Protecting the Rights of Transgender Parents And their Children

A GUIDE FOR PARENTS AND LAWYERS

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National Center for
TRANSGENDER
EQUALITY

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The **American Civil Liberties Union** (ACLU) is the oldest organization dedicated to promoting and defending civil liberties in the United States. The ACLU has worked to promote the rights of lesbian, gay, bisexual, and transgender (LGBT) people since 1936 and in 1986 established the ACLU LGBT & AIDS Project. Through the Project, the ACLU has advocated for LGBT parents and their children in courts across the country. This includes representing parents in custody disputes where their gender identity or sexual orientation was raised as a reason to limit custodial rights and successfully challenging discriminatory adoption and foster care policies in Florida, Arkansas and Missouri. The ACLU's advocacy in support of transgender equality includes, in addition to the parenting cases, litigation involving workplace discrimination, school bullying, access to healthcare, and identity documents.

The **National Center for Transgender Equality** (NCTE) is a social justice organization dedicated to advancing the equality of transgender people through advocacy, collaboration and empowerment. NCTE was founded in 2003 by transgender activists who saw the urgent need for a consistent voice in Washington, DC for transgender people. NCTE provides this presence by monitoring federal activity and communicating this activity to our members around the country, providing congressional education, and establishing a center of expertise on transgender issues. NCTE also works to strengthen the transgender movement and individual investment in this movement by highlighting opportunities for coalition building, promoting available resources, and providing technical assistance and training to trans people and our allies.

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Introduction

More and more transgender parents are fighting to protect their relationships with their children in the face of custody challenges. Yet they face significant obstacles. Parents who have come out or transitioned after having a child with a spouse or partner have seen their gender transition raised as a basis to deny or restrict child custody or visitation. Transgender people who formed families after coming out or transitioning have faced challenges to their legal status as parents, often based on attacks on the validity of their marriages.

Many transgender people have and raise children without encountering legal challenges to their fitness or legal status as a parent. However, such challenges are still all too common. And many parents have been treated terribly by the courts because judges have a limited understanding of what it means to be transgender and they have very little—and inconsistent—case law to guide them.

The purpose of this guide is to provide information to transgender parents and their attorneys to help them protect parent-child relationships and assist them when faced with disputes over child custody issues.

This guide is divided into two parts. The first part addresses **challenges to the fitness of transgender parents**. This section discusses the limited and varying case law concerning the relevance of a parent's gender transition or transgender status in custody proceedings. It then offers recommendations for parents to consider before coming out to their families as transgender (if they have not already done so) which may help protect them in a future custody dispute. Finally, it provides suggestions for advocacy, including evidence and legal arguments for attorneys to consider using where needed in legal representation of transgender parents.

The second part of this guide addresses **challenges to the legal parental status of transgender parents**. This section first provides an overview of the legal landscape and the ways people who become parents after coming out or transitioning may be vulnerable to challenges to their legal status as parents. Next, it offers recommendations about how to secure one's legal status as a parent. It then suggests legal arguments that may be helpful if a parent is faced with a challenge to her legal parental status.

At the end of this guide is an appendix in which you will find an annotated list of cases addressing the parental rights of transgender parents and sample expert testimony that may be relevant in some cases. A valuable resource for attorneys representing transgender parents is the treatise *Transgender Family Law: A Guide to Effective Advocacy*, edited by Jennifer L. Levi and Elizabeth E. Monnin-Browder.

Because every case is different, and because the law frequently changes, is not clearly established, or is interpreted in different ways by different courts, you should not rely on the information presented in this guide for legal advice about a particular case.

Protecting Against Challenges to the Parental Fitness of Transgender Parents

Transgender parents in custody disputes—especially those who come out as transgender or begin to transition after having children—may see their transition or transgender status raised by their former spouse or partner or by the judge as a basis to limit or deny them custody or visitation with their children. An ex or a judge who lacks information on what it means to be transgender may feel concerned that the parent's transition or gender expression may have a negative impact on the child's well-being. Or the ex may simply see this as an arrow in the quiver to win custody where it is contested. Either way, transgender parents in custody disputes may face this additional challenge. This section of the guide provides information to help parents and their lawyers overcome this challenge.

For this information to be useful to parents, it is important to first have a general understanding of the legal standards applied in child custody disputes. Here is a basic overview:

- If the court is making an initial determination of custody and visitation[1] upon a couple's separation or divorce, the governing standard is the "best interest of the child". Typically, a statute or case law identifies the best interest factors to be assessed by courts. They vary somewhat from state to state, but they usually include considerations such as the quality of the child's relationship with each parent; each parent's ability to provide for the child's physical, educational and emotional needs; each parent's willingness to support the child's relationship with the other parent; the stability of the home life of each parent; and the child's wishes if the child is mature enough.
- Where a parent seeks to modify an existing child custody order, the parent must first demonstrate a significant change in circumstances since the previous order and then show that the requested change of custody is in the best interest of the child.
- There is a presumption in favor of liberal visitation with the non-custodial parent unless contact with the parent is found to cause or pose a threat of physical or emotional harm to the child. Where a parent is deemed to pose a danger to a child, courts will typically explore the possibility of supervised visitation before taking the extreme step of cutting off contact between a parent and child.

Overview of the Case Law

There are few cases addressing the relevance of a parent's gender transition or transgender status in child custody proceedings. Indeed, most states have no reported cases on this subject. Within this limited body of case law, the treatment of transgender parents varies dramatically from case to case.

Some parents have fared well, with courts rejecting the asserted unfitness of transgender

1 Some states have abandoned the terms "custody" and "visitation" in favor of terms like "parenting time" or "time sharing" which can be divided between the parents in any way the court deems to be in the best interest of the child.

parents. For example, a Colorado appeals court reversed a trial court's decision transferring custody away from a transgender parent based on the parent's gender transition from female to male. *Christian v. Randall*, 516 P.2d 132 (Colo. Ct. App. 1973). The appellate court's decision was based on the fact that "the record contain[ed] no evidence that the environment of the [transgender parent's] home ... endangered the children's physical health or impaired their emotional development." *Id.*, at 133.

