



Transgender Family Law Facts

*a fact sheet for transgender spouses,
partners, parents, and youth*



Transgender Law Center

Making Authentic Lives Possible

Introduction

This fact sheet was designed to answer basic legal questions related to marriage, domestic partnerships, parenting, foster care, and youth issues. It is not intended to be a comprehensive summary of family law, or to be used in place of legal representation.

If you have questions about a family law issue, or want more information, please contact:

Transgender Law Center

415-865-0176
transgenderlawcenter.org/help

National Center for Lesbian Rights

415-392-6257
nlcrights.org

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Marriage

Transgender people may be confused about whether they can get married, and to whom. This is because it is sometimes not clear what defines a person's "legal" gender for purposes of marriage, and what steps need to be taken in order for a person to be able to enter into a marriage that is legally recognized. This is also because an increasing number of states permit same-sex marriage. As a result, it is important that a transgender person consider both the marriage laws of a state, as well as the gender change laws of a state, in deciding where to get married.

Same-Sex Marriage

For transgender people living in states that recognize both same-sex and different-sex marriage, the issue of their "legal" gender doesn't make a difference regarding whether they can marry: they can marry either someone of the same or opposite gender, regardless of what steps they have taken to transition, and the state will recognize their marriage.

At least fourteen states currently recognize both same-sex and different-sex marriages, including: California, Connecticut, Delaware, Iowa, Maine, Massachusetts, Maryland, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Washington. The District of Columbia and several Native American tribes also recognize same-sex marriages.

In these jurisdictions, a spouse's transition status and/or legal documentation can help determine whether they are entering into a same or different sex marriage. For example, a transgender woman who has not undergone medical or legal transition should be allowed to enter into a legal same-sex marriage with a cisgender (non-transgender) woman in California; or into a legal different-sex marriage with a cisgender man or transgender man who has undergone medical transition or legally changed his sex.

Keep in mind that couples who enter into same-sex marriages and who reside in a state that does not respect their marriage may still be entitled to receive some federal benefits, but not all, because some federal benefits are based on the validity of the marriage where the couple lives. Please see NCLR's website for more information about how each type of federal benefit will be affected by where a married same-sex couple lives: <http://www.nclrights.org/legal-help-resources/resource/after-doma/>.

Different-Sex Marriage

For those individuals living in a state that does not recognize same-sex marriages, the validity of a transgender person's different-sex marriage may be impacted by when they transitioned, whether they transitioned medically or underwent a legal gender change, as well as when they married.

Keep in mind that most states have not addressed the issue of whether a marriage with a transgender spouse is valid, and some states do not recognize legal gender change for purposes of marriage.

Transition Before Marriage

If a transgender person changes the gender marker on at least one of their government-issued ID documents -- a driver's license, passport, birth certificate, or Social Security card -- that should be sufficient legal recognition of the person's identity to allow them to legally marry a person of a different sex. Changing the gender marker on their birth certificate is generally the safest way to make sure a transgender person's different-sex marriage will be recognized.

In the past, courts in some states (including Texas, Kansas, and Ohio) have refused to recognize different-sex marriages entered into by transgender people where they had changed their birth certificate but hadn't undergone sex-reassignment surgery (SRS) -- and in rare cases, even where the person had undergone SRS and changed the gender marker on their birth certificate. There is a good chance those decisions would not come out the same way today, but if you live in one of those states, it's a good idea to take extra precautions to make sure your relationship will be recognized even if your marriage is not. You can do things like making a will, filling out a health care power of attorney, and obtaining a second-parent adoption for any children of the relationship. For more information, see NCLR's publication, "Transgender People and Marriage: The Importance of Legal Planning," at <http://www.nclrights.org/wp-content/uploads/2013/07/tgmarriage.pdf>.

Transition After Marriage

In all United States jurisdictions, a marriage that is valid at the time it is entered remains valid until death, dissolution, or annulment. Although most U.S. states do not permit same-sex marriages, no state has ever dissolved a marriage on the grounds that one spouse has transitioned. Therefore, if a couple marries as a different-sex couple and one spouse subsequently transitions, the marriage will almost certainly remain valid in any state. Just to be safe, however, it's a good idea to take the steps outlined above, including making a will, filling out a health care power of attorney naming your spouse as the decision-maker in case anything happens to you, and obtaining a second-parent adoption for any children of the relationship.

