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## Transgender Family Law Facts:

A fact sheet for transgender spouses, partners, parents, and youth

This fact sheet was designed to answer basic legal questions related to marriage, domestic partnerships, parenting, foster care, and youth issues. The Transgender Law Center also has a more complete guide for community members and our families: *Transgender Family Law 101*. In addition, we have the *Transgender Family Law Practitioner's Guide* for attorneys and advocates and *Transgender People and the Family Court System* for California family law court personnel.

### Marriage<sup>1</sup>

Since, at the time of publication, California only allows “opposite sex” couples to get married, gender matters. Because, as a transgender person, you may be unsure of what your “legal” gender is, determining to whom you can stay married or get married to can be confusing. In general, people are concerned about marriages that are either pre-transition or post-transition.

(Some people have questions about relationships that don't fit into either of these descriptions. If you do, feel free to call us at the above number.)

#### (a) *Pre-Transition Marriage* (does transition end a marriage?)

When a couple gets married, and at some later point one spouse transitions, the key question is whether the couple, who are now same-sex, are still married. While neither the courts nor the legislature has yet said anything about these marriages, California marriage law generally says that a valid marriage can only be ended through death or divorce.<sup>2</sup> Because of this, it is our strong belief that pre-transition marriages remain valid after transition.

#### (b) *Post-Transition Marriages* (can someone marry based on their gender identity?)

California expressly recognizes a person's gender identity as his or her gender in some situations (changing your gender marker on your driver's license or birth certificate, for example). For that reason, we strongly believe that you can marry based on your gender identity. The best way to support that marriage is through getting a court order and/or a new birth certificate that

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<sup>1</sup> Bi-national couples seeking to have one spouse immigrate as a result of marrying a U.S. citizen or resident will face special marriage related issues. See TLC's publication on immigration issues for more information.

<sup>2</sup> A marriage can also be invalidated if there was fraud at the time of marriage, but transition has never been held to be fraud.

recognizes your change of gender.<sup>3</sup> However, even without such proof, you can still make a case for getting married.

To provide you and your family as much protection as possible, we recommend that you take a couple of extra steps beyond getting a marriage license. These steps include, entering into a memorandum of understanding (MOU) prior to marriage, creating a will or trust, entering into a parent MOU prior to the birth of any children, and completing basic paperwork for power-of-attorney.

**Special Note:** Transgender people who, post-transition, are in a same-sex relationship (for example, a FTM engaged to a non-transgender man) sometimes wonder if they can marry based on their birth-identified gender. For a number of reasons, we do not advise doing this. Instead, we recommend that you consider a Domestic Partnership.

### **Domestic Partnerships**

In California, a separate legal process called Domestic Partnership (DP) was created for couples that are same-sex or in which one partner is over the age of 62. Similar to the way in which the “opposite sex” requirement raises questions about marriage, so too does the “same-sex” requirement about DPs.

Luckily, the answers are basically the same. Transition doesn’t end an existing DP and someone should be able to enter into a DP based on gender identity. In addition, if a couple is in a pre-transition DP, they can get married to each other after the transition of one partner without first ending the DP. But be aware that even though the rights associated with DPs have expanded, it is not a marriage. A DP will not be recognized by the U.S. government and may not be recognized in other states.

### **Parenting**

Transgender people can become parents in a number of different ways: biologically having a child; parenting a child born to a spouse, DP, or someone that agrees publicly that two of you are co-parents; adopting a spouse’s or DP’s child through a step-parent adoption; and/or adopting a child that has no biological ties to either spouse or DP (or doing so as a single person). California law strongly supports the right and ability of transgender people to be parents in each of these situations. A transgender person should not be at risk of having custody or visitation with their child lessened or compromised simply because of their gender identity or expression.

Unfortunately, due to a lack of experience with transgender parents on the part of some judges, family law attorneys, and court personnel, transgender parents may have a hard time asserting their rights. Therefore, we recommend that you clarify your legal rights by calling TLC or a private lawyer who understands transgender family law issues. It is very important to advocate for yourself from the start because once you have given up your rights to custody and visitation, it is very difficult to get them back.

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<sup>3</sup> See our publications on ID change to get more information about changing your IDs or getting court orders.

## **Foster Care**

Transgender people participate in the Foster Care system in a number of different ways: as youth in the system, as foster parents, and as people working in the system. All of these groups are protected from gender identity discrimination under California law. No one can be denied services, rejected as a foster care family, or fired from the system simply for being transgender. For youth in the system, this also means that you can't be denied the right to transition simply because you are in foster care or denied a transfer if your foster care family is not supportive. And the staff at any facility should work with you through your transition and make sure that your identity is respected.

## **Transgender Youth Issues**

Despite transgender-positive laws affecting youth,<sup>4</sup> California still treats youth as not being able to make some decisions without the approval of their parent(s) or guardian(s). Therefore, in order to change your name officially on your driver's license or state ID, a transgender person under 18 will need permission from a parent(s) or guardian(s), unless you are an emancipated minor.

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

Finally, as more transgender youth come out at an earlier age, sometimes parents disagree among themselves about whether to support their children. If the parents are separated, this disagreement can lead to a renewed custody challenge. If you are in this situation and want to support your child, please contact TLC or another knowledgeable legal resource prior to taking any significant steps.

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<sup>4</sup> In addition to the Foster Care law, transgender students are protected from discrimination. TLC has a separate publication on Transgender Students' Rights.