Other parents have had terrible outcomes. They have had their relationships with their children limited solely based on the court's conclusion that being in the care of a transgender parent would expose a child to psychological harm. For example, an Ohio court cut off a parent's visitation after accepting testimony that "the transsexualism of the [parent] would have a sociopathic affect [sic] on the child ... without appropriate intervention." *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161 at *1-2 (Ohio Ct. App. July 20, 1982). Just a few years ago, a Washington court decided not to give primary custody to a transgender parent because, it said, the "impact of [the parent's planned] gender reassignment surgery on the children is unknown." *Magnuson v. Magnuson*, 170 P.3d 65, 66 (Wash. Ct. App. 2007). In the most extreme cases, courts have terminated parents' parental rights, completely severing the parent-child relationship, because they were transgender. *Daly v. Daly*, 715 P.2d 56 (Nev. 1986); *M.B. v. D.W.*, 236 S.W.3d 31 (Ky. Ct. App. 2007).

In several of the cases where transgender parents were able to retain custody or visitation, the court's decision rested at least in part on the fact that the parent had concealed her gender identity from her children. *See, e.g., In re the Marriage of D.F.D. and D.G.D.*, 862 P.2d 368 (Mont. 1993) (noting that the evidence showed that the father would never cross-dress in the presence of his child); *In re Custody of T.J.*, No. C2-87-1786, 1988 WL 8302, at *3 (Minn. Ct. App. Feb. 9, 1988) (emphasizing that gender dysphoric father "had decided to maintain his male identity."); *P.L.W. v. T.R.W.*, 890 S.W.2d 688, 690 (Mo. Ct. App. 1994) (noting that father's cross-dressing occurred outside of the child's presence).

In some cases where transgender parents had bad results in court, they did not present testimony from expert witnesses such as psychologists, leaving the courts to rely solely on the untested assertions about transgender parents offered by the other parent's experts. In some cases, courts did not even rely on evidence; they merely ruled based on speculation or assumption of psychological or social harm associated with being in the care of a transgender parent. *See, e.g.*, *Cisek*, 1982 WL 6161 at *2 (in denying transgender parent visitation with her child, court noted that "[c]ommon sense dictates that there can be social harms."). In all of these cases, the courts had a serious lack of understanding about what it means to be transgender. For example, in a Nevada case where the court terminated a transgender parent's parental rights, the court said "Suzanne, in a very real sense, has terminated her own parental rights as a father. 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." *Daly*, 715 P.2d at 59. It is this kind of misconception that transgender parents may be up against in contested custody cases.

It is important to note that even though the outcomes were terrible in many of the cases, the courts did not establish a general rule that transgender parents are inherently unfit to parent or that custody or visitation rights of transgender parents should always be denied or limited.

Indeed, some courts explicitly disclaimed doing so. *See, e.g., Magnuson*, 170 P.3d at 66 ("[The trial] court properly focused on the children's needs in making the residential placement decision, not transgender status ...."); *M.B.*, 236 S.W.3d at 36-37 ("We note that the circuit court did not find that the appellant's undergoing gender reassignment, by itself, inflicted M.B.'s emotional injury and justified termination of the appellant's parental rights. Rather, the court found that the entire series of events, including the appellant's behavior surrounding the sex change, caused the emotional injury.").

Recommendations for Parents Prior to Transitioning or Coming Out to Their Families

For parents who have not yet transitioned or come out as transgender to their spouse or partner and children, there are some steps that can be taken prior to doing so that could be helpful in making the transition process go more smoothly for everyone in the family. In addition, as will be discussed more fully in the next section, **following these recommendations where feasible could be helpful in the event the parent ends up in a dispute over child custody issues because courts are likely to look favorably on these actions.** However, in considering these recommendations, it is important to keep in mind that every person's personal and family situation is unique and what may be effective for some parents may not be helpful for others. Moreover, some of these recommendations depend on the availability of resources, e.g., the ability to access mental health care related to one's gender transition, which may be excluded from health insurance coverage and out of reach financially for many people.

■ Plan your gender transition process with the guidance of a doctor or therapist.

If you are transitioning as part of a treatment plan for gender dysphoria[2] recommended by a doctor or therapist, it might help your former spouse or partner to be more accepting and understanding of your transition. To the extent this may help reduce the level of conflict surrounding your transition and the divorce or separation, it could help support a positive adjustment for the children. Research shows that the cooperation between both parents is an important factor that supports children's positive adjustment to a parent's gender transition. In contrast, factors that place children at risk include having a parent who is extremely opposed to the other parent's gender transition and conflict between the parents regarding the transition. See White, T. & Ettner, R. (2004). Disclosure, risks and protective factors for children whose parents are undergoing a gender transition. *Journal of Gay and Lesbian Psychotherapy, 8*, 129-145; White, T. & Ettner, R. (2006). Adaptation and adjustment in children of transsexual parents, *European Child and Adolescent Psychiatry, 16*, 215-221. Moreover, as discussed below, if you end up in court over a custody dispute, the fact that your transition was part of a treatment plan under the guidance and supervision of a doctor or therapist could be important and helpful information to present to the court.

If you need assistance finding a doctor or therapist, the World Professional Association for Transgender Health has a "Find a Provider" link on its website. See http://www.wpath.org/find_a_provider.cfm.

2 The current edition of the Diagnostic and Statistical Manual of Mental Disorders uses the term gender identity disorder. But in the next edition, which is due to be published in May 2013, this term has been replaced with gender dysphoria.

■ Prior to coming out to your children as transgender, consult with a child development expert (e.g., a child psychologist or social worker) to get advice on how to make the adjustment as easy as possible for them.

An expert may have useful advice on how to discuss your transition with your children. There is some scientific evidence suggesting that children tend to adjust more easily to a parent's gender transition during the preschool years and may need additional support during adolescence. See White and Ettner (2004), *supra*; White and Ettner (2006), *supra.* Thus, whether or not you are seeing a therapist as part of your transition or for other mental health needs, a child development expert may be able to help you plan your transition in a way that is responsive to your children's needs. She may be able to prepare you for questions or reactions your children may have and offer suggestions on how you can help them through any difficulties they may experience in adjusting to your transition. Moreover, as discussed below, getting and acting on the advice of an expert could be extremely helpful if a dispute ends up in court.

