

# Representing Transsexual Clients: Selected Legal Issues

By Shannon Minter © 2004

Legal Director, National Center for Lesbian Rights  
870 Market Street, Suite 370, San Francisco, CA 94102  
415-392-6257; Minter@nclrights.org

## I. Introduction

The existence of individuals who live as members of the other gender and whom we would now likely identify as “transsexual” has been documented throughout human history.<sup>1</sup> In contrast, the contemporary medical treatments that comprise sex-reassignment have only been available for about forty years. As a medical condition, transsexualism is defined as “the desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.”<sup>2</sup> Transsexualism is technically classified as a specific form of a broader psychiatric disorder termed “gender identity disorder,” also known as “gender dysphoria.”<sup>3</sup> The only recognized treatment for transsexualism is medical, not psychiatric. The medically prescribed treatment for transsexualism consists of three components: (1) hormone therapy; (2) living as a member of the other sex (known as the “real life experience”); and (3) sex-reassignment surgeries.<sup>4</sup>

As medical treatments for transsexualism have developed, transsexual people have sought—and, increasingly, received—legal protection in the areas of employment discrimination, marriage, child custody, health care, prison safety, hate crimes legislation, and asylum.<sup>5</sup>

## II. Employment Discrimination

### [1] Disability Laws

#### [a] Federal Disability Laws

Transsexual people currently have no established protection under federal laws that prohibit discrimination on the basis of handicap or disability. Transsexualism has been recognized as a medical condition for many years and is included as a psychiatric disorder in the DSM under the rubric of “gender identity disorder.” Nonetheless, both the Rehabilitation Act of 1973

---

<sup>1</sup> See, e.g., Leslie Feinberg, *Transgender Warriors: Making History From Joan of Arc to RuPaul* (1997).

<sup>2</sup> Stedman’s Medical Dictionary 1841 (26<sup>th</sup> ed. 1995).

<sup>3</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders IV* (1994).

<sup>4</sup> See Harry Benjamin International Gender Dysphoria Association, *Standards Of Care for the Diagnosis and Treatment of Gender Identity Disorders* (Sixth Edition, February 2001) ([www.hbigda.org](http://www.hbigda.org)).

<sup>5</sup> The Transgender Law & Policy Institute provides regular updates on legislation and litigation affecting transsexual people. See [www.transgenderlaw.org](http://www.transgenderlaw.org).

("Rehabilitation Act") and the Americans with Disabilities Act ("ADA") explicitly *exclude* both "transsexualism" and "gender identity disorders not resulting from physical impairments" from protection.<sup>6</sup>

### **[b] State Disability Laws**

Most states and the District of Columbia have statutes prohibiting employment discrimination on the basis of disability. Some of these state laws include explicit exemptions for transsexual people, similar or identical to the exemptions in the Rehabilitation Act and the ADA. These include Indiana, Iowa, Louisiana, Nebraska, Ohio, Oklahoma, Texas, and Virginia. Even in the absence of a specific exclusion, a few courts have held that transsexualism is not a protected disability.<sup>7</sup>

More often, however, state courts and administrative agencies have found that transsexualism is a protected disability under state laws. For example, an appellate court in New Jersey recently held that transsexualism is a protected handicap under the New Jersey non-discrimination law.<sup>8</sup> Similarly, courts in Massachusetts have held that transsexualism is a protected disability under state law.<sup>9</sup>

At the administrative level, state agencies responsible for enforcing state disability protection laws have issued favorable rulings for transsexual plaintiffs in at least five states. In 1996, the Oregon Bureau of Labor and Industry ruled that a transsexual woman who was fired from her job as a result of her transition was protected from employment discrimination under Oregon disability law. Unfortunately, the Oregon Legislature responded to this decision in 1997 by amending the state law to state that "an employer may not be found to have engaged in an unlawful employment practice solely because the employer fails to provide reasonable accommodation to a person with a disability arising out of transsexualism."<sup>10</sup> While this provision excludes transsexual people from the right to obtain reasonable accommodation, it does not exclude them from the right not to be fired or otherwise discriminated against because of their transsexual status. The Florida Division of Administrative Hearings has also ruled that transsexual people are protected under the Florida state law prohibiting discrimination on the

---

<sup>6</sup> See Rehabilitation Act, 29 U.S.C. 706(8)(F)(i) (1997); ADA, 42 U.S.C. 12211(b)(1) (1997).

<sup>7</sup> See *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*, 694 A.2d 1134 (Pa. Commw. 1997) (holding that transsexualism is not a protected disability under the Pennsylvania Human Rights Act); *Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284 (E.D. Pa. 1993) (same); *Somers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470 (Iowa 1983) (holding that transsexualism not a protected disability under Iowa Civil Rights Act).

<sup>8</sup> *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super 2001).

<sup>9</sup> See *Lie v. Sky Publishing Corp.*, 2002 Mass. Super. LEXIS 402 (Mass. Super. Oct. 7, 2002) (holding that a transsexual plaintiff had established a prima facie case of discrimination on the basis of handicap under state law); *Doe v. Yunits*, 2001 WL 664947 (Mass.Super. Feb 26, 2001). See also *Doe v. Boeing Co.*, 846 P.2d 531 (Wash. 1993) (holding that gender dysphoria was a covered disability, although ultimately concluding that the plaintiff had failed to prove that she was discriminated against because of her disability).

