

# TRANSGENDER PEOPLE AND MARRIAGE LAWS

It may seem obvious that the government has no business weighing in on your gender when it comes to whom you marry. Yet LGBT people continue to endure interference at the state and federal levels when it comes to respect for their relationships. This discriminatory landscape has permitted some courts—often at the behest of hostile ex-spouses—to invalidate marriages where one or both parties is transgender.

Transgender people going through divorces, inheritance battles or custody disputes are particularly vulnerable to legal challenges to the validity of their marriages because the rules out there are so inconsistent. Some states recognize a person's gender transition for purposes of entering a different-sex marriage; others don't. Some states allow same-sex couples to marry; others don't.

Until the freedom to marry for same-sex couples is the law of the land and gender is irrelevant on wedding licenses (and therefore also irrelevant to all of the state and federal responsibilities, rights and benefits that go along with

being married—such as the ability to inherit without a will, to apply jointly for insurance policies, to adopt jointly, to receive Social Security survivor benefits, to file joint tax returns, and so on), Lambda Legal is working to ensure that transgender people's gender identity is respected for the purpose of marriage.

It's important for the government to recognize gender identity because doing so honors who someone really is and because otherwise people miss out on rights, responsibilities and privileges guaranteed to everyone else. And it's important for marriage equality advocates to include transgender people because their relationships so easily fall victim to these discriminatory laws.

We have seen a dramatic increase in public support for marriage equality in recent years, and new states appear poised to join the six states and the District of Columbia that currently permit all couples to marry regardless of sex or gender. If you have questions or concerns, talk to an attorney or contact Lambda Legal's Legal Help Desk at 1-866-542-8336 or [www.lambdalegal.org/help](http://www.lambdalegal.org/help).

## OUR STORY

### QUEER ACTIVISTS GET HITCHED

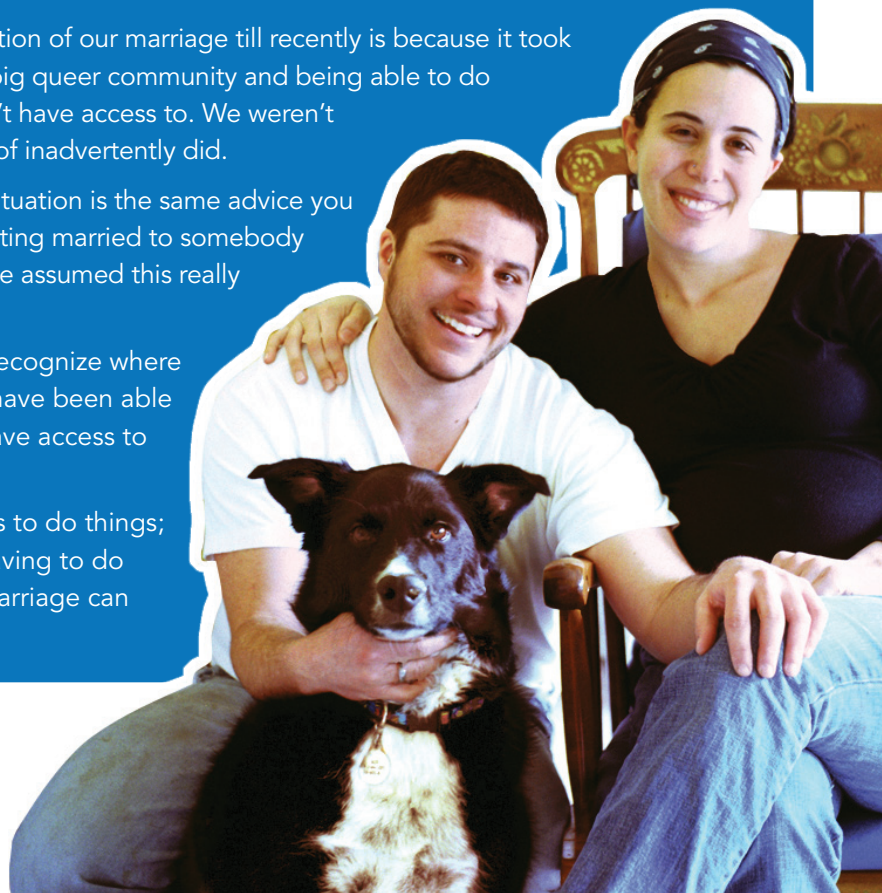
*Erin Schmitt, 30, and Dane Menkin, 38, met in 2002 at the Michigan Womyn's Music Festival five years before Dane transitioned from female to male. They married in 2008, have two children together and own a house in Philadelphia.*

**Erin:** Part of the reason we didn't have a public recognition of our marriage till recently is because it took us a long time to reconcile being active members in a big queer community and being able to do something that most of our friends in Pennsylvania don't have access to. We weren't looking to challenge a political system—and then kind of inadvertently did.