■ If possible, include the children's other parent in the plan for coming out to them.

As mentioned above, research shows that cooperation between both parents helps support children's positive adjustment to a parent's gender transition while transition-related conflict between the parents undermines children's adjustment. See White& Ettner (2004), *supra*; White & Ettner (2006), *supra.* To the extent the other parent is open to working with you to support a positive adjustment for the children, discussing your plans with the other parent prior to sharing them with the children can help foster cooperation. And as discussed below, if you end up in court, it will be helpful to be able to show the judge that you tried to work together with the other parent on how and when to disclose to your children the fact that you are transgender or at least informed her prior to discussing it with your children.

Advocacy Suggestions for Parents and their Lawyers If Faced with a Custody Dispute

The rest of this section offers suggestions about how to deal with the challenges transgender parents may face if they are unable to informally work out custody arrangements with the child's other parent. It summarizes the types of evidence and legal arguments that may be useful depending on the circumstances of the case. The information provided here may be useful not only to parents in the midst of court proceedings, but also to those who are in negotiations or mediation with ex-spouses or partners.

EVIDENCE

If a transgender parent ends up in a court battle over custody issues, the evidence to present in a particular case will depend on the facts of the situation. The parent may have already taken steps toward or completed transition or may be getting ready to do so. The child may be aware that the parent is transgender or may not yet know. The child may be very young or may be a teenager and have preferences about custody or visitation. In addition, the types of evidence to present may vary depending on the legal issue before the court, e.g., initial custody determination or modification. This discussion will therefore include evidence that will be relevant and useful to some parents but not all depending on their circumstances.

Routine best interest evidence

The standards for determining custody and visitation discussed above ought to apply to transgender parents the same as any other parents and it is essential to put on all available evidence about the child's individual circumstances just as any parent would need to do in a custody dispute. The evidence will generally include the following:

■ Testimony from the parent as well as other witnesses who know the family (e.g., teachers, doctors, neighbors) about all of the best interest factors.

■ Testimony from a psychologist or other expert who has evaluated the child and parents regarding what custody arrangement is in the best interest of the child. In states where parents may request a guardian *ad litem* (GAL) to investigate and make a custody recommendation on behalf of the child, this should be considered as well. Whether this request should be made depends on what information you have about the GALs and their views about transgender parents.

■ Where the children are mature enough to have a preference regarding custody and want to tell it to the judge, they may testify in court or state their preference in a private meeting with the judge.

■ Where the issue before the court is whether a non-custodial parent should be allowed to have reasonable visitation, expert testimony about how maintaining the child's relationship with both parents is important to her well-being and the serious harm associated with severing or limiting a parent-child relationship. See, e.g., Lamb, M.E. (2002). Placing children's interests first: developmentally appropriate parenting plans. *Virginia Journal of Social Policy & the Law, 10*(1), 99-119; s*ee In re D.F.D.*, 862 P.2d 368, 376 (Mont. 1993) (in rejecting restrictions on cross-dressing father's parenting time, court noted that "every counselor who testified in this case testified that the negative impact on the son [of observing his father cross-dress] would be less than the impact from not having a normal relationship with his father.").

Additional evidence to present (if available) if it is argued that a parent's transgender status makes her an unfit parent

■ Testimony from the parent and her treating doctor or therapist that a) the parent's transition was or is being undertaken based on the advice of a doctor in order to treat a medical condition, and b) this treatment has improved the parent's mental health and alleviated a significant stressor, which helps make her an even better parent.

For those parents who are transitioning as part of a treatment plan for gender dysphoria, this can be important to dispel the misconception that an individual's decision to transition is an irresponsible and selfish indulgence as opposed to a serious decision to undergo necessary medical treatment that is made with the children's interest in mind. Offering such testimony from the parent's treating doctor could help avoid results like *Cisek v. Cisek*, No. 80 C.A. 113, 1982 WL 6161 at *2 (Ohio Ct. App. July 20, 1982), where an Ohio court terminated a transgender parent's visitation after noting that it was bothered by the fact that the parent did not present evidence of the motivation for changing sex, asking "Was his sex change simply an indulgence of some fantasy?"

■ Testimony from an expert on child development (e.g., a child psychologist or social worker) whom the parent consulted about how to come out to her children as transgender.

The fact that a parent sought the advice of a professional to help minimize any difficulties in adjustment for her children and planned her disclosure to her children based on that professional advice shows the court that she is putting her children first. Presenting this type of evidence might help avoid results like *M.B. v. D.W.*, 236 S.W.3d 31, 36-37 (Ky. Ct. App. 2007), where a Kentucky court said that the termination of a transgender parent's parental rights was not based on her gender transition by itself, but rather, the parent's failure to prepare the children for this change, which resulted in emotional injury. The court found that the parent acted based on her own "self-centered interest," not the best interest of the children.

■ Testimony from the parent about efforts to work together with the other parent to plan the transition process to best support the well-being of the children.

Once again, this can help demonstrate to the court that the parent has planned her transition with a focus on the children's well-being. In addition, courts are likely to look favorably upon such cooperation and unfavorably upon disclosure to children without at least first informing the other parent.

■ "Transgender 101" testimony by an expert.

The goal in custody disputes should be to keep the court focused on the individual child's situation as opposed to generalizations about transgender parents. But when a parent's gender transition or expression is being raised as a reason to restrict or deny custody or visitation, it may be helpful to provide expert testimony to educate the court and prevent it from relying on misunderstandings or baseless assumptions about transgender people and their parenting ability.

Appendix 2 provides sample expert testimony, including citations to supporting authority, addressing areas of scientific evidence that might be helpful to present through an expert witness depending on the circumstances of your case. The areas covered include the following:

- What it means to be transgender.
- Gender dysphoria is a recognized medical condition requiring treatment, which often includes taking various steps towards a gender transition. Such treatment is effective and promotes mental health.
- There is nothing about being transgender that limits an individual's ability to be an effective parent and raise healthy, well-adjusted children. In a family breakup involving a transgender parent, as in any family dissolution, it is important to children's well-being to maintain close relationships with both of their parents whenever possible.

The expert witness could be the parent's treating doctor or therapist.