<sup>10</sup> Oregon Rev. Stats. 659.439(2) (1997).

basis of disability.<sup>11</sup> Similar administrative rulings have been issued in Illinois, Massachusetts, and New Hampshire.<sup>12</sup>

## [2] Federal Sex Discrimination Laws

### [a] Title VII

Until very recently, federal courts uniformly held that transsexual people are not protected under Title VII's prohibition of sex discrimination, on the ground that the term "sex" must be narrowly construed to mean a person's biological sex at birth, and that Congress did not intend Title VII to protect transsexual people.<sup>13</sup>

Over the past decade, however, the rationales in these decisions have been undercut by the Supreme Court's increasingly expansive interpretation of Title VII in other contexts.<sup>14</sup> As a result, both the Ninth Circuit and the First Circuit have issued favorable decisions holding that transsexual or, more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes.<sup>15</sup> In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.<sup>16</sup>

---

<sup>11</sup> *Smith v. City of Jacksonville Correctional Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991) (holding that an individual with gender dysphoria is within the disability coverage of the Florida Human Rights Act, as well as the portions of the Act prohibiting discrimination based on perceived disability).

<sup>12</sup> *Evans v. Hamburger Hamlet & Forncrook*, 1996 WL 941676 (Chi. Comm'n Hum. Rel. 1996) (denying defendant's motion to dismiss disability claim brought by transsexual plaintiff); *Jette v. Honey Farms Mini Market*, 2001 Mass. Comm. Discrim. LEXIS 50 (Oct. 10, 2001) (holding that transsexual people are protected by state law prohibitions against sex and disability discrimination); *Jane Doe v. Electro-Craft Corporation*, No. 87-B-132 (N.H. Sup. Ct. 1988) (holding that transsexualism is a disability within the meaning of the state employment discrimination statute).

<sup>13</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *ie.*, . . . a person born with a female body who believes herself to be a male"). See also *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995) (same); *Somers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (same); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) (same); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Calif. 1975) (same).

<sup>14</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); see also *Oncala v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the "principal evil" Congress intended to combat when it enacted Title VII).

<sup>15</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). See also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire").

<sup>16</sup> See, e.g., *Doe v. United Consumer Financial Services*, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, "at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize her as male or female 'just from looking')"). For a complete list of federal cases holding that discrimination on the basis of gender non-

## [b] Title IX

In 1997, a federal district court in New York held that a transsexual woman could proceed with a sexual harassment suit against New York University under Title IX of the Education Amendments Act, which prohibits sex discrimination in public education.<sup>17</sup> The university moved for summary judgment on the ground that the plaintiff "is in fact a male-to-female transsexual who, at the time of the professor's alleged conduct, was in the process of becoming a female."<sup>18</sup> The court rejected this argument: "The simple facts are . . . that Professor Eisen was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female."<sup>19</sup> The court distinguished Title VII case law addressing employment discrimination, stating that "all of [the cases on this issue] stand for the entirely different proposition that Title VII, and hence Title IX, does not prohibit expressing disapproval of conduct involved in the transformation from one gender to another."<sup>20</sup>

In addition, at least one federal district court has recognized that harassment based on failure to conform to gender stereotypes is also prohibited under Title IX.<sup>21</sup>

## [3] State Sex Discrimination Laws

In the past, employment discrimination cases brought under state laws prohibiting sex discrimination have been unsuccessful.<sup>22</sup> More recently, however, courts<sup>23</sup> and administrative

---

conformity and/or transgender status is a form of sex discrimination, see <http://www.transgenderlaw.org/cases/federalcases.htm>. For an exception to this trend, see *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job).

<sup>17</sup> *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 249.

<sup>20</sup> *Id.* (also citing dicta in *Holloway*, 566 F.2d at 644, that "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII").

<sup>21</sup> *Snelling v. Fall Mountain Regional Sch. Dist.*, 2001 WL 276975 (D.N.H. 2001) (holding that harassment based on "sex-typed stereotypes of masculinity" is actionable under Title IX).

<sup>22</sup> See *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282 (Feb. 4, 1997) (dismissing sex discrimination claim alleging violations of Connecticut Fair Employment Practice Act); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96 (D.D.C. 1994) (dismissing sex discrimination claim alleging violations of the D.C. Human Rights Act); *Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284 (E.D. Pa. 1993) (dismissing claim brought under sex discrimination provision of Pennsylvania Human Rights Act); *Kirkpatrick v. Seligman*, 636 F.2d 1047 (5<sup>th</sup> Cir. 1981) (no violation under the federal Equal Protection Clause or under state law prohibiting sex discrimination where employer fired plaintiff when plaintiff notified employer of her intent to undergo sex reassignment, began living and dressing as a female, and refused to comply with employer's requirement that she must wear male clothing to work).

agencies<sup>24</sup> have uniformly interpreted state and local sex discrimination laws to include transsexual people. Based on this strong trend, state sex discrimination claims are currently the most viable avenue of protection for transgender and transsexual employees.

