

TRANSGENDER PEOPLE AND MARRIAGE: THE IMPORTANCE OF LEGAL PLANNING

By Shannon Minter, Legal Director
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
Telephone: 415 392-6257 x310
E-mail: Minter@nclrights.org
Copyright 2002

Transgender people face unique legal issues with regard to marriage. Although marriage is not yet a legal option for lesbian, gay or bisexual people in any state, it is already an option -- and a reality -- for many who are transgender. This article summarizes the legal issues surrounding marriage for transgender people and suggests some ways that transgender persons can protect their marital relationships.

Many people are aware that transgender individuals are often able to enter into a heterosexual marriage after undergoing sex-reassignment. What may be less well known, however, is that a transgender person may also be married to a person of the same sex. That situation arises, for example, when one of the spouses in a heterosexual marriage comes out as transsexual and transitions within the marriage. If the couple chooses to stay together, as many do, the result is a legal marriage in which both spouses are male or female. Alternatively, in states that do not allow a transgender person to change his or her legal sex, some transgender people have been able to marry a person of the same sex. To all outward appearances and to the couple themselves, the marriage is a same-sex union. In the eyes of the law, however, it is a different-sex marriage, because technically speaking, the law continues to view the transgender spouse as a legal member of his or her birth sex even after sex-reassignment. In short, marriage is a very real option for a variety of transgender people in a variety of circumstances.

In practice, however, the legal validity of marriages involving a transgender spouse is not yet firmly established in the great majority of states. In 1999, for example, an appellate court in Texas invalidated a seven year marriage between Christine Littleton, a transgender woman, and her deceased husband. The case arose when Ms. Littleton brought a wrongful death suit seeking damages for her husband's death as a result of alleged medical malpractice. Rather than ruling on the merits of Ms. Littleton's suit, the court held that a person's legal sex is genetically fixed

at birth and that Ms. Littleton should be deemed to be legally male, despite her female anatomy and appearance, and despite the fact that she had lived as a woman for most of her adult life. As a result of that decision, Ms. Littleton was denied all of the rights afforded to a legal spouse -- not only the right to bring a wrongful death suit, but the right to intestate inheritance, to obtain her deceased husband's Social Security and retirement benefits, and many others as well.

In contrast, in 1997, a trial court in Orange County, California affirmed the validity of a marriage involving a transgender man. The case arose when the wife sought to invalidate the marriage in order to deprive her husband of his parental rights vis-a-vis the couple's child, who was born through alternative insemination. Fortunately, the trial court rejected the wife's argument that the transgender husband should be considered legally female and refused to nullify the marriage. The court held that California law recognizes the post-operative sex of a transsexual person for all legal purposes, including marriage. Notably, however, if the court had ruled differently, or if the transgender spouse had not undergone extensive and expensive sex reassignment surgeries prior to the marriage, it is likely that he would have lost any right to maintain a relationship with his child.

As these and other similar cases make clear, it is critical that transgender people who are married become aware of their potential legal vulnerability and take steps to protect themselves as much as possible. As an initial matter, transgender persons who are married should certainly act accordingly and should not hesitate to exercise their rights as legal spouses, whether that be the right to file married tax returns, the right to apply for spousal benefits, or the right to have or adopt children as a married couple. At the same time, however, it is also important to create a safety net in the event that the validity of the marriage is challenged.

Although there are many benefits and protections that arise exclusively through marriage and cannot be duplicated through any other means, there are also some basic protections that can be safeguarded and secured through privately executed documents and agreements. At a minimum, a transgender person who is married should have: (1) a last will and testament for both spouses; (2) financial and medical powers of attorney in which each spouse designates either the other spouse or another trusted person to be his or her legal agent in the event of incapacitation; and (3) a written personal relationship agreement including a detailed account of each spouse's rights and responsibilities with regard to finances, property, support, children, and any other issues that are important to the couple. The agreement should also include an acknowledgment that the non-transgender partner is aware that his or her spouse is transgender, to avoid any later claims of fraud or deception.

Ideally, the couple should draft those documents with assistance from an attorney and supplement them with any other legal planning documents that are appropriate for their specific circumstances.

With those basic documents in place, transgender people who are married can at least ensure that the spouses can inherit each other's estates and retain control over their own financial and medical decisions, even if the validity of the marriage is challenged. In many cases, the safety net created by extra legal planning will never have to be used. In others, the presence of that extra protection will shelter the transgender person and his or her spouse from devastating emotional trauma and financial loss.