Additional evidence to present if the issue of social stigma is raised

To the extent social stigma against transgender people is raised as a basis to restrict or limit a parent's custody or visitation, in addition to offering the legal arguments suggested in the next section below, it may be helpful to present the following evidence:

■ Testimony explaining that if there is in fact prejudice in the community against transgender people, the child will not be shielded from that prejudice by separating her from her transgender parent.

Whether or not that parent has custody and regardless of the terms of visitation, the child has a transgender parent. If there are children or others in the community who would taunt, ostracize or otherwise express prejudice against a child because of it, limiting her contact with that parent will not prevent it. In those circumstances, it is important for the child to have the loving support of both parents to help her cope. *See Maxwell v. Maxwell*, No. 2012-CA-000224-ME, 2012 WL 5050588 at *7 (Ky. Ct. App. Oct. 19, 2012) ("If the children are subject to teasing [because of the mother's same-sex relationship], it will likely occur whether their mother has custody or not. The harm from removing them from a positive and loving relationship with their mother seems much more consequential."). This testimony ideally would be presented by a psychologist or other expert on child development, but if that's not possible, it could be discussed as common sense by the parent.

■ Testimony explaining that children of transgender parents are hardly the only children who may be exposed to teasing, bullying or other negative reactions of peers or others in the community.

Many children are subjected to such treatment for countless reasons—their family's religion, race, or national origin; their disability, weight, lack of skill at sports; their parents' appearance, job, accent or anything else that makes them seem different. Thus, courts do not have the capacity to shield children from social prejudice. This testimony ideally would be presented by a psychologist or other expert on child development, but if that's not possible, it could be discussed as common sense by the parent.

■ In some cases—e.g. if some time has already passed since the child learned that the parent is transgender and the child has good peer relationships—the parent or other witnesses may be able to offer testimony about the child's actual experience to refute speculated harms.

Additional evidence to present if it is argued that the parent should conceal her gender identity from her children

To the extent a parent is facing the assertion that she should be required to conceal from her children the fact that she is transgender, in addition to the legal response discussed in the next section below, it may be helpful to present the following evidence:

■ Testimony about how requiring a parent to conceal a core part of herself is harmful to the parent-child relationship.

This testimony ideally would be presented by a psychologist. If that is not possible, the parent may be able to talk effectively about how harmful it would be to the parent-child relationship to keep secrets from her child—that it would create a wedge between them; that it's important to her for her child to know that she will always be open and honest with her; that it would injure the child's trust in her to find out from someone else that her parent has been concealing this information from her.

■ If the child is young, testimony from an expert explaining the scientific research showing that children may have an easier time adjusting to a parent's gender transition at young ages and, thus, it is best not to delay disclosure.

■ Testimony from the parent's treating doctor or therapist about how part of her treatment includes living full time in accordance with her gender identity and attempting to conceal her gender identity would be psychologically harmful.

LEGAL ARGUMENTS

This section summarizes a number of legal arguments that may be useful depending on the circumstances of a particular case. It includes arguments under state domestic relations law as well as constitutional arguments that can be asserted. Courts hearing custody disputes are much less likely to rule on constitutional grounds but it is worth making the arguments where applicable because they may be accepted or could help lead courts to rule favorably on other grounds.

A court may not limit custody rights based on a parent's gender transition or transgender status in the absence of evidence demonstrating harm to the child.

It is critical to make the court understand that it has to treat the case like any other child custody dispute. This means the court needs to rule based on the evidence, not on assumptions that transgender parents harm children. There are arguments to be made based on domestic relations law as well as the Constitution to get a court to focus on the evidence rather than rely on negative assumptions about transgender parents.

State domestic relations law argument:

Courts across the country have recognized the principle that custody determinations must be evidence-based and assumptions of harm are improper. For example, numerous courts have held that a parent's custody cannot be denied or restricted just because she lives with someone to whom she is not married unless there is evidence that this is harmful to the child. *See, e.g., Moses v. King*, 637 S.E.2d 97 (Ga. Ct. App. 2006) ("Georgia's appellate courts have held that a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent evidence that the child was harmed or exposed to inappropriate conduct."); *Higgins v. Higgins*, 981 P.2d 134, 135-36 (Ariz. Ct. App. 1999) (reversing trial court's denial of custody based on mother's cohabitation "[b]ecause the record contains no evidence" that it had a detrimental effect on the children); *Boswell v. Boswell*, 721 A.2d 662, 678 (Md. 1998) (requiring "an evidence-based finding of adverse impact on the child caused by a parent's non-marital relationship to justify restrictions or limitations on custody or visitation"). *See also V.B. v. J.E.B.*,–A.3d --, 2012 WL 4320455 (Pa. Super. Sept. 21, 2012) (father's participation in polyamorous relationship not proper ground to deny custody absent evidence of harm).

There is also a significant body of law applying this principle to lesbian and gay parents, with many courts holding that it is improper to assume, without evidence, that living with or having visitation with a gay parent is detrimental to a child. For example, a Florida appellate court reversed a trial court's custody decision that was based on the assumption that living with a lesbian mother can adversely affect a child. *Maradie v. Maradie*, 680 So.2d 538, 543 (Fla. 1st Dist. Ct. App. 1996). The court explained that "a connection between the actions of the parent and harm to the child requires an evidentiary basis and cannot be assumed." *Id. See also Damron v. Damron*, 670 N.W.2d 871 (N.D. 2003) ("Other courts generally have recognized that, in the absence of evidence of actual or potential harm to the children, a parent's homosexual relationship, by itself, is not determinative of custody.") (collecting cases).[3]

3 However, there are still a few states in the South where appellate courts have deemed a parent's lesbian or gay orientation or same-sex relationship a sufficient basis to deny or limit custody. *See Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999); *Ex parte JMF*, 730 So.2d 1190 (Ala. 1998); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).

