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## **Family Law and Gender Identity: Legal Issues Arising When Marrying and Parenting While Trans**

**Margaret (Meg) Butler\***

Issues of the heart and home are common across a variety of gender and sexuality identifications. This chapter presents scholarship related to a number of different legal issues related to heart and home and also gender identity<sup>1</sup>: marriage, gender nonconforming parenting, children and their rights to self-identify and present as gender nonconforming,<sup>2</sup> foster care for gender nonconforming children, and estate planning.<sup>3</sup>

Even with the variety of legal issues raised by the scholarship included in this chapter, there remains great possibility for future scholarship. First, much of the existing scholarship are notes or case comments, written by law students. As the difficulties experienced by trans and gender nonconforming people are more commonly observed and reported in the news, professors, practitioners, and judges will devote greater attention to addressing the issues raised. A significant opportunity exists for scholarship advocating for professional training and education for lawyers and the judiciary, to minimize the likelihood that transgender parties are adversely affected by biases and prejudices as they seek to assert their rights.

When the United States Supreme Court decided *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), it may be argued that legal issues related to marriage of transgender or gender nonconforming people were mooted. However, issues remain and leave room for further scholarship. Time will tell whether outcomes of dissolutions in which one or both spouses is transgender are consistent with outcomes of dissolutions in which both

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<sup>1</sup> See chapters by Lee Little and David Holt for annotations relating to family-related legal issues and sexuality.

<sup>2</sup> Annotations of legal resources related to seek medical treatment may be found in the chapter on gender identity and health. Articles included in this chapter have a more substantial focus on the minor's agency, rather than the right to medical treatment.

<sup>3</sup> Title IX-related scholarship related to education is aggregated together, regardless of the age of the learner. Please see the education law-gender identity chapter for those resources. See Rebecca Mattson's chapter "LBGTQ Athletes and Discrimination in Sport" for resources related to Title IX in the context of sports.

spouses are cisgender. Of particular interest is whether transgender parents will be accorded equal treatment as cisgender parents in custody determinations. Further, whether the special estate planning needs of transgender clients continues has not yet been answered clearly. It is foreseeable that more authors will address custody and parenting decisions related to the medical care of minor children who identify as gender nonconforming.

The needs of gender nonconforming minor children in foster care, ranging from housing to access to medical treatment, will persist, as long as parents are unable or unwilling to accept their children. Issues in this area include whether the state should pursue termination of parents' rights for their failure to recognize or consent to treatment for gender nonconforming or transgender children; the state should assert child support claims for its care of these children, how children are housed, and protecting the children from abuse by other children and influential figures in their lives.

With lifetime rates of abuse or intimate partner violence experienced by gender nonconforming or transgender people ranging from 31 to 50%, higher than in the cisgender population, this area calls out for additional scholarship.<sup>4</sup> In the future, scholars may develop theories of rights and law to support those who experience violence in the home.

Reproductive rights of transgender and gender nonconforming people raise additional opportunities for scholarship. Although it might be considered as well in the health context, whether there is a fundamental right to parent bumps heads with whether a medical practitioner has a religiously protected right to refuse to perform treatment or accept a transgender person as a patient.

To become grounded in the possible topics in this area, consider locating and visiting the websites of transgender rights advocacy organizations such as the Transgender Law Center, the National Center for Transgender Equality, and the National Center for Lesbian Rights for an overview. To search for scholarship in this area, in free databases such as Google Scholar, begin constructing your search with the term *transgender* or "*gender nonconforming*". Add to that search term additional terms that focus in on your area of interest, such as *reproductive rights* or *foster care*. Other key search terms that may be used include: *trans* or *transgender* or *cisgender*, *gender non-conforming*, *marriage*, *divorce*, *estate planning*,

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<sup>4</sup> Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research*, THE WILLIAMS INSTITUTE, p. 3 Nov. 2015, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf>.

*intimate partner violence*, etc. As discussed in the chapter “Names Are Important,” keep in mind that transgender is an umbrella term and that using a narrower term, such as transsexual, will limit the scope of research.