**Dane:** The first advice that I would give people in our situation is the same advice you would give anybody, which is make sure that you're getting married to somebody that you want to be with forever, not just because you've assumed this really cool new privilege. It's marriage.

The other thing I would say is, spend some time and recognize where you come from if before your transition you wouldn't have been able to marry. Likely some of the people you know don't have access to it. So don't forget that.

**Erin:** For queer folks, there are so many different ways to do things; it's kind of awesome not having the expectations of having to do things in a certain way. And if you're a trans couple, marriage can be a piece of that.



# FAQ

## Answers to Some Common Questions about Transgender People and Marriage Law

### Q: Can transgender people in different-sex relationships get married?

**A:** Some courts have ruled that transgender people cannot marry, usually by relying upon bans against marriage for same-sex couples and some states' refusals to acknowledge gender transition. But marriage has been deemed by the Supreme Court as a fundamental right under the Constitution. And many states recognize that the sex you are assigned at birth is not a permanent stamp of who you are, allowing transgender people to amend or correct their birth certificates.

In the 2012 case of *Radke v. Miscellaneous Drivers & Helpers*, a Minnesota court found that the marriage between a transgender woman (Christie) and her husband was valid at the time it was entered into because Christie had legally amended her birth certificate to reflect her female gender identity and, as a result, was eligible to be married to a man under Minnesota law. Christie's husband's health insurance company had denied her access to spousal health care, citing a prohibition on marriage for same-sex couples in Minnesota. The court overturned the company's decision, however, stating that it was "not the [company's] role to impose its own definition of gender and marriage upon its participants" but instead, that under state law they were obligated to respect both Christie's birth certificate amendment and her marriage.

Another transgender-friendly marriage ruling came in the 1970s in New Jersey. *M.T. v J.T.* involved a transgender woman (M.T.), who married a non-transgender man (J.T.) shortly after she had sex reassignment surgery, and lived with him for two years until he moved out. When she filed a complaint seeking support and maintenance, J.T. claimed M.T. was a male and that their marriage was therefore void. But M.T. won the case because the court perceived "no legal barrier, cognizable social taboo, or reason grounded in public policy" that she should not be recognized as female.

More recent was 1997's *Vecchione v. Vecchione*, in which a California court refused to annul a post-transition different-sex marriage (in such marriages, one or both partners have already transitioned) because "California recognizes the post-operative gender of a transgendered person."

The cases above relied on surgical standards to determine someone's gender—which is far from ideal. There is nothing rational about requiring that someone undergo surgery in order to have their gender identity officially recognized and be able to marry. Transition is not a one-size-fits-all experience; it's an individualized assessment between the transgender person and their doctor. Sex reassignment surgery (SRS) has been widely rejected as a requirement for gender marker changes on official documents, by the medical community and even by the federal government: In 2010, the U.S. State Department removed the requirement that a person must undergo sex reassignment surgery in order to change the gender marker on their passport. Now, passport officials look to what is "appropriate clinical treatment" for that person. Three states (WA, VT, CA) have since removed surgical requirements for changing gender markers on birth certificates, with more states expected to follow soon. In 2010, the World Professional Association for Transgender Health (WPATH) urged governments

and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedure.

Despite the surgical requirement in these cases, however, both *M.T. v J.T.* and *Vecchione v. Vecchione* did affirm that transgender people can marry as long as they meet a state's requirements for gender marker change on a birth certificate. This is especially important as a precedent because it protects transgender people who come from states or countries that refuse to allow for change in gender marker on a birth certificate. If those people live in a state that does allow those changes and they can meet that state's requirements, their marriage should be recognized.

### Q. How do you know if you're marrying in a trans-friendly state?

**A:** If you live in a jurisdiction where same-sex couples may marry, it doesn't matter what gender you or your loved one happen to be—except that same-sex couples continue to be denied federal rights and benefits under the so-called Defense of Marriage Act (DOMA).