The principle that custody determinations must be made based on actual evidence rather than assumptions of harm should apply equally to cases involving transgender parents. Indeed, at least one court has explicitly said so. A Colorado appellate court rejected a father's petition to transfer custody away from his ex-spouse, who was transitioning, because "the record contain[ed] no evidence that the environment of the [transgender parent's] home ... endangered the children's physical health or impaired their emotional development." *Christian v. Randall*, 516 P.2d 132, 133 (Colo. Ct. App. 1973). *See also Magnuson v. Magnuson*, 170 P.3d 65, 67 (Wash. App. 2007) (the rule that "[v]isitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent" is "equally applicable in this transgender residential placement context."). As discussed above, there are unfortunately a number of cases in which courts have accepted assertions of harm associated with a parent's gender transition or expression. But those cases were decided based on the specific facts and testimony presented, not a general rule against custody or visitation rights for transgender parents.

Constitutional arguments:

The constitutional protections afforded to parent-child relationships and medical decision-making provide additional arguments against courts curtailing transgender parents' custody or visitation based on assumptions or speculation that they pose a risk to their children.

The Due Process Clause of the 14th Amendment protects both the relationships that exist between parents and their children and the parents' autonomy in making decisions about the care of their children. The United States Supreme Court has long recognized the fundamental constitutional right of parents and their children to maintain their family relationships and the right of fit parents to raise their children as they deem appropriate. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The government may not interfere with parent-child relationships or parental decisions absent a compelling interest. Restricting a parent's relationship with her child because she is transgender or transitioning clearly burdens the parent-child relationship. It also intrudes on parental autonomy. *Cf. Maxwell v. Maxwell*, No. 2012-CA-000224-ME, 2012 WL 5050588 at *7 (Ky. Ct. App. Oct. 19, 2012) (violates fundamental right of parent to make custody determination based on fact that mother was in same-sex relationship). When a transgender parent makes the decision to live her life consistent with her gender identity, that is not just a personal or medical decision; it is also a parental decision to do what she believes will be best for her children by being open and honest with them and by making herself healthier, and, thus, a better parent.

Limiting custody or visitation because a parent is transgender also intrudes upon the right guaranteed by the Due Process Clause to independence in making certain kinds of important decisions such as medical decisions. *See Whalen v. Roe*, 429 U.S. 589 (1977); *Sell v. United States*, 539 U.S. 166 (2003) (liberty interest in avoiding unwanted administration of drugs); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (right to refuse life-saving treatment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy right to access and use contraception); *see also In re Guardianship of Browning*, 568 So.2d 4, 10 (Fla. 1990) (Florida Constitution's right to privacy "encompasses all medical choices."). Where a parent undergoes a gender transition as part

of her doctor's recommended treatment for the medical condition gender dysphoria, this is a constitutionally protected medical decision. Restricting a parent's child custody or visitation because of this medical decision constitutes a penalty on the exercise of this constitutional right and is, thus, impermissible absent a compelling state interest such as demonstrable harm to the child. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("any classification which serves to penalize the exercise of [a fundamental constitutional] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.").

Because these important constitutional rights are implicated, the evidence-based standard discussed above is constitutionally required. Since the government clearly has a compelling interest in protecting children against harm, the same factual question at issue under domestic relations law should resolve these constitutional issues—namely, does the evidence show that living with or visiting with the transgender parent causes or will cause harm to the child? Asserting these constitutional arguments gives the judge additional reasons to fully hear the evidence and should make clear that the burden is on the other side to prove any asserted harm.

A court cannot restrict custody or visitation in order to shield children from prejudice.

Transgender parents may face the argument that their custody or visitation should be denied or restricted to protect their children from social prejudice against transgender people. *See, e.g.*, *Cisek*, 1982 WL 6161 at *2 (in terminating transgender parent's visitation with child, court noted that "[c]ommon sense dictates that there can be social harms.").

In addition to offering the testimony suggested in the section on evidence above, there is a powerful legal argument that this is an impermissible consideration in a child custody dispute. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), a father sought to have custody of his daughter transferred away from the mother because she married a man of a different race. The trial court ordered a change in custody on the basis that it is inevitable that the child would "suffer from the social stigmatization that is sure to come" if she remains with her mother. *Id.*, at 431. The Supreme Court reversed, stating that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.,* at 433. Thus, it concluded, racial biases and the possible injury they might inflict on a child living in a biracial household "are not permissible considerations" in making a child custody determination. *Id.*

A number of state appellate courts have relied on this case to reject similar arguments against allowing lesbian or gay parents to have custody of their children. *See e.g. S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985); *Maxwell*, 2012 WL 5050588 at *7; *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. 2d Dist. Ct. App. 2000); *Conkel v. Conkel*, 509 N.E.2d 983 (Ohio Ct. App. 1987). The same principle applies with equal force in the context of transgender parents.

A court may not require a parent to conceal her gender identity from her child without evidence that it is necessary to protect the child from harm.

An issue that may be raised by the other parent or the court is whether the transgender parent ought to be prohibited from disclosing to her children the fact that she is transgender or presenting in accordance with her gender identity when in their presence. If faced with this argument, the suggested testimony discussed above concerning the impact of keeping such a secret from the children (see Evidence section) can be paired with the following legal arguments.

State domestic relations law argument:

State domestic relations law often recognizes that a parent should not have restrictions imposed on how she interacts or spends time with her child unless those restrictions are necessary to protect against a demonstrated harm. *See, e.g., Marlow v. Parkinson*, 236 S.W.3d 744 (Tenn. Ct. App. 2007) (restraints on a parent "must involve conduct that competent evidence shows could cause harm to the child."); *In re Marriage of Dorworth*, 33 P.3d 1260, 1262 (Colo. Ct. App. 2001) ("parental conduct may be restricted only if child's physical, mental, or emotional health would be endangered"). On this basis, courts have struck down restrictions on parents such as taking children to a particular church (*Dorworth*, 33 P.3d 1260), and allowing children to spend time with the parent's boyfriend or girlfriend (*Bates v. Bates*, 1995 WL 134907 (Tenn. Ct. App. 1995)). Without an evidence-based showing that a transgender parent's openness about her gender identity is harmful to the child, an order requiring a parent to conceal this information about herself should not be permitted.

Constitutional arguments:

Ordering a parent to conceal from her children the fact that she is transgender burdens the constitutional right to parental autonomy discussed above. A parent has the right to make the parental decision to be honest with her children about who she is and not to keep secrets from them. A court cannot interfere with such parental decision-making absent a compelling interest such as demonstrable harm to the child.