#### **[4] State Laws Prohibiting Sexual Orientation Discrimination**

Fourteen states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation.<sup>25</sup> Of these, California, Minnesota, New Mexico, and Rhode Island also explicitly protect transgender and transsexual people.<sup>26</sup> Where transgender people are not expressly included in state laws, courts have rejected attempts by transgender plaintiffs to seek protection under the rubric of sexual orientation.<sup>27</sup>

In practice, however, transsexual people are often mistakenly perceived to be lesbian, gay, or bisexual. If a transsexual person is discriminated against based on this mistaken belief, then the

---

<sup>23</sup> See *Enriquez v. West Jersey Health Systems*, 2001 N.J. Super. LEXIS 283 (N.J. Super 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination); *Lie v. Sky Publishing Corp.*, 2002 Mass. Super. LEXIS 402 (Mass. Super. Oct. 7, 2002) (holding that a transsexual employee had stated a viable sex discrimination claim under state law); *Doe v. Yunits*, 2000 WL 33162199, at \*3-4 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm'n*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's sex discrimination claim under the New York State and New York City Human Rights Laws); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals). See also *McGrath v. Toys "R" Us, Inc.*, 2002 U.S. Dist. Lexis 22610 (E.D. NY October 16, 2002) (awarding attorneys' fees to plaintiffs in the first public accommodations case in which the rights of transsexuals were vindicated under the New York City Human Rights ordinance).

<sup>24</sup> See *In the Matters of HCRC No. 9951 et al*, D.R. No. 02-0015 (Hawaii Civil Rights Commission, June 28, 2002) (holding that the Hawaii Civil Rights Commission has jurisdiction to investigate all claims of sex discrimination filed by transgendered individuals and transsexuals); *Millett v. Lutco, Inc.*, 2001\_Mass. Comm. Discrim. LEXIS 52 (Oct. 10, 2001) (holding that transsexual people are protected by state law prohibitions against sex discrimination); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

<sup>25</sup> These are California, Connecticut, Hawaii, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Vermont, and Wisconsin.

<sup>26</sup> See Minn. Stat. Ann. § 363.01(45) (1996); N.M. Stat. Ann. § 28-1-2(Q); R.I. Gen. Laws § 11-24-2 (2001). California amended the definition of "sex" in the California Fair Employment and Housing Act to specifically include transgender people in 2003. See 2003 Bill Text CA A.B. 196 (2003).

<sup>27</sup> *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that the definition of sexual orientation in New York City ordinance does not include transsexualism); *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. at 98 (holding that "a conclusory statement that [transsexual plaintiff] was discharged on the basis of transsexuality . . . does not constitute a claim for relief on the basis of . . . sexual orientation").

transsexual person may have a viable claim of sexual orientation discrimination in states in which there is protection against such conduct.<sup>28</sup>

### **[5] State Laws Protecting Transgender People**

Four states expressly, by statute, prohibit discrimination against transgender people. Minnesota passed the first such law in 1993. The Minnesota statute establishes protections for transgender people under the rubric of sexual orientation, which is defined to include "having or being perceived as having a self image or identity not traditionally associated with one's biological maleness or femaleness."<sup>29</sup>

In 2001, the Minnesota Supreme Court held that this statutory language does not prohibit an employer from requiring employees to use the restroom facilities corresponding to their biological sex.<sup>30</sup> The plaintiff in *Goins* was a transsexual woman who had undergone extensive medical treatments to alter her biological sex. Nonetheless, she did not argue that she should be considered biologically female. Rather, she argued that the statute should be interpreted to prohibit employers from inquiring into an employee's biological sex and to require employers to accept the employee's self-image as female or male.<sup>31</sup> The Minnesota Supreme Court rejected this broad construction of the statute. Accordingly, to state a viable claim, future transsexual plaintiffs who are denied access to appropriate restrooms should argue (and be prepared to present evidence) that they have altered their biological sex by undergoing sex-reassignment.

In 2001, Rhode Island's non-discrimination statute was amended to explicitly include "gender identity or expression" as a protected category.<sup>32</sup> The statute defines "gender identity or expression" to include:

a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.<sup>33</sup>

In 2003, New Mexico amended its state Human Rights Law to prohibit discrimination on the basis of gender identity. The statute defines "gender identity" to mean "a person's self-perception, or perception of that person by another, of the person's identity as a male or female

---

<sup>28</sup> See, e.g., *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282 ("[h]ad the plaintiff failed to allege specifically discrimination based on sexual orientation, but rather merely referenced his transsexualism as a basis for discrimination based on sexual orientation, the . . . claim would have been legally insufficient")

<sup>29</sup> Minn. Stat. Ann. § 363.01(45) (1996).

<sup>30</sup> *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

<sup>31</sup> *Goins*, 635 N.W.2d at 723 (Goins argues "that the [statute] prohibits West's policy of designating restroom use according to biological gender, and requires instead that such designation be based on self-image of gender").

<sup>32</sup> R.I. Gen. Laws § 11-24-2 (2001).

<sup>33</sup> R.I. Gen. Laws § 11-24-2.1(a)(8) (2001).

based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."<sup>34</sup>

Also in 2003, California enacted AB 196, which clarifies that the definition of "sex" in the California Fair Employment and Housing Act (FEHA) includes "a person's actual or perceived sex, [including] a person's identity or appearance, whether or not that identity or appearance is different from that traditionally associated with that person's sex at birth."<sup>35</sup> Although the new law does not go into effect until January 1, 2004, the legislative history makes it clear that the amendment was intended only to codify the principle that sex discrimination statutes prohibit anti-transgender discrimination, not to effect a substantive change in the law. Thus, persons who have transgender discrimination claims need not wait for the new law to go into effect to bring sex discrimination claims under FEHA.