If you live in a jurisdiction where same-sex couples *may not* marry, you may have more trouble. If you are in a different-sex couple—for example a transgender man who is married to a non-transgender woman—the validity of your marriage depends on whether the government respects your gender identity. You are generally allowed to marry if you have made every possible effort to document a gender transition, whether that's changing a birth certificate or taking medical steps in one's transition. On the other hand, courts in Texas and Kansas have ruled in marriage cases that no amount of surgery, document changes or time spent living in accordance with one's gender identity is enough to alter a person's gender in the eyes of the law.

### Q: Can courts invalidate the marriage of a transgender surviving spouse?

**A:** Two of the most fiercely bigoted anti-transgender court rulings have involved transgender women whose different-sex marriages were invalidated after the death of a non-transgender spouse.

### DEFINITION "Transgender" and "TGNC"

Transgender is an umbrella term used to describe people whose gender identity, one's inner sense of being male or female, differs from their assigned or presumed sex at birth; **Gender-NonConforming** people don't meet society's expectations of gender roles.

**“We weren’t looking to challenge a political system—and then kind of inadvertently did.” —ERIN SCHMITT**

The first such case in Texas involved a transgender woman who filed a wrongful death suit after her husband died from what she said was an overlooked blood clot. The court in *Littleton v. Prange* refused to recognize Christie Lee Littleton as a woman because her birth certificate said she was male. The court held that because Littleton was born male, her marriage to her husband had never been legally valid, because same-sex couples cannot marry in Texas.

The 1999 ruling was disturbing not just because it ignored Littleton’s gender identity but for its hostile language: “She has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate... Her female anatomy, however, is all man-made.”



This expression gets thrown around a lot, but there is no such magical wand to make you “legally” male or female when it comes to gender transition. Laws vary from state to state concerning the requirements for changing gender markers on birth certificates and other identity documents. Laws also vary concerning whether a state will accept such identity documents as conclusive with respect to your gender identity. Finally, context also can make a difference with respect to whether your gender identity will receive respect. For example, a court might recognize your gender identity or the sex designation on your birth certificate as your “legal gender” in one marriage-related context, but a government agency in the same state might deny you respect in another marriage-related context despite the change to your gender marker.

**DOMA**

***The Defense of Marriage Act Doesn’t Affect Transgender Marriages***

The federal Defense of Marriage Act (DOMA), passed into law in 1996, defines marriage for the purpose of federal recognition as a “legal union between one man and one woman” and states that “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The federal government has consistently found that legally married different-sex couples, where one partner has subsequently transitioned, are still entitled to the same spousal benefits as couples who are and remain “opposite sex” in the traditional sense throughout their marriage.

The U.S. Office of Personnel Management has directly addressed this issue in its “Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace”: “If the employees in transition are validly married at the time of the transition, the transition does not affect the validity of that marriage, and spousal coverage should be extended or continued even though the employee in transition has a new name and gender.”

Other federal agencies that have drawn the same conclusion include the Social Security Administration (SSA), the Board of Immigration Appeals (BIA) and the Internal Revenue Service (“IRS”) as well as the United States Navy.

**CHILDREN**

***Protecting Your Rights as a Trans Parent***

Parental rights can be very hard to defend in court once they’re challenged, whether as part of divorce or custody proceedings or because of sheer discrimination. Documenting your intentions for a child through a will, adoption, guardianship and/or other legal documents and proceedings is especially important when a parent is transgender; couples should also consider writing up a statement of intention. For more information, please see “Transgender Parenting,” another one of the fact sheets in this Lambda Legal Transgender Rights Toolkit, which can be found at [www.lambdalegal.org/publications/trans-toolkit](http://www.lambdalegal.org/publications/trans-toolkit).

**IMMIGRANT RIGHTS**

***Federal Policy on Transgender Spouses***

In April 2012, the Obama Administration loosened the immigration rules for transgender spouses applying for benefits under the U.S. Citizenship and Immigration Service (USCIS) with these key policy clarifications:

- A marriage of a transgender person is presumed to be valid when there are no laws or precedents questioning its validity. Marriage benefits will be approved where a transgender individual has legally changed his or her gender and subsequently married a person of the other gender (i.e. a transgender man marries a cisgender woman); the marriage is seen as a heterosexual marriage under the law where the marriage took place; and the law where the marriage took place does not bar a marriage between a transgender person and a person of the other gender.
- When determining whether a marriage is different sex, the USCIS no longer requires proof of surgery. Instead, a transgender person can show an amended birth certificate or other official recognition of the corrected gender such as passport, court order, naturalization certificate or in some cases a driver’s license; or medical certification from a licensed physician (M.D. or D.O.) certifying that the individual has had appropriate clinical treatment using guidelines issued by the World Professional Association for Transgender Health (WPATH). (For more about WPATH’s Standards of Care, please see our “Transition-Related Health Care” fact sheet, downloadable here: [www.lambdalegal.org/publications/trt\\_transition-related-health-care](http://www.lambdalegal.org/publications/trt_transition-related-health-care))

Talk to an immigration lawyer or contact Immigration Equality ([www.immigrationequality.org](http://www.immigrationequality.org)) if your marriage or immigration status might be affected by these policies.

