation of such a marriage license does not invalidate this agreement.
- H. In the event that any provision of this Memorandum is deemed invalid or unenforceable, the remaining provisions are severable and remain effective.

In witness thereof, the parties have entered into this agreement on [date].

 (“Husband”)

 (“Wife”)

DURABLE POWER OF ATTORNEY FOR FINANCES

Recording requested by and when recorded mail to:

Warning to Person Executing This Document

This is an important document. It creates a durable power of attorney. Before executing this document, you should know these facts:

- 1. This document may provide the person you designate as your attorney in fact with broad powers to dispose, sell, convey and encumber your real and personal property.**
- 2. These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.**
- 3. You have the right to revoke or terminate this durable power of attorney at any time.**

DURABLE POWER OF ATTORNEY

1. Creation of Durable Power of Attorney

By signing this document, I, _____, intend to create a durable power of attorney. This durable power of attorney shall not be affected by my subsequent disability or incapacity, and shall remain effective until my death, or until revoked by me in writing.

2. Effective Date

This durable power of attorney shall become effective only in the event that I become incapacitated or disabled so that I am not able to handle my own financial affairs and decisions.

That determination shall be made in writing by a licensed physician and the writing shall be attached to this durable power of attorney.

3. Designation of Attorney in Fact

I, _____, hereby appoint
_____, as my attorney in fact, to act for me in
my name and for my use and benefit. Should _____
for any reason fail to serve or cease to serve as my attorney in fact, I appoint
_____ of _____ to be
my attorney in fact.

4. Authority of Attorney in Fact

I grant my attorney in fact full power and authority over all my property real and
personal, and authorize _____ to do and perform all and every act
which I as owner of that property could do or perform and hereby ratify and confirm that
all that my attorney in fact shall do or cause to be done under the Durable Power of
Attorney.

[Special Provisions or Limitations. Add to this section any specific limitation(s),
restriction(s), direction(s), etc. you want.]

5. Reliance by Third Parties

The powers conferred on my attorney in fact by this durable power of attorney may be
exercisable by my attorney in fact alone, and my attorney in fact’s signature or act under
the authority granted in this durable power of attorney may be accepted by any third
person or organization as fully authorized by me and with the same force and effect as if I
were personally present, competent and acting on my own behalf. No person or
organization who relies on this durable power of attorney or any representation my
attorney in fact makes regarding [his/her] authority, including but not limited to:

- (i) the fact that this durable power of attorney has not been revoked;
- (ii) that I, _____, was competent to execute this power
of attorney;
- (iii) the authority of my attorney in fact under this durable power of attorney,

Durable Power of Attorney for Finances
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shall incur any liability to me, my estate, heirs, successors or assigns because of such reliance on this durable power of attorney or on any such representation by my attorney in fact.

Signed on _____ at _____, _____.

Signature of Principal

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)
County of _____)

On this date _____ before me, _____,
personally appeared _____

____ Personally known to me - OR - ____ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Notary's Signature

IMPORTANT NOTE: This sample legal document is provided for informational purposes only and may or may not be valid in your state. This sample legal document also may not include the particular provisions you need. We strongly recommend you consult a competent family or estate planning attorney who is familiar with these issues. This sample document in no way constitutes, and should not be relied upon, as legal advice.

CALIFORNIA

ADVANCE HEALTH CARE DIRECTIVE

Explanation

You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or an employee of the health care institution where you are receiving care, unless your agent is related to you, is your registered domestic partner, or is a co-worker. Your supervising health care provider can never act as your agent.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition;
- (b) Select or discharge health care providers and institutions;
- (c) Approve or disapprove diagnostic tests, surgical procedures and programs of medication; and
- (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation;
- (e) Make anatomical gifts, authorize an autopsy, and direct the disposition of your remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out part 2 of this form.

Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death.

Part 4 of this form lets you designate a physician to have primary responsibility for your health care.

After completing this form, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health-care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.

You have the right to revoke this advance health care directive or replace this form at any time.