Requiring a parent to conceal her gender identity or transgender status from her child also implicates the First Amendment right to free expression. A judge may not restrict an individual's expression unless doing so is necessary to further a compelling government interest. *See, e.g., Texas v. Johnson,* 491 U.S. 397 (1989). In *Shepp v. Shepp,* 906 A.2d 1165 (Pa. 2006), the Pennsylvania Supreme Court held in a custody case that the First Amendment prohibited the trial court from barring a fundamentalist Mormon father from speaking to his child about plural marriage given the absence of evidence of harm. As the court explained, "[t]he state's compelling interest to protect a child in any given case … is not triggered unless a court finds that a parent's speech is causing or will cause harm to a child's welfare." *Id.*, at 1173.

A transgender parent therefore cannot be made to conceal her gender identity from her child unless the opposing party can show that this is necessary to protect the child from harm. Once again, these constitutional arguments can be helpful to reinforce the court's obligation to rule based on evidence rather than speculated harm and make clear that the burden is on the other side to demonstrate the need for any restriction.

Protecting Against Challenges to the Legal Parental Status of Transgender Parents

Transgender people who have already come out or transitioned may form a family with a spouse or partner in a number of ways, including through sexual intercourse, insemination (of partner's or donor sperm), surrogacy and adoption. These parents may face challenges to their legal status as parents in the event of a breakup of the family or the death of their spouse or partner (i.e., from grandparents or other relatives), especially when they are not biologically related to the child and their parental status is derived from a marriage.

The Legal Landscape

For non-biological parents, their legal parentage can be linked to marriage in a few different ways. Under most states' laws, a man is the presumed father of a child born to his wife during their marriage. In a number of states, an individual can only adopt his or her partner's child if the couple is married. Some states' laws provide that a husband (but not unmarried partner) is the father of a child born to his wife through donor insemination. And among the states in which the law allows for enforceable surrogacy agreements, some cover only married couples.

In the majority of states, where marriage is restricted to different-sex couples, reliance on marriage to establish parental rights can be risky for transgender parents. There have been cases where ex-wives of transgender men challenged the validity of the couple's marriage by arguing that their husband is actually female and the marriage is, therefore, an invalid same-sex marriage. Thus, they argued, the presumption of paternity does not apply or the adoption is invalid. Sterling Simmons, a transgender father in Illinois, was stripped of parental rights because his marriage was deemed void. *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005).[4] Similarly, a Florida appellate court invalidated the marriage of a transgender man and his wife and, thus, reversed a trial court's decision recognizing him as a parent based on his marriage. *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. 2d Dist. Ct. App. 2004). *But see Pierre v. Pierre*, 898 So.2d 419 (La. Ct. App. 2005) (reversing termination of parental rights of transgender father because state statute provides that even if a court determines that a marriage is void, the party still may be awarded child custody). The fact that a transgender parent has changed the gender markers on his birth certificate and other identity documents to match his gender identity does not guarantee that courts will recognize his gender for purposes of marriage. Sterling Simmons had male identity documents but this did not help him when his marriage was challenged. *Simmons*, 825 N.E.2d at 949.

There is very little case law even outside the context of parenting that addresses the legal status of marriages entered into by transgender people in states that have gender requirements for marriage. Some of the state appellate courts that have considered the issue

4 This case was decided before Illinois' civil union law, which provides all of the state-law protections of marriage to civil unioned couples.

have held that an individual's sex at birth is her legal sex for life, regardless of her gender identity or medical or surgical treatments undertaken as part of a transition. In these states a marriage between a transgender man and a woman who is not transgender, for example, is not legally recognized because the marriage is deemed to be an invalid same-sex marriage. In addition to the Florida and Illinois cases discussed above, appellate courts in Kansas, Ohio and Texas have voided marriages on this basis. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *In re A Marriage License for Nash*, No. 2002-T-0149, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999). In contrast, a New Jersey court recognized a transgender spouse's gender identity in the context of marriage and, thus, upheld the validity of the marriage. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *see also In Re Lovo-Lara*, 23 I. & N. Dec. 746 (BIA 2005) (Board of Immigration Appeals held that North Carolina law recognizes post-transition gender of transgender spouse as long as statutory requirements for changing birth certificate gender marker are met); *In re Heilig,* 816 A.2d 68 (Md. 2003) (recognizing that gender can be medically changed). In the rest of the states, there is no case law on this question.

In states that allow same-sex couples to marry or enter into civil unions or domestic partnerships, there is no basis to attack a transgender parent's marital or similar legal status based on her gender. However, to the extent a parent is relying on a presumption of parenthood that applies when children are born during the course of the marriage (or civil union or domestic partnership), the law is not settled in some states with respect to circumstances under which the presumption can be resettled.[5] Therefore, the presumption of paternity could potentially be challenged in a custody dispute. In addition, if the couple moves to one of the many states that do not recognize same-sex marriages or similar legal statuses, a parental relationship derived from that status could be vulnerable to challenge.

Transgender parents who are biologically related to their children may still be vulnerable to challenges to their legal parentage if they use assisted reproduction. For example, if a transgender woman has a child by having her partner inseminated with her sperm by a doctor, under some states' assisted reproduction laws she may be considered a "donor" with no parental rights if she is not married to the recipient of the sperm or if her marriage is not legally recognized.[6] In any state, it is important to know and comply with the requirements of the law governing assisted reproduction.

5 However, some states have statutes or court decisions that make clear that the lack of biological connection is not necessarily a basis to rebut the presumption of parentage afforded to spouses if the individual has developed a parent-child relationship with the child. *See, e.g., Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); D.C. Code § 1.6-909(b)(1); Iowa Code § 600B.41A.

6 *See, e.g.,* 750 I.L.C.S. 40/3(b); Ohio Stat. § 3111.95(B); Va. Code Ann. § 20-158(3); *see also* F.S.A. §§ 742.13 and 14 (donor of sperm or ova relinquishes parental rights unless member of "commissioning couple," which is defined as "the intended mother and father of a child").

Recommendations for Parents to Secure their Status as Legal Parents

For transgender people who have had children since coming out or transitioning, or those who are considering doing so, the options available to secure both parents' legal parent-child relationships will depend on where you live since the law varies dramatically from state to state.

■ Get an adoption or judgment of parentage where possible.