## **[6] Local Ordinances Protecting Transgender People**

Over fifty localities have adopted ordinances prohibiting discrimination against transgender people. Jurisdictions that have passed such laws include, among others: New York City, Boston, Chicago, San Francisco, Dallas, Philadelphia, Atlanta, and Seattle. They also include a number of smaller cities, such as Tucson, AZ; Santa Cruz, CA; Iowa City, IA; Louisville, KY; Ann Arbor, MI; Toledo, OH; and Tacoma, WA.<sup>36</sup>

## **[7] Employer Policies**

Increasingly, both public and private employers are broadening their non-discrimination policies to include transgender and transsexual employees. Employers who have taken this step include American Airlines, Intel, Lucent Technologies, Apple Computer, Box Office Tickets, Inc., the City of Dallas, Texas, the City of Lexington, Kentucky, and the City of Decatur, Georgia, among others.<sup>37</sup>

# **III. Marriage**

## **[1] Transsexual Transition within an Existing Marriage.**

What happens to the validity of an existing marriage when one of the spouses undergoes sex-reassignment? There are no published decisions on this issue. So long as both spouses want to stay in the marriage and continue to live as a married couple, many couples in this situation have avoided legal problems, in large part because there are relatively few situations in which anyone other than one of the spouses has legal standing to challenge the validity of a marriage. Legal problems may arise when one spouse dies and the other attempts to collect survivorship benefits

---

<sup>34</sup> N.M. Stat. Ann. § 28-1-2(Q).

<sup>35</sup> AB 196 amends California Government Code § 12926.

<sup>36</sup> For an overview of legislation protecting transgender people, see Paisley Currah & Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (NCLR & NGLTF, 2000) (PDF version available at <http://www.nglftf.org>). For an updated list of jurisdictions with transgender-protective laws, see <http://www.transgenderlaw.org>.

<sup>37</sup> The Human Rights Campaign maintains a database of employers that include gender identity in their non-discrimination policies. See <http://www.hrc.org/worknet/transgender/index.asp>

or to claim inheritance or other tax benefits that are restricted to married couples. Alternatively, an employer or health insurance company may challenge the validity of the marriage in the context of trying to exclude the spouse from an employer-provided health plan. Under longstanding legal principles, the validity of a marriage is determined at the time the marriage is created; moreover, once a valid marriage exists, there is nothing other than death or divorce that can dissolve it. These principles support the view that a marriage in which one of the spouses undergoes sex-reassignment continues to be valid.

## **[2] The Right to Marry**

### **[a] Case Law**

Only a handful of courts have ruled on the validity of a marriage entered into *after* a transsexual person has undergone sex-reassignment. At least two courts have recognized the individual's reassigned sex for the purpose of marriage.<sup>38</sup> In contrast, a few courts have ruled that, for purposes of marriage, a person's legal sex is irrevocably determined at birth. In 2002, the Kansas Supreme Court ruled that the marriage between J'Noel Gardiner, a male-to-female transsexual, and her deceased husband was invalid, even though she had undergone sex-reassignment many years prior to the marriage.<sup>39</sup> An appellate court in Texas reached the same result, invalidating a marriage between a transsexual woman and her deceased husband on the ground that one's legal gender is fixed at birth.<sup>40</sup> In contrast, on February 19, 2003, Senior Circuit Court Judge Gerard O'Brien in Pasco County, Florida issued a landmark decision affirming the validity of a marriage between Michael Kantaras, a female-to-male transsexual, and Linda Kantaras, his wife.<sup>41</sup> This decision is currently on appeal to the Florida Court of Appeal. Also in 2003, a Louisiana trial court affirmed the validity of a marriage between Jody Carter, a transsexual woman, and her male spouse; no appeal of that decision is pending.

### **[b] Birth Certificate Statutes**

The vast majority of states have laws or administrative policies allowing a transsexual person to change the sex designation on his or her birth certificate. States with statutes allowing a transsexual person who has undergone sex-reassignment to change his or her birth certificate include AZ, CA, CO, GE, HI, IL, IA, LA, MA, MD, MI, NC, NE, NJ, NM, OR, UT, and WI. Others have administrative policies to the same effect. This is important, because by allowing

---

<sup>38</sup> See *M.T. v. J.T.*, 355 A.2d 204 (N.J. App. Div. 1976) (upholding validity of a marriage involving a "post-operative" transsexual woman). See also Stuart Pfeifer, "Transsexual Can Sue for Custody," *Orange Co. Reg.*, Nov. 26, 1997, at B1 (discussing the unreported California case of *Vecchione v. Vecchione*, which upheld the validity of a marriage between a female-to-male transsexual and his female spouse).

<sup>39</sup> *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

<sup>40</sup> *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (holding that post-operative transsexual woman who had obtained a female birth certificate was legally male for the purpose of marriage), *cert. denied*, 531 U.S. 872 (2000).