INSTRUCTIONS

**PRINT THE
NAME, HOME
ADDRESS AND
HOME AND
WORK
TELEPHONE
NUMBERS OF
YOUR PRIMARY
AGENT**

**PRINT THE
NAME, HOME
ADDRESS AND
HOME AND
WORK
TELEPHONE
NUMBERS OF
YOUR FIRST
ALTERNATE
AGENT**

**PRINT THE
NAME, HOME
ADDRESS AND
HOME AND
WORK
TELEPHONE
NUMBERS OF
YOUR SECOND
ALTERNATE
AGENT**

PART 1
POWER OF ATTORNEY FOR HEALTH CARE

(1) **DESIGNATION OF AGENT:** I designate the following individual as my agent to make health care decisions for me:

(Name of individual you choose as agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make a health-care decision for me, I designate as my first alternate agent:

(Name of individual you choose as first alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

(Name of individual you choose as second alternate agent)

(address) (city) (state) (zip code)

(home phone) (work phone)

ADD PERSONAL INSTRUCTIONS ONLY IF YOU WANT TO LIMIT THE POWER OF YOUR AGENT

INITIAL THE BOX IF YOU WISH YOUR AGENT'S AUTHORITY TO BECOME EFFECTIVE IMMEDIATELY

CROSS OUT AND INITIAL ANY STATEMENTS IN PARAGRAPHS 4, 5, OR 6 THAT DO NOT REFLECT YOUR WISHES

(2) **AGENT'S AUTHORITY:** My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration, and all other forms of health care to keep me alive, **except** as I state here:

(Add additional sheets if needed.)

(3) **WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE:** My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box. If I mark this box [], my agent's authority to make health care decisions for me takes effect immediately.

(4) **AGENT'S OBLIGATION:** My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

(5) **AGENT'S POSTDEATH AUTHORITY:** My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

(6) **NOMINATION OF CONSERVATOR:** If a conservator of my person needs to be appointed for me by a court, I nominate the agent designated in this form. If that agent is not willing, able, or reasonably available to act as conservator, I nominate the alternate agents whom I have named, in the order designated.

PART 2

INSTRUCTIONS FOR HEALTH CARE

If you fill out this part of the form, you may strike any wording you do not want.

INITIAL THE PARAGRAPH THAT BEST REFLECTS YOUR WISHES REGARDING LIFE-SUPPORT MEASURES

(7) **END-OF-LIFE DECISIONS:** I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below: **(Initial only one box)**

(a) **Choice NOT To Prolong Life**

I do not want my life to be prolonged if (1) I have an incurable and irreversible condition that will result in my death within a relatively short time, (2) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or (3) the likely risks and burdens of treatment would outweigh the expected benefits, **OR**

(b) **Choice To Prolong Life**

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards.

(8) **RELIEF FROM PAIN:** Except as I state in the following space, I direct that treatment for alleviation of pain or discomfort should be provided at all times even if it hastens my death:

(9) **OTHER WISHES:** (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

(Add additional sheets if needed.)

ADDITIONAL INSTRUCTIONS (IF ANY)

**ORGAN
DONATION**

**PART 3
DONATION OF ORGANS AT DEATH
(OPTIONAL)**

(10) Upon my death: (mark applicable box)

[] (a) I give any needed organs, tissues, or parts,

OR

[] (b) I give the following organs, tissues, or parts only

[] (c) My gift is for the following purposes:
(strike any of the following you do not want)

- (1) Transplant
- (2) Therapy
- (3) Research
- (4) Education

**PART 4
PRIMARY PHYSICIAN
(OPTIONAL)**

(11) I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

**PRINT THE
NAME, ADDRESS
AND TELEPHONE
NUMBER OF
YOUR PRIMARY
PHYSICIAN**

**PRINT THE
NAME, ADDRESS
AND TELEPHONE
NUMBER OF
YOUR
ALTERNATE
PRIMARY
PHYSICIAN**

(12) **EFFECT OF COPY:** A copy of this form has the same effect as the original.

(13) **SIGNATURE:** Sign and date the form here:

(date)	(sign your name)
(address)	(print your name)
(city)	(state)

(14) **WITNESSES:** This advance health care directive will not be valid for making health care decisions unless it is either:

- (1) signed by two (2) qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature; or
- (2) acknowledged before a notary public.