Where possible, the safest course for securing and protecting both parents' parental rights is to do a step-parent or second parent adoption[7] or get a judgment of parentage.

A judgment of parentage is an alternative to adoption that is available in some states. Like an adoption, it is a court order. Unlike an adoption, which typically takes at least a few months to finalize, a judgment of parentage may have the advantage of being available shortly after birth and in some states, even prior to birth. Some people feel that an adoption is more secure because it is widely understood. If you have the option to do either, you should consult with an attorney about which course to pursue.

Even if marriage ought to confer full parental rights, getting an adoption or judgment of parentage can provide protection against the types of vulnerabilities discussed in the previous section. An adoption or judgment of parentage even provides protection when traveling to other states that have different laws since the Constitution requires every state to respect judgments (including adoptions) from other states.

As mentioned above, some states allow an individual to adopt her partner's child only if the couple is married. In such states, there is some risk that a married transgender person who adopts her spouse's child through a step-parent adoption could face a challenge to the adoption based on an attack on the marriage. But it is still worth doing because it is difficult for someone to challenge a final adoption. Most states have laws strictly limiting the circumstances under which adoptions can be challenged after a specified time period, e.g. one year. *But see Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010) (invalidating second parent adoption after many years on basis that court that granted the adoption lacked jurisdiction to do so).

An adoption or judgment of parentage may still be advised even if both partners are biological parents of the child if the couple used assisted reproduction such as IVF or intrauterine insemination. Whether this is necessary will depend on your state's laws concerning assisted reproduction. As discussed above, under some states' laws, individuals who contribute sperm for assisted reproduction are deemed "donors" with no legal parental rights unless they are married to the birth mother in a marriage that is recognized under the state's laws.

■ For couples using assisted reproduction involving donor sperm or eggs, sign a consent form acknowledging an intent to be a parent. If you provide the reproductive material, do not sign any form that waives parental rights.

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7 The term "second parent adoption" is often used to refer to the adoption of an unmarried partner's child. As of the date of publication, there is a clear law establishing that such adoptions are available statewide to unmarried couples in California, Colorado, Connecticut, Illinois, Indiana, Maine, Massachusetts, Montana, New Jersey, New York, Pennsylvania, Vermont and Washington, D.C. In a number of other states, such adoptions are widely available but there is no statute or appellate court decision definitively establishing that this is permitted under state law. This kind of adoption is prohibited statewide in Kentucky, Mississippi, Nebraska, North Carolina, Ohio, Utah and Wisconsin.

In a number of jurisdictions, statutes provide that when a man consents to his wife's insemination with donor sperm, he is a legal parent to the child that results. In a few states, these statutes are written or interpreted by the courts to be gender-neutral and marital status-neutral and thus apply to any couples who use donor sperm or eggs.[8] If that is the law in your state, signing a consent to the use of assisted reproduction establishes a legal parent-child relationship immediately.

This is not a substitute for the protection afforded by an adoption or judgment of parentage. If the statute in your state is the more common type that is restricted to husbands whose wives undergo donor insemination, your legal parental status could be vulnerable to challenge. Even if you live in a state with the broader type of statute, getting an adoption or judgment of parentage will still provide additional security when crossing state lines since they are judgments entitled to full faith and credit. It is therefore advised to sign the consent form to establish immediate protection, and follow that up with an adoption or judgment of parentage.

If you provide sperm or eggs to your partner with the intent to parent together, make sure to carefully read any medical forms you are asked to sign and do not sign anything indicating that you are a donor with no parental rights.

■ Document your agreement about your parental role.

In states where getting a second parent adoption or judgment of parentage is not an option, it is recommended that couples document in a parenting agreement their common understanding that both partners intend to jointly raise the child as full and equal parents and that in the event of a separation, the legal parent recognizes that it is in the best interest of the child to maintain regular contact with and support from both parents and will not challenge the parental status of the other parent. This agreement should be signed by both parents as well as by witnesses and a notary to demonstrate the gravity of the parties' agreement and avoid any disputes over its authenticity. This should be done as early as possible and before any conflicts arise.

Such agreements are not necessarily legally enforceable by courts but they still may help protect you. They may help deter the legal parent from later taking action contrary to what she agreed to in a formal written agreement that she signed in front of witnesses.

In some states, parenting agreements may also help you get court-ordered visitation or even custody. As will be discussed in the next section, a number of states have case law or statutes providing some or even full parental rights to individuals if they can show that, with the biological or adoptive parent's consent, they functioned as a de facto parent to a child.[9] In these states, parenting agreements can be critically important evidence and prevent an ex-partner from later denying her agreement to parent jointly.

Protections for de facto parents are no substitute for adoptions or judgments of parentage where available. They usually do not provide the same level of security or the full set of rights

8 D.C. Stat. section 16-909(e)(1); N.M.S.A. section 40-11A-703; Wash. Rev. Code section 26.26.710.

9 As of the date of publication, states with some form of protection for individuals who are not biological or adoptive parents but are in a parental role include Arkansas, California, Colorado, Delaware, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, West Virginia, Wisconsin, and Washington, D.C.

and protections to which parents are entitled. For example, in some states, an individual who is in a parental role but not a biological or adoptive parent to the child can seek visitation but not custody. Or there may be a higher burden for such individuals to meet to gain a right to visitation or custody. For these reasons, where available, it is strongly recommended to establish a legal parent-child relationship through adoption or judgment of parentage.

Advocacy Suggestions for Parents and their Lawyers If Faced with a Challenge to Legal Parentage

If a transgender parent faces a challenge to her legal parental status based on the legal status of her gender (i.e., an attack on her marriage as an invalid same-sex marriage), she and her attorneys should explore whether there are legal arguments available in the jurisdiction that do not require litigation over determining the gender of the parent. Such litigation can be extremely costly, as it requires substantial expert testimony. And it is unpredictable. In *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. 2d Cist. Ct. App. 2004), there was a three-week trial involving extensive expert testimony. The trial court, in an opinion that was over 800 pages long, agreed that the transgender father was male and, thus, that his marriage and parental status were valid. But in a seven page opinion, the appellate court reversed, ruling that an individual's assigned sex at birth is forever his gender. Alternative approaches that may be more effective and less costly include the following:

■ Cite to laws providing that even if a marriage is invalidated, parentage is not affected.