<sup>41</sup> *Kantaras v. Kantaras*, Case No: 98-5375CA (Circuit Court of the Sixth Judicial Circuit, Pasco County, Florida, February 19, 2003). The full text of the decision is available at [www.transgenderlaw.org](http://www.transgenderlaw.org).

birth certificate changes, a state is acknowledging that changing one's sex is legally possible.<sup>42</sup> Courts in Texas and Kansas have rejected the argument that obtaining a new birth certificate is sufficient to establish one's legal sex for the purpose of marriage.<sup>43</sup> In other states, however, it is likely that courts will hold that providing a transsexual person with a new birth certificate establishes the person's legal sex for all purposes, including marriage.

### **[c] Parental rights**

A transsexual person who marries and has children (through donor insemination, adoption, surrogacy, or some other route) is in a potentially vulnerable legal situation as a parent. If the other parent successfully argues that the marriage was never valid, then the transsexual person's parental status and parental rights may be jeopardized. At least in some states, however, a transsexual parent may be able to argue that the other parent should be estopped from challenging his or her parental status, even if the underlying marriage is held to be invalid.<sup>44</sup>

## **IV. Child Custody**

Some courts have held that a parent's transgender status is not relevant to child custody unless there is specific evidence of harm to the child. In *Christian v. Randall*, 516 P.2d 132 (Co. Ct. App. 1973), the Colorado Court of Appeals refused to remove custody from a female-to-male transsexual parent. The court held that the mother's transition from female to male and subsequent marriage to a woman did not justify a change of custody to the father, where there was no evidence that the children had been adversely affected.<sup>45</sup> In *Marriage of D.F.D.*, 862 P.2d 368 (Mont. 1993), the Montana Supreme Court reversed a trial court decision awarding sole custody to the mother and restricting the father's visitation rights, solely because father had cross-dressed in private. The court noted that the father's counselor testified that the father would not cross-dress in the future and that even, if he did, he would not do so in front of his son. The court also noted that the counselor had testified that even if the father did cross-dress in front of his son, any "negative impact on the son would be less than the impact from not having a normal relationship with his father." *Id.* at 376.

More commonly, however, transgender and transsexual parents face tremendous discrimination in child custody and visitation decisions.

### **[1] Termination of Parental Rights**

---

<sup>42</sup> See also *Matter of Heilig*, 2003 Md. LEXIS 31 (Maryland Court of Appeal, Feb. 11, 2003) (holding that Maryland courts have jurisdiction to enter an order declaring the legal sex of a transsexual person who was born in another state but resides in Maryland).

<sup>43</sup> *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999)

<sup>44</sup> See, e.g., *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985) (holding that a female-to-male transsexual was estopped from denying his parental responsibilities, regardless of whether his marriage to the child's mother was valid).

<sup>45</sup> See also *In re the Custody of T.J.*, 1988 Minn. App. LEXIS 144 (Minn. App. Feb. 2, 1988) (unpublished decision) (affirming award of custody to transsexual father and concluding that "there is no evidence...that providing primary parenting responsibilities to a gender dysphoric father would cause future problems for [the child]").

At least one court has terminated a transsexual parent's parental rights. In *Daly v. Daly*, 715 P.2d 56 (Nevada 1986),<sup>46</sup> the Nevada Supreme Court characterized a male-to-female transsexual parent as “selfish” and terminated his parental rights, stating: “It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.”

## **[2] Restrictions on Custody or Visitation**

Several courts have granted custody or visitation to transgender parents only when the parent agreed to hide his or her transgender status.<sup>47</sup> Other courts have restricted or denied visitation to transsexual parents.<sup>48</sup>

## **V. Health Care**

### **[1] Medicare And CHAMPUS**

Medicare does not pay for sex reassignment surgeries. Medicare Program: National Coverage Decisions, 54 Fed. Reg. 34555, 34572 (Aug. 21, 1989). Sex reassignment surgeries are also excluded from the Civilian Health and Medical Program of the Uniformed Services. 32 C.F.R. @ 199.4(e)(7).

### **[2] Medicaid**

In contrast, there is no exclusion of sex-reassignment under the federal Medicaid statute. As a result, almost every court that has ever considered the issue has concluded that States cannot categorically exclude sex reassignment surgeries from Medicaid coverage.<sup>49</sup> Despite these

---

<sup>46</sup> See also *In re Darnell*, 49 Or. App. 561, 619 P.2d 1349 (1980) (terminating mother's parental rights on the ground that the mother's continued relationship with her former husband, a female-to-male transsexual, was detrimental to the best interests of the child; an earlier proceeding had terminated the parental rights of the father).

<sup>47</sup> See *In re D.F.D. and D.G.D.*, 261 Mont. 186 (1993) (awarding custody to cross-dressing father after expert testimony that father no longer cross-dressed and would not do so in the future); *In re T.J.*, Minn. App. LEXIS 144 (1988) (awarding custody to "gender dysphoric" father where father agreed to undergo therapy and "to maintain his male identity" and where there was no evidence that the child manifested any gender "atypical" behaviors or gender identity problems); *In re V.H.*, 412 N.W. 2d 389 (Minn. Ct. App. 1987) (granting custody to cross-dressing father on condition that father never cross-dress in front of daughter or have any literature relating to transvestism in his home)

<sup>48</sup> See *J.L.S. v. D.K.S.*, 1997 Mo. App. LEXIS 377 (March 11, 1997) (reversing a trial court order that had awarded joint legal, but not physical, custody to a male-to-female parent and imposing an indefinite moratorium on visitation, based on finding that it would be emotionally confusing for the children to see their father as a woman); *B. v. B.*, 184 A.2d 609 (N.Y. App. Div. 1992) (refusing to grant overnight visitation to father who cross-dressed).