ALTERNATIVE No. 1 STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud or undue influence, (4) that I am not a person appointed as an agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individuals' health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

First Witness:

(date)	(signature of witness)
(address)	(printed name of witness)
(city)	(state)

**SIGN AND DATE
THE DOCUMENT**

**PRINT YOUR
NAME AND
ADDRESS**

**WITNESSING
PROCEDURE**

**BOTH OF YOUR
WITNESSES MUST
AGREE WITH THIS
STATEMENT**

**HAVE YOUR
WITNESSES
SIGN AND DATE THE
DOCUMENT AND
THEN PRINT THEIR
NAME AND
ADDRESS**

**© 2000
PARTNERSHIP FOR
CARING, INC.**

Second Witness:

_____	_____
(date)	(signature of witness)
_____	_____
(address)	(printed name of witness)
_____	_____
(city)	(state)

ADDITIONAL WITNESS STATEMENT

I further declare under penalty of perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law.

_____	_____
(date)	(signature of witness)
_____	_____
(address)	(printed name of witness)
_____	_____
(city)	(state)

**ALTERNATIVE No. 2
NOTARY PUBLIC**

State of California)
) SS.
County of _____)

On _____ before me, _____
(insert name of notary public)

personally appeared _____,
(insert the name of principal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity and that by his/her signature on the instrument the person upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

NOTARY SEAL _____
(signature of notary)

ONE OF YOUR WITNESSES MUST ALSO AGREE WITH THIS STATEMENT

HAVE YOUR WITNESS ALSO SIGN AND DATE THIS SECTION AND PRINT THEIR NAME AND ADDRESS

OR

A NOTARY PUBLIC SHOULD FILL OUT THIS SECTION OF YOUR DOCUMENT

**THIS SECTION
IS TO BE
COMPLETED
ONLY IF YOU
ARE A
RESIDENT IN A
SKILLED
NURSING
FACILITY**

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as witness as required by section 4675 of the Probate Code.

_____	_____
(date)	(signature)
_____	_____
(address)	(printed name)
_____	_____
(city)	(state)



AB 458 FACT SHEET

Foster Care Non-Discrimination Act

AB 458, the Foster Care Non-Discrimination Act, was signed into law on September 6, 2003 and goes into effect on January 1, 2004. AB 458 prohibits discrimination in the foster care system on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status. Because training is crucial to enable service providers to fulfill their responsibilities to provide safe and nondiscriminatory care, placement, and services to foster children, AB 458 also mandates initial and ongoing training for all group home administrators, foster parents, and department licensing personnel.

This law is the first of its kind in the United States to explicitly include protections for lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth and adults involved with the foster care system.

Specifically, the law provides:

- Ø All foster children¹ and all adults engaged in the provision of care and services to foster children² have a right to fair and equal access to all available services, placement, care, treatment and benefits.
- Ø All foster children³ and all adults engaged in the provision of care and services to foster children⁴ have a right not to be subjected to discrimination or harassment on the basis of actual or perceived sexual orientation or gender identity.
- Ø Adds these rights and protections to the California Foster Child List of Rights.
- Ø All group home administrators,⁵ foster parents,⁶ and department licensing personnel⁷ must receive initial and ongoing training on the right of a foster child to have fair and equal access to all available services and to not be subjected to harassment or discrimination based on their actual or perceived sexual orientation or gender identity.
- Ø All community college districts that provide orientation and training to relative caregivers must make available to relative and extended family caregivers orientation and training courses that cover the right of a foster child to have fair and equal access to all available services, placement, care, treatment, and benefits and the right of foster youth not to be subjected to discrimination or harassment on the basis of actual or perceived sexual orientation or gender identity.⁸

(OVER)

ENDNOTES

¹ Cal. Welfare & Inst. Code § 16001.9(a)(22).

² Cal. Welfare & Inst. Code § 16013(a).

³ Cal. Welfare & Inst. Code § 16001.9(a)(22).

⁴ Cal. Welfare & Inst. Code § 16013(a).

⁵ Cal. Health & Safety Code § 1522.41(c)(1)(H). Failure to comply with this section shall constitute cause for revocation of the license of the facility. Cal. Health & Safety Code § 1522.41(b)(3)

⁶ Cal. Health & Safety Code § 1529.2(b)(3)(F); § 1529.2(b)(4)(F).

⁷ Cal. Health & Safety Code § 1563(c)(5).

⁸ Cal. Welfare & Inst. Code § 16003(a)(1).