The language in the second case, Kansas’s 2002 decision in *In re Estate of Gardiner*, was equally bad: “The body [she] inhabits is a male body in all aspects other than what the physicians have supplied.” Therefore, “as a matter of law, she...is a male.”

Lambda Legal submitted a friend-of-the-court brief in *Gardiner* but the Kansas Supreme Court nevertheless ruled against the validity of the transwoman’s marriage by declining to recognize the gender marker change on her Wisconsin birth certificate—and relying on a Kansas statute limiting marriage to different-sex couples.

**Q: Is a marriage still valid if one spouse transitions later on?**

**A:** Marriages remain valid if they were valid at the time they were entered into. The government cannot retroactively invalidate a marriage because of a change in eligibility criteria that occurs *after* the marriage is entered into. Not even the federal Defense of Marriage Act (see sidebar for more about DOMA) should affect couples who are already married and were eligible for marriage at the time they entered into that relationship.

It’s an important principle to defend, especially in the face of openly anti-transgender policies and sentiments. That was the situation, for example, in 2007 when Lambda Legal represented a transgender man in a Florida alimony case known as *Roach v. Roach n.k.a. Silverwolf*. Julio Silverwolf (formerly Julia Roach) transitioned from female to male after 18 years of marriage to Lawrence Roach.

When the couple were divorcing, Roach argued that he shouldn’t have to pay alimony because Silverwolf was “legally dead” as a result of his transition and because Florida does not recognize marriages of same-sex couples. But the court upheld the alimony agreement, basing its ruling on the determination that the marriage was valid at the time it was entered into.

# TIPS

## DOCUMENTS TO EXECUTE IF YOU’RE GETTING MARRIED AND ONE OR BOTH OF YOU IS TRANSGENDER:

- Power of attorney
- Health care proxy
- Living will
- HIPAA release
- Guardianship/custody agreement or second-parent adoption (if kids are involved)
- Prenuptial agreement specifying that both parties are aware of each other’s gender status

Also: It’s helpful to have your identity documents (such as your birth certificate, driver’s license or passport) changed to reflect your gender identity, but rules for changing ID gender vary from state to state. For more information about changing identity documents, see [www.lambdalegal.org/publications/sources-of-authority-to-amend](http://www.lambdalegal.org/publications/sources-of-authority-to-amend).

Photo of Erin Schmitt and Dane Menkin © Arthur Robinson Williams

WHAT YOU NEED TO KNOW Gender Identity and Marriage Law		
	...and you and your partner’s gender identities are...	...and you and your partner’s gender identities are...
<b>If you transition BEFORE getting married...</b>	<b>DIFFERENT-SEX</b> , the validity of your marriage depends on your state. But generally you can marry if you meet your state’s requirement for gender marker change on your birth certificate. New Jersey, Minnesota and California courts have recognized the gender identity of transgender spouses and affirmed the validity of their marriages to different-sex spouses. However, some states refuse to allow gender-marker changes on birth certificates and do not legally recognize gender transition.	<b>SAME-SEX</b> , you may marry and receive respect for your marriage in those jurisdictions that issue marriage licenses to same-sex couples. In addition, your marriage will receive respect in a few other states.
<b>If you transition AFTER getting married...</b>	<b>DIFFERENT-SEX</b> , your marriage will be respected in all jurisdictions that respect marriages of same-sex couples and you may have arguments for respect in other states depending on a number of factors, including whether your state of residence legally recognizes your gender transition in this context.	<b>SAME-SEX</b> , your marriage should receive respect, as it was valid when you entered into it, and there is some legal precedent to support this.

**FOR MORE INFORMATION:** Contact Lambda Legal at 212-809-8585, 120 Wall Street, Suite 1900, New York, NY 10005-3919. If you feel you have experienced discrimination, call our Help Desk toll-free at 866-542-8336 or go to [www.lambdalegal.org/help](http://www.lambdalegal.org/help)