<sup>49</sup> See *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (“We find that a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the ‘diagnosis, type of illness, or condition.’”); *J.D. v. Lackner*, 80 Cal. App. 3d 90 (Cal. Ct. App. 1978); *Doe v. State*, 257 N.W.2d 816 (Minn. 1977) (noting that SRS was “the only surgical treatment which, if recommended by a physician and related to a patient's health is not covered by the [Minnesota Medicaid] program.”). But see *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001) (reversing district court's ruling and holding that Iowa's rule denying coverage for SRS was not

holdings, many state Medicaid statutes contain a blanket exclusion for procedures related to sex-reassignment.<sup>50</sup>

In addition, even in states with positive case law on this issue, as a practical matter, it is extremely difficult to obtain Medicaid reimbursement for medical procedures related to sex-reassignment (especially surgery). This is true for a number of reasons, including, among others: (1) the front line Medicaid staff who process Medicaid claims often automatically deny claims from transsexual persons based on the mistaken belief that the procedures are cosmetic or experimental, or based on the mistaken belief that the procedures are categorically excluded; (2) transsexual persons and their health care providers often fail to submit adequate documentation supporting the medical necessity of particular procedures, based on a lack of familiarity with the legal requirements for showing medical necessity; (3) advocates and attorneys often fail to provide adequate representation for transsexual persons, based on prejudice, ignorance, or an inability to find information and models of good advocacy; (4) health care providers who specialize in transgender issues often do not accept Medicaid patients.

Transsexual people who have completed sex reassignment are also frequently denied routine medical treatments appropriate to their new sex. In the first published decision to address this form of discrimination, the Superior Court of Massachusetts held that a transsexual woman who had undergone sex reassignment over 25 years earlier could not be denied medically necessary breast reconstruction surgery simply because she is transsexual. *Beger v. Division of Medical Assistance* (2000 Mass. Super. LEXIS 126).

### [3] Private Insurance

Private insurance is largely governed by contract law. In the absence of an explicit contractual provision specifying that the insurance company will not pay for sex-reassignment treatment, transsexual people have won claims requiring the company to pay for surgeries.<sup>51</sup> In addition, while most insurance plans expressly exclude services related to sex-reassignment, there is anecdotal evidence that growing numbers of transsexual individuals are successfully challenging these exclusions through internal appeals procedures.<sup>52</sup>

Thus far, there have been few attempts to litigate employers' refusal to provide equal health benefits to transsexual employees under non-discrimination statutes. In *Mario v. P. & C. Food Markets, Inc.*, 2002 U.S. App. LEXIS 26433 (2<sup>nd</sup> Cir. 2002), a female-to-male transsexual sued his employer for wrongfully denying insurance coverage for sex-reassignment surgeries under a plan governed by the Employee Retirement Income and Security Act of 1974 (ERISA). The Second Circuit held that the employee failed to prove that the procedures were medically

---

arbitrary or inconsistent with the Medicaid Act); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (reversing district court's ruling that Georgia's Medicaid program could not categorically deny coverage for SRS).

<sup>50</sup> See, e.g., Ill. Admin. Code tit. 89 @ 140.6(1); 55 Pa. Code @ 1163.59(a)(1); Alaska Admin. Code tit. 7, @ 43.385(a)(1).

<sup>51</sup> See, e.g., *Davidson v. Aetna Life & Casualty Ins. Co.*, 420 N.Y.S. 2d 450 (N.Y. Sup. Ct. 1979).

<sup>52</sup> See Kari Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination against Transsexuals*, 11 Colum. J. Gender & L. 88 (2002).

necessary. The court also rejected the plaintiff's alternative claim that the denial of reimbursement violated Title VII.

## VI. Prison Issues

### [1] Sexual Violence

It is well established that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Prison officials who display a "deliberate indifference" to this duty are liable under the Eighth Amendment prohibition of cruel and unusual punishment.

Transsexual people who have not had genital surgery are generally classified according to their birth sex for purposes of prison housing—a situation which puts male-to-female transsexuals at great risk of sexual violence. In *Farmer v. Brennan*,<sup>53</sup> a case involving a transsexual prisoner who was beaten and raped by her cellmate, the Supreme Court adopted a very narrow interpretation of "deliberate indifference":

Petitioner is a transsexual who is currently serving a 20-year sentence in an all-male federal prison for credit card fraud. Although a biological male, petitioner has undergone treatment for silicone breast implants and unsuccessful surgery to have his [sic] testicles removed. Despite his [sic] overtly feminine characteristics and his [sic] previous segregation at a different federal prison because of safety concerns, . . . prison officials at the United States penitentiary in Terre Haute, Indiana housed him [sic] in the general population of that maximum-security prison. Less than two weeks later, petitioner was brutally beaten and raped by another inmate in petitioner's cell.<sup>54</sup>

The Court rejected Farmer's theory that prison officials should be held to an *objective* standard of liability, *i.e.*, prison officials should be liable for risks to prisoner safety when those risks are obvious enough that officials "should have known" the prisoner was in danger. Instead, the Court held that a prison official is not liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."<sup>55</sup> In other words, prison officials are not liable for violence inflicted on a transsexual prisoner by other prisoners unless they have *actual subjective knowledge* that the transsexual prisoner is at risk and deliberately fail to act on that knowledge.<sup>56</sup>

---

<sup>53</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994).