NCLR's Youth Project has been advocating for LGBTQ youth in schools, foster care, juvenile justice settings, and the mental health system since 1993. The Project provides direct, free legal information to youth, legal advocates, and activists through a toll-free line; advocates for policies that protect and support LGBTQ youth in these different arenas; and litigates cases that are creating new legal protections for youth in schools, foster care, juvenile justice and other settings.

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LGBTQ Youth in the California Foster Care System A Question and Answer Guide

This question and answer guide is designed to address many of the frequently asked questions about protecting lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth in the California foster care system from harassment and discrimination.

Are there LGBTQ youth in foster care?

Yes. At any one time there are approximately 260,000 youth in the foster care system in the United States¹ and approximately 42,500 youth in the California foster care system.² While it is impossible to determine precisely the number of LGBTQ youth in the foster care system, recent studies suggest that LGBTQ youth make up between 5 and 10 percent of the total foster youth population.³ The actual percentage may be even higher since LGBTQ youth are over-represented in the foster care pool due to discrimination and abuse many of these youth face in their families of origin and in their schools.⁴

Are LGBTQ youth in the foster care system at risk of being harassed or discriminated against?

Yes. LGBTQ youth are disproportionately targeted for harassment and discrimination in the foster care system. In one of the only studies of its kind, a New York Task Force found:

- Ø 100% of LGBTQ youth in New York City group homes reported that they were verbally harassed on the basis of their sexual orientation or gender identity while at their group home.⁵
- Ø 70% reported physical violence due to their sexual orientation or gender identity.⁶
- Ø 78% were removed or ran away from their foster placements as a result of hostility toward their sexual orientation or gender identity.⁷
- Ø 56% spent time living on the streets because they felt “safer” there than they did living in their group or foster home.⁸

This abuse is perpetrated not only by youth peers, but also by facility staff and other service providers. When the abuse is between peers, often it is condoned by facility staff or goes unaddressed.

What are some examples of discrimination that LGBTQ youth might encounter in the foster care system?

Examples of unlawful discrimination include:

- Ø Failing or refusing to take steps to protect an LGBTQ youth from harassment based on their actual or perceived sexual orientation or gender identity;

- Ø Failing to use the requested name and pronoun that is in accordance with a transgender youth's gender identity;
- Ø Treating displays of affection by same-sex couples differently than displays of affection by different-sex couples;
- Ø Refusing to allow a youth to wear clothing that is consistent with their gender identity;
- Ø Not allowing an LGBTQ youth to attend a gay prom;
- Ø Confiscating LGBTQ supportive materials.

Do foster care providers have a legal responsibility to protect LGBTQ youth from harassment and discrimination?

Yes. California law specifically protects foster children from harassment and discrimination based on actual or perceived sexual orientation or gender identity. All LGBTQ youth in foster care must be provided with equal access to all available services, placement, care, treatment and benefits. The law covers all aspects of foster care, including all available services, placement, care, treatment, and benefits, and the right to not be subjected to discrimination or harassment.⁹

In addition, all foster youth have a constitutional right to equal protection under the law. This means that all group home facilities must protect LGBTQ youth, and those perceived to be LGBTQ, from harassment, just as they must protect all foster youth from harassment on the basis of race, religion, and sex. If group home providers ignore incidents of harassment because they believe LGBTQ youth should expect to be harassed or that they have brought the harassment upon themselves by being open about their sexual orientation or gender identity, they have violated the youth's right to equal protection..

In addition, all youth have constitutional rights to freedom of expression, which may include the right to be open about their sexual orientation or gender identity. The First Amendment and the Federal Due Process and Equal Protection Clauses may also protect the right of a transgender youth to dress in accordance with his or her gender identity in a group home.¹⁰

Does the law require foster care providers to receive training about this nondiscrimination requirement?

Yes. Under the California Foster Care Nondiscrimination Act all group home administrators, foster parents, and department licensing personnel must receive initial and ongoing training on the rights of a foster child to have fair and equal access to all available services and the right to not be subjected to harassment or discrimination based on their actual or perceived sexual orientation or gender identity.¹¹

In addition, all community college districts that provide orientation and training to relative caregivers must make available to these caregivers, orientation and training courses that cover the rights of a foster child to have fair and equal access to all available services and to not be subjected to harassment or discrimination on the basis of actual or perceived sexual orientation or gender identity.¹²

In addition to the required trainings, what other steps can service providers take to ensure they comply with the nondiscrimination requirements?