Aloni, Erez, *Cloning and the LGBTI Family: Cautious Optimism*, 35 N.Y.U. REV. L. & SOC. CHANGE 1–80 (2011) (from the Symposium: From Page to Practice: Broadening the Lens for Reproductive and Social Rights).

Aloni argues that cloning is a solution that would allow LGBTI families to have genetically-related children, and that the federal ban on such research perpetuates discrimination and violates equal protection. Taking a systematic approach, Aloni evaluates possible benefits, methodologies of reproductive cloning, and considers both traditional and so-called heterosexist arguments against cloning. Finally, Aloni argues that banning reproductive cloning violates both fundamental rights and the equal protection clause.

Anthony, Deborah J., *Caught in the Middle: Transsexual Marriage and the Disconnect Between Sex and Legal Sex*, 21 TEX. J. WOMEN & L. 153–86 (2012).

Anthony’s analysis begins by noting that transsexuals are adversely affected by prohibitions against same-sex marriage, prohibitions which often fail to define either “male” or “female.” After presenting both the scientific and legal approaches to determining and defining gender, Anthony argues that current legal standards violate transsexuals’ rights to equal protection by both discrimination on the basis of sex and by withholding the fundamental right to marriage. The due process right to privacy, through association by marriage, is also violated, Anthony argues. Ultimately, Anthony champions the “right of the individual to meaningfully determine her own identity and live her life accordingly.”

Bergstedt, A. Spencer, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675–712 (2008).

Practitioner A. Spencer Bergstedt contributed this frequently cited piece to a symposium on estate planning for same-sex and transgender couples. The article presents basic information about transgender people and related estate planning needs, probate issues that arise for transgender people, and practical suggestions on drafting effective estate plans. Issues raised include: name changes; gender marker changes; the

REAL ID Act; and marital status. Documents addressed include: power of attorney; inheritance rights; wrongful death and medical malpractice claims; and avoiding challenges to capacity or validity. Suggestions for drafting include: provide a clear statement of identity; consider post-mortem instructions; and consider during-life issues such as aging, medical decision-making documents, and prenuptial agreements.

Cruz, David B., *Heterosexual Reproductive Imperatives*, 56 EMORY L.J. 1157–72 (2007).

This article was adapted from the Mary C. Dunlap Memorial Lecture on Sex, Gender, and Social Justice at Boalt Hall School of Law. Cruz uses women's rights to reproductive autonomy as the lens to analyze ideologies of heterosexual reproduction. Then Cruz considers how those same ideologies are used to form the basis of arguments against same-sex couples' claims to marriage rights and transpersons' claims to legal recognition of their gender.

Ford, Andrew, *State Child Emotional Abuse Laws: Their Failure to Protect Children with Gender Identity Disorder*, 49 FAM. CT. REV. 642–56 (2011).

Ford notes that transgender children are often subject to emotional abuse by parents who fail or refuse to recognize their gender. To address this problem, Ford proposes an emotional abuse model statute that identifies actions that would be presumptively considered abusive, such as failure to use the name designated by the child. Existing emotional abuse statutes are described, as are their failures to protect transgender children.

Franson, Holly V., Comment, *The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies*, 84 U. COLO. L. REV. 497–528 (2013).

In this casenote and comment, Franson takes on the challenge of school dress codes which, Franson asserts, present unique obstacles for the transgender child who is faced with the Hobson's choice: violate school dress codes or experience psychological trauma of violating the sense of self. The note reviews three cases in which students brought action against school districts based on enforcement of dress code rules, concluding that the Fourteenth Amendment is the strongest basis on

which to assert such a claim. Finally, Franson advocates that schools adopt the Model District Policy on Transgender and Gender Nonconforming Students released by the Gay, Lesbian and Straight Education Network (GLSEN) and the National Center for Transgender Equality.

Goodmark, Leigh, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51–104 (2013).

This is the first law review article to address intimate partner abuse, sometimes called family violence, as experienced by transgender people. The author suggests that the legal system is unlikely to provide relief for transgender people who are subjected to abuse. An improved understanding of the needs of those who experience domestic violence, particularly including transgender people, is required to improve law and policy regarding domestic violence. Taking a thoughtful approach, Goodmark raises a variety of concerns: recognizing types of behavior uniquely abusive to transgender people; identifying barriers to assistance including economic needs and access to shelter; and failures of the police and court systems to provide protection from abusers. Considering the role of patriarchy in perpetuating abuse, makes suggestions of changes to the legal system and other alternatives.