<sup>54</sup> *Id.* at 852.

<sup>55</sup> *Id.* at 837.

<sup>56</sup> See also *Lucrecia v. Samples*, 1995 U.S. Dist. LEXIS 15607 (Oct. 16, 1995) (finding no Eighth Amendment violation where prison officials transferred male-to-female transsexual prisoner, who had developed breasts and had her testicles surgically removed, from female prison to male prison, where she was subjected to constant verbal, physical, and sexual harassment and assault by other prisoners and by prison guards). But see *Powell v. Schriver*, 175 F.3d 107 (2<sup>nd</sup> Cir. 1999) (holding that qualified immunity did not protect prison official from claim that the disclosure of the inmate's transsexual status constituted deliberate indifference to a substantial risk of serious harm, in violation of the 8<sup>th</sup> Amendment).

To protect transsexual women housed in male prisons from the risk of violence, prison officials sometimes separate them from other prisoners. This is referred to as "administrative segregation." While placing a transsexual woman in administrative segregation may provide greater protection, it also results in exclusion from recreation, educational and occupational opportunities, and associational rights.<sup>57</sup>

## [2] Access to Hormone Therapy and Sex-Reassignment Surgeries

The issue of whether a transsexual person is entitled to hormone therapy or sex-reassignment surgery while in prison has been litigated extensively, based on the established constitutional principle that it is a violation of the Eighth Amendment prohibition against cruel and unusual punishment for prison officials to exhibit "deliberate indifference" to a prisoner's "serious medical needs." In the past, courts almost always ruled in favor of prison officials.<sup>58</sup> Recently, however, prisoners have had more success in challenging denials of hormone therapy.

In *De'Lonta v. Angelone*, 330 F.3d 630 (4<sup>th</sup> Cir. 2003), the Fourth Circuit held that a transsexual prisoner had alleged facts sufficient to establish that the denial of treatment for her compulsion to mutilate herself constituted deliberate indifference to her medical needs. The court also held that the prison's refusal to provide her with hormone treatment was based solely on a policy rather than on a medical judgment concerning the prisoner's specific circumstances. In *Kosilek v. Maloney*, 221 F. Supp.2d 156 (D. Mass. 2002), a federal district court held that the plaintiff's gender identity disorder constituted a serious medical need and directed prison officials to provide adequate treatment. In *South v. Gomez*, 211 F.2d 1275 (9<sup>th</sup> Cir. 2000), the Ninth Circuit held that prison officials violated the Eighth Amendment by abruptly terminating a prisoner's course of hormone therapy when she was transferred to a new facility. Similarly, in *Wolfe v. Horn*, 130 F. Supp. 2d 648 (E.D. Pa. 2001), the court held that abrupt termination of prescribed hormonal treatment by a prison official with no understanding of the plaintiff's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute "deliberate indifference." See also *Phillips v. Michigan Department of Corrections*, 731

---

<sup>57</sup> See Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 530 (2000).

<sup>58</sup> See *Maggert v. Hanks*, 131 F.3d 670 (7<sup>th</sup> Cir. 1997) (recognizing that sex reassignment is the only effective treatment for transsexual prisoners, but holding that it is permissible to withhold treatment from transsexual prisoners in light of fact that neither public nor private health insurance programs will pay for sex reassignment); *Long v. Nix*, 86 F. 3d 761 (8<sup>th</sup> Cir. 1996) (holding that prisoner diagnosed with gender identity disorder had no right to cross-dress or to estrogen therapy); *Brown v. Zavaras*, 63 F.3d 967 (10<sup>th</sup> Cir. 1995) (rejecting equal protection claim brought by pre-operative male-to-female transsexual based on evidence that Colorado provided hormone therapy to non-transsexual prisoners with low hormone levels and to post-operative male-to-female transsexuals); *White v. Farrier*, 849 F.2d 322 (8<sup>th</sup> Cir. 1988) (holding that male-to-female transsexual prisoner is not entitled to cross-dress or wear cosmetics and does not have a constitutional right to hormone therapy); *Meriwether v. Faulkner*, 821 F.2d 408 (7<sup>th</sup> Cir. 1987), cert. denied, 484 U.S. 935 (1987) (holding that transsexual prisoner is constitutionally entitled to some type of medical treatment for diagnosed condition of transsexualism, but she "does not have a right to any particular type of treatment, such as estrogen therapy"); *Jones v. Flannigan*, 1991 U.S. App. LEXIS 29606 (7<sup>th</sup> Cir. 1991) (same); *Supre v. Ricketts*, 792 F.2d 958 (10<sup>th</sup> Cir. 1986) (same); *Lamb v. Maschner*, 633 F. Supp. 351 (D. Kansas 1986) (holding that transsexual prisoner had no right to hormone therapy). See also *Cuoco v. Mortisugo*, 222 F.3d 99 (2<sup>nd</sup> Cir. 2000) (holding that officials were entitled to immunity from claim by transsexual pre-trial detainee who was denied hormones).