Foster care programs should adopt and enforce written anti-harassment/anti-discrimination policies that explicitly prohibit harassment and discrimination on the basis of actual or perceived sexual orientation or gender identity. Both the policy and the forms for filing complaints under the policy should be readily available to foster youth.

Programs should also provide anti-bias training for youth and any other persons involved in the foster care system who are not mandated to receive training under the law, including child welfare workers and other group home staff. All facilities should have information and materials about LGBTQ issues available for staff and youth.

Are foster parents required to take in a foster child who is LGBTQ even if they feel that homosexuality is morally wrong?

Foster parents are free to hold any beliefs they choose about homosexuality. Foster parents and relative caregivers are not paid employees of the state. Instead they care for foster children in their own homes and are permitted under current practice to decide on an individual basis whether to accept and retain an individual child in their care. But once a foster parent or relative caregiver accepts a child into their home, they have a legal responsibility to provide care to the child without discrimination on the basis of actual or perceived sexual orientation, gender identity, HIV status, and other protected categories.

Because a change in living environment is traumatic for any child, if a foster parent or relative caregiver cannot fulfill their responsibility of caring for a particular child, then they should notify the child's social worker and seek additional training, counseling, or other assistance with the goal of keeping the child in the home. Only as a last resort should a foster parent or relative caregiver request that a child be removed from their home.

How do we protect LGBTQ youth in foster care from harassment and discrimination and still respect the religious and cultural diversity of foster parents and youth?

It does not violate any person's religious beliefs or disrespect any person's cultural background to teach young people or adults that violence, name calling and other harassment are wrong and to ensure that all youth are treated equally. Everyone is free to hold any beliefs they choose regarding homosexuality and gender, so long as they do not harass, threaten, or discriminate against foster youth because of their sexual orientation or gender identity. Developing an atmosphere of respect for diversity in all foster care placements provides the necessary space for all foster youth to feel comfortable and safe.

In addition, it does not violate the religious freedom of staff or administrators to require that staff appropriately respond to violence, discrimination and harassment.

Adopting and enforcing inclusive anti-harassment and discrimination policies and training all staff on these non-discrimination requirements will help service providers ensure that all of their youth are provided with the safe and affirming placements to which they are entitled.

¹ According to the U.S Department of Health and Human Services, Administration on Children, Youth, and Families, and the Children's Bureau on September 30, 2001 there were 542,000 kids in foster care in the United States. The median age for these kids was 10.6 years old. Approximately 49% or 260,475 were over the age of 11. Statistics available at: <http://www.acf.hhs.gov/programs/cb/publications/afcars/report8.htm> (last visited December 2, 2003).

² According to the Child Welfare Research Center Child Welfare Services report, there were 90,049 children in foster care in California on July 1, 2003. Of these youth, 42,612 were over the age of 11. Statistics available at: http://cssr.berkeley.edu/CWSCMSreports/Pointintime/fostercare/childwel/data/CWf_PA0_jul2003_0.html (last visited December 19, 2003).

³ See Lambda Legal Defense and Education Fund, *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care* 11 (2001) (hereinafter *Youth in the Margins*).

⁴ See *id.*

⁵ See Urban Justice Center, *Justice for All? A Report on Lesbian, Gay, Bisexual and Transgendered Youth in the New York Juvenile Justice System* 16 (2001) (citing Joint Task Force of New York City's Child Welfare Administration and the Council of Family and Child Caring Agencies, *Improving Services for Gay and Lesbian Youth in NYC's Child Welfare System: A Task Force Report*, (1994)).

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ Cal. Welfare & Inst. Code § 16001.9(a)(22).

¹⁰ See, e.g., *Doe v. Yunits*, 2000 WL 33162199, at * 3-4 (Mass. Super.), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass.App.2000).

¹¹ Cal. Health & Safety Code § 1522.41(c)(1)(H); Cal. Health & Safety Code § 1529.2(b)(3)(F); § 1529.2(b)(4)(F); Cal. Health & Safety Code § 1563(c)(5).

¹² Cal. Welfare & Inst. Code § 16003(a)(1).

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