Domestic Partnerships and Civil Unions

In California, Oregon, Washington, Maine, Hawaii, Nevada, Wisconsin, and Washington, D.C., a separate legal system called Registered Domestic Partnership (RDP) exists for same-sex couples and couples in which at least one partner is over the age of 62. Several other states offer the same or similar benefits but call the relationship a civil union, including Colorado, Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. Similar to the way in which the "different-sex" requirement raises questions about the availability of marriage for transgender people, so too does the "same-sex" requirement for RDPs and civil unions.



Luckily, the answers are basically the same. Gender transition shouldn't end an existing RDP or civil union, and someone should be able to enter into a RDP if their legal gender is the same as their partner's. RDPs and civil unions have all of the rights and responsibilities of marriage under the laws of the state that granted that status; however, RDPs and civil unions will not be recognized by the U.S. government and may not be recognized in other states.

Special note for people who transition after entering into a RDP or civil union: If one partner in a same-sex RDP or civil union transitions, the RDP or civil union will not automatically "convert" to a different-sex marriage. It will stay as an RDP or civil union unless or until the couple goes through all steps necessary to get married (i.e. applying for a marriage license and having the marriage solemnized). Also, the couple would not need to end their RDP or civil union in order to get married -- once a valid marriage is established, the RDP is terminated.

Parenting

Transgender people can become parents in a number of different ways: by having a child; acting as a co-parent to a child born to a spouse or partner; conceiving a child through assisted reproductive technology, such as surrogacy; and/or adopting a child that has no biological ties to either parent (or doing so as a single person). The law in California strongly supports the right and ability of transgender people to be parents in each of these situations. That is, in California a transgender person should not be at risk of having custody or visitation with their child lessened or compromised simply because of their gender identity or expression. However, other states have different interpretations of the law so it is important that a transgender person consult a legal expert before starting a family.

Unfortunately, due to a lack of experience with transgender parents on the part of some judges, family law attorneys, and court personnel, transgender parents may have a hard time asserting their rights--especially in states that have fewer legal protections for LGBT people. If you end up in a conflict over parentage, custody, or visitation, we recommend that you clarify your legal rights by calling Transgender Law Center, the National Center for Lesbian Rights, or a private lawyer who understands transgender family law issues.

Additionally, all non-biological or non-adoptive parents should get an adoption or parentage judgment from a court. It is very important to establish parenting rights from the start because once a person has given up their rights to custody and visitation, it is very difficult to get them back.

Foster Care

Transgender people participate in the foster care system in a number of different ways: as youth in the system, as foster parents, and as people working in the system. Discrimination laws vary from state to state, but under California law, all of these groups are protected from gender identity discrimination. 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 they can't be denied the right to transition simply because they are in foster care or denied a transfer if the foster care family is not supportive. The staff at any facility should work with the youth through their transition and make sure that their identity is respected.



Transgender Youth Issues

Despite transgender non-discrimination laws that protect youth, state laws still generally treat youth as not being able to make many important decisions without the approval of their parent(s) or guardian(s). For example, in California, in order to change a youth's name officially on their driver's license or state ID, a transgender person under 18 will need permission from their parent(s) or guardian(s), unless the youth is an emancipated minor.

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. If you are old enough and can show a judge that you can support yourself, emancipation may be an option. Or someone else (for instance, a family friend or other relative) can ask the court to assign them as your guardian. 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.

Finally, as more transgender youth come out at an earlier age, sometimes parents disagree among themselves about whether to support their children. If the parents are separated, this disagreement can sometimes lead to a renewed custody challenge. If you are in this situation and want to support your transgender child, please contact Transgender Law Center, the National Center for Lesbian Rights, or another knowledgeable legal resource prior to taking any significant steps, because litigating these cases in court can be risky and difficult.