Hammer, Gail, *Transparent: When Legal Fictions and Judicial Imagination Make Facts Disappear, They Enforce Transphobic Discrimination*, 30 COLUM. J. GENDER & L. 119–203 (2015).

First Hammer introduces the reader to Kim, a transgender woman who owes a child support obligation that, over time, she is unable to meet for a variety of reasons including disability and transitioning. Kim's experiences demonstrate that the judge, when faced with a transgender parent, routinely ignored facts regarding her income, imputing an impossibly high income and finding her in contempt of court. Given that example, Hammer suggests several changes to the legal system, such as the amendment of child support guidelines to allow courts to consider discrimination when electing to impute income; the adoption of rules of evidence that accept self-reported gender identity; mandating cultural competence training for judges; whether appointed or elected, evaluators of judges (for rating of candidates, etc.) should consider as a factor whether the judge is able to "prioritize facts over legal fictions" (161). One appendix includes suggested training information for judge education. The other includes a survey of state laws regarding the imputing of income to unemployed parents for calculation of child support.

Jeruss, Sara, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853–934 (2009).

In this article, attorney Jeruss notes the unique position of LGBT adolescents and sets forth the proposition that a right of access to the courts would benefit the minors. After explaining how to resolve conflicts between parents' and minors' rights, Jeruss provides a 50-state survey of state procedural laws regarding minors' access to the courts. Jeruss explores the mature minor doctrine and ultimately argues that minors are mentally capable of deciding to go to court and should be allowed to do so independently, using guardians ad litem, and that this right should be codified.

Joslin, Courtney G., et al., *Marriage and Custody Issues for Transgender People*, in LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW (2017).

Part of a larger work, this chapter provides a quick access point to the state of law regarding marriage and custody issues. Notably, the chapter includes summaries of legal conflict that was apparently settled by the *Obergefell* decision. Although this resource does not provide detailed scholarly analysis, it would help a practitioner get quickly up to speed on issues that may arise, for example, when divorced parents disagree about medical treatment for transgender children.

Kennedy, Amanda, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281–302 (2008).

Recognizing that the health of transgender youth may be endangered by systemic failures to allow the youth to determine their transition path, Kennedy describes barriers to youth participation including parent stonewalling, financial concerns, and legislative or administrative requirements. Kennedy provides a basic background on the legal effects of transition and provides descriptive scenarios of what happens legally when parents agree to a minor's transition, they disagree regarding the minor's transition, and the parents both oppose the minor's transition. Kennedy concludes by offering legal and public policy justifications for allowing minors to make decisions regarding their own transitions.

TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY (Jennifer L. Levi et al. eds., 2012).

The contributing authors represent a list of notable attorneys from both Massachusetts and national advocacy organizations including the National Center for Lesbian Rights (NCLR) and Gay and Lesbian Advocates and Defenders (GLAD). The scope of content ranges from basic practice recommendations that would make a practice more welcoming to specific concerns including assisting clients with changing gender markers on identification, marriage-related issues, parental rights protections, end-of-relationship representations, and protecting parental rights. The authors also address transgender children in the context of custody disputes and representation of trans youth. The coverage of family issues is rounded out by a frank discussion of intimate partner violence and basic estate planning. The book is a project of GLAD's Transgender Rights Project.

Love, Ariel, *A Room of One's Own: Safe Placement for Transgender Youth in Foster Care*, 89 N.Y.U. L. REV. 2265–2300 (2014).

Arguing that the New York City foster care system fails to protect the substantive due process rights of transgender youth by failing to mandate separate bedrooms for transgender youth, Love offers a legislative solution as well as litigation strategies. In this note, Love recognizes that transgender children and youth in foster care are at their most vulnerable in their bedrooms, where they are naked or sleeping, and observes that LGBTQ-only group homes are the safest group home option for transgender children and youth in foster care. The note includes first-person anecdotes of abuse experienced in mixed-gender group homes.