F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6<sup>th</sup> Cir. 1991) (granting preliminary injunction directing prison officials to provide estrogen therapy to a pre-operative transsexual woman who had been taking estrogen for several years prior to her transfer to a new prison and distinguishing failure "to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery" from "[t]aking measures which actually reverse the effects of years of healing medical treatment").

## VII. Hate Crimes

In 1998, California became the second state (following Minnesota in 1993) to amend its state hate crimes law to include transgender and transsexual people. The California legislation added "gender" to the list of protected categories and defined the term to mean: "a person's actual or perceived sex, [including] a person's identity or appearance, whether or not that identity or appearance is different from that traditionally associated with that person's sex at birth."<sup>59</sup> Since then, Vermont, Missouri, and Pennsylvania have also amended their state hate crimes statutes to include transgender people.<sup>60</sup>

## VIII. Immigration and Asylum

Neither the United States Citizenship and Immigration Services (formerly the Immigration & Naturalization Service) nor the Board of Immigration Appeals has expressly recognized transsexual people as "a particular social group" for the purposes of asylum. Nonetheless, a growing number of individuals who have been persecuted for being transgender or transsexual have received asylum in the past few years, under the rubric of persecution on the basis of sexual orientation and/or gender.<sup>61</sup>

In a groundbreaking decision, in 2000, the Ninth Circuit held that Geovanni Hernandez-Montiel, a transgender youth from Mexico who was repeatedly beaten, kidnapped and raped by police officers was entitled to asylum on the ground that he was persecuted because of his sexual orientation.<sup>62</sup> The Board of Immigration Appeals had denied Geovanni's claim, holding that he was not entitled to protection because he could have avoided persecution by adopting a more masculine style of dress and behavior. The 9<sup>th</sup> Circuit rejected that rationale, which the court described as "offensive."

---

<sup>59</sup> See California Penal Code § 422.6.

<sup>60</sup> See Missouri Revised Statutes § 557.035 (2000); 13 V.S.A. §§ 1455 and 1458 (2000); Pa. ALS 143; 2002 Pa. Laws 143; 2001 Pa. HB 1493 (2002).

<sup>61</sup> See, e.g., Law Office of Robert Jobe, Press Release, "Six More Gays Receive Asylum as Window of Opportunity Closes in April 1997," Feb. 25, 1997 (San Francisco, CA) (describing decisions granting asylum to a female-to-male transsexual from Pakistan and a male-to-female transsexual from Peru). Cf. *Miranda v. INS*, 51 F.3d 767 (8<sup>th</sup> Cir. 1995) (holding that male-to-female transsexual from Honduras was not entitled to suspension of deportation based on hardship due to absence of comprehensive medical care for transsexual people in Honduras, where she had already undergone sex reassignment surgery and there was no evidence that she would be unable to obtain necessary care to maintain her health in Honduras).

<sup>62</sup> See *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9<sup>th</sup> Cir. 2000).

## VIII. Additional Resources

- (1) *A Legal Guide to Child Custody and Selected Family Law Issues for Transgendered Parents* is available from the National Center for Lesbian Rights, 870 Market Street, Suite 370, San Francisco, CA 94102; (415) 392-6257; [www.nclrights.org](http://www.nclrights.org); [info@nclrights.org](mailto:info@nclrights.org).
- (2) Spencer Bergstedt, Esq, *Translegalities: A Legal Guide for FTMs, and Translegalities: A Legal Guide for MTFs*. These publications may be ordered by contacting Spencer Bergstedt, e-mail: [MstrSpence@aol.com](mailto:MstrSpence@aol.com).
- (3) Paisley Currah and Shannon Minter, *Transgender Equality: A Handbook for Activists and Policymakers* (NCLR & NGLTF, 2000) (PDF version available at <http://www.nglftf.org>).
- (4) Other publications on transgender legal issues are available from the Transgender Law & Policy Institute, <http://www.transgenderlaw.org>; [info@transgenderlaw.org](mailto:info@transgenderlaw.org).
- (5) For information on state laws and policies relating to the issuance of new birth certificates for transsexual people, see <http://www.drbecky.com/birthcert.html>.
- (6) For information relating to legislation protecting transgender people, contact the Transgender Civil Rights Project of the National Gay & Lesbian Task Force at 202-393-5177, [www.nglftf.org](http://www.nglftf.org).
- (7) For information relating to employer policies prohibiting discrimination against transgender employees, contact the Human Rights Campaign, at 202-628-4160, [www.hrc.org](http://www.hrc.org).
- (8) For additional legal materials relating to transgender people, see the website of attorney Phyllis Randolph Frye at [www.transgenderlegal.org](http://www.transgenderlegal.org).
- (9) For more information on transgender parenting issues, see [www.geocities.com/transparencycy](http://www.geocities.com/transparencycy).
- (10) For more information on medical issues for transsexual people, contact the Harry Benjamin International Gender Dysphoria Association at [www.hbigda.org](http://www.hbigda.org).
- (11) For information on transgender legal issues outside the U.S., contact Press for Change at [www.pfc.org.uk](http://www.pfc.org.uk) or the International Gay & Lesbian Human Rights Commission at [www.iglhrc.org](http://www.iglhrc.org).
- (12) For information and assistance regarding transgender legal issues in California, contact the Transgender Law Center at [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org).