Nixon, Laura, *The Right to (Trans)Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 78–104 (2013).

Nixon, a Law Students for Reproductive Justice Fellow at the National Center for Lesbian Rights, argues that reproductive health issues of transgender people are overshadowed in the movements for both LGBT rights and reproductive health and rights. After critiquing the common abortion-centric focus on reproductive issues, Nixon provides an overview of reproductive justice analysis and applies that lens to the issues experienced by transgender people. Nixon also suggests that state



statutes that restrict gender marker changes to those who have undergone procedures that diminish fertility is a form of passive eugenics. By focusing on reproductive justice, Nixon suggests that advocacy for all will be improved.

Olson, Christine T., *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25–58 (2009).

After providing a background explanation of why it is important for transgender youth to express their gender identities and a brief survey of current statutory and case law, Olson argues that group foster homes may not legally enforce gender-conforming dress or other requirements. The analysis reviews free speech protection, Fourteenth Amendment due process liberty interests in gender expression and state duty to protect its youth, and both individual and class based equal protection gender discrimination claims. Olson recommends explicitly anti-discrimination laws and policies.

Parks, Wesley, *Removal of the Impediment: The State of Transgender Marriage in Montana*, 74 MONT. L. REV. 309–42 (2013).

Parks describes the laws of Montana, where gender markers on driver licenses may be changed without sex reassignment surgery, while birth certificates may only be changed after completion of sex reassignment surgery. Montana courts are silent, thus far, on issues related to transgender people marrying. Parks considers cases considered in other jurisdictions and argues that Montana should be the first state to use a subjective definition of sex for purposes of marriage and that Montana should further adopt gender-neutral marriage legislation.

Perkiss, David Alan, *Boy or Girl: Who Gets to Decide? Gender-Nonconforming Children in Child Custody Cases*, 27 HASTINGS WOMEN'S L.J. 315–38 (2016).

Perkiss evaluates two parental custody cases in which the parents disagreed about diagnosis and treatment of Gender Identity Dysphoria in Child (GIDC). To minimize the risk to transgender youth of harm arising from family rejection, Perkiss makes several suggestions. He advises advocates to be careful to represent the best interests of the child and to support the client's position with expert testimony. Perkiss also recommends training to prepare judges to make medically supported opinions.

Skougard, Erika, *The Best Interests of Transgender Children*, 2011 UTAH L. REV. 1161–1201 (2011).

Skougard's note provides an overview of gender identity as described in the *Diagnostic and Statistical Manual-IV*. The lack of consensus regarding treatment approaches for gender identity disorder of childhood (GIDC) is noted. Skougard provides two case studies demonstrating "an unreceptive court" and a court applying a traditional "best interests of the child" analysis. Recommendations for parents, attorneys, and courts are included.

Stirmitzke, Audrey C., *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285–320 (2011).

In this note, Stirmitzke reviews transsexual marriage cases, particularly focusing on the English case *Corbett v. Corbett*, 2 All E.R. 33 (P. 1970), which set forth the "true sex" model for determining eligibility to (heterosexually) marry. In the "true sex" model, one's sex is assigned at birth. Ultimately Stirmitzke argues that the solution to the problems raised by the "true sex" model and same-sex marriage bans would be to no longer consider sex as a factor when determining marriage eligibility.

Turner, J. Lauren, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552–69 (2009).

Using the facts of real cases, Turner sets the stage for her arguments with a hypothetical describing the experiences of a transgender youth in foster care. After calling on foster care agencies to fulfill their responsibilities to transgender children, Turner advocates for law changes to clarify that hormone therapy and sex reassignment surgery should be treated as medically necessary. Finally, Turner responds to anticipated counter-arguments to her proposal.

### Primary Sources

Corbett v. Corbett, 2 All E.R. 33 (P. 1970)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

REAL ID Act of 2005, Pub. L. No. 109-13, Division B, 119 Stat. 231 (2005) (codified in scattered sections of 8 U.S.C. & 49 U.S.C.), 8 U.S.C.A. § 178

Title IX, An Act to Amend the Higher Education Act of 1965. Pub. L. No. 92-318, 86 Stat. 235 (1972), codified at 20 U.S.C. §§ 1681–1688