Some states have statutes providing that even if a marriage is deemed invalid, that does not affect the legal parent-child relationships that resulted from that voided marriage. *See e.g.*, 750 Ill. Comp. Stat. 5/303 (Illinois statute provides that "[c]hildren born or adopted of a marriage declared invalid are the lawful children of the parties."); L.S.A.-C.C. art. 152 (Louisiana statute provides that in the case of a declaration of a nullity of a marriage, "a party not entitled to the civil effects of marriage may be awarded custody, child support, or visitation. The award shall not terminate as a result of the declaration of nullity."); R.C.W.A. 26.09.040(5) (Washington state statute provides that "[a]ny child of the parties born or conceived during the existence of a marriage or domestic partnership of record is legitimate and remains legitimate notwithstanding the entry of a declaration of invalidity of the marriage or domestic partnership."). At least one court has applied this kind of rule to protect the parental status of a transgender parent whose marriage was invalidated. *Pierre v. Pierre*, 898 So. 2d 419, 424-25 (La. Ct. App. 2005). *See also Kantaras*, 884 So.2d at 160 (court invalidated marriage but sent case back to trial court to determine legal parental status).

In addition, many states have statutes and case law providing that a man is the presumed father if he and the child's mother have "attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid." Most states have no case law addressing the application of the marital presumption of parentage to transgender men. *But see In re Marriage of Simmons*, 825 N.E.2d 303, 311-12 (Ill. App. Ct. 2005) (rejecting application of marital presumption to transgender man). And the circumstances under which presumptions of parentage can be rebutted are not clear in many states. But arguments based on these kinds of statutes can and should be strongly pursued.

■ Make arguments based on the legal doctrine of "estoppel": The legal parent should be barred from challenging the validity of the marriage or parent-child relationship that she participated in creating.

The concept of estoppel is that "one who has taken a certain position should not thereafter be permitted to change it to the prejudice of one who has relied thereon." *Swift v. Swift*, 29 N.W.2d 535, 540 (Iowa 1948). As one court put it, "[e]stoppel applies to prevent a person from asserting a right where his conduct or silence makes it unconscionable for him to assert it." *In re Marriage of Recknor*, 138 Cal.App.3d 539, 546, (Cal. Ct. App. 1982).

Courts in a number of states have applied estoppel principles to bar a mother from challenging the paternity of her husband if she held him out as the father of her children and, thus, encouraged the development of a parent-child relationship. *See, e.g.*, *Clark v. Edens*, 254 P.3d 672 (Okla. 2011); *Fish v. Behers*, 741 A.2d 721 (Pa. 1999); *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990); *Inoue v. Inoue*, 185 P.3d 834 (Haw. Ct. App. 2008). As one court explained, the use of the doctrine of estoppel in paternity actions is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child." *Fish*, 741 A.2d at 528 (internal citations omitted). This principle has also been applied to prevent a biological mother from denying the parentage of her female ex-partner. *In re T.P.S.*, No. 120176, 2012 WL 4801575 (Ill. Ct. App. Oct. 9, 2012).

The principle of estoppel has also been used by courts to bar individuals from challenging the validity of their marriage. *See, e.g.*, *Memmolo v. Memmolo*, 599 A.2d 413 (Del. 1991) ("After the passage of eighteen years, the holding out of himself as a husband and the father of five children, the husband is estopped from raising a legal challenge to the validity of his marriage status."); *see also Heuer v. Heuer*, 704 A.2d 913 (N.J. 1998); *Marriage of Recknor*, 138 Cal.App.3d at 546.

The same principle ought to apply to transgender parents in analogous situations. The argument would be that where the legal parent chose to marry a transgender partner and create a family together and, in reliance on the legal parent's actions, the transgender parent lived with her as her spouse and developed a bonded parent-child relationship with the child, the legal parent should be estopped from challenging the marriage or parental status of her former spouse.

■ Cite to statutes or case law recognizing de facto parents.

Some jurisdictions have statutes or common law doctrines recognizing full or limited parental rights for individuals who, although not related to the child by blood or adoption, have fully functioned as their parents (referred to here as de facto parents).

In several states, the courts have used equitable principles to recognize de facto parents (sometimes referred to as "psychological parents" or "equitable parents") to ensure that children can maintain relationships with the people they have known as their parents, even if not their biological or adoptive parents. In these states, an individual (whether or not married to the parent) can be afforded parental rights if she has, with the legal parent's consent, fully functioned as a parent and developed a bonded parent-child relationship with the child. *See, e.g., Latham v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011) (collecting cases).

Some states have established such protection through statutes. *See, e.g.,* D.C. Stat. §§ 16-831.01 and 16-831.03 ("de facto parents" may seek custodial rights); 13 Del. Code § 8-201 (same); Or. Rev. Stat. § 109.119 (person "who has established emotional ties creating a child-parent relationship" may seek custodial rights); Mont. Code Ann. §§ 40-4-211(4)(b) and 228 (individual who "has established a child-parent relationship with the child" may seek custodial rights); Wisc. Stat. § 767.43(1) (visitation available to "person who has maintained a relationship similar to a parent-child relationship with the child").

Some state courts have used alternative approaches to protect the relationships between children and people who have functioned as their parents. *See, e.g., Frazier v. Goudschall,* No. 103,487, 2013 WL 646309 (Kan. Feb. 22, 2013) (applying presumption of paternity to female partner of biological mother and enforcing co-parenting agreement); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (applying presumption of paternity to female partner of biological mother who received the children into her home and openly held them out as her children); *In re T.P.S.*, No. 120176, 2012 WL 4801575 (Ill. Ct. App. Oct. 9, 2012) (using contract principles to honor agreements entered into by a parent and a partner to jointly raise a child).

If a parent pursues a claim based on the fact that she is a de facto parent, she may face a constitutional challenge to the application of the doctrine or statute on the basis that the legal parent's right to parental autonomy bars intrusion on her parental decision-making. But there is a growing body of case law that says it does not violate the Constitution to grant custody or visitation rights to an individual who, with the consent of the legal parent, developed a relationship with the child that is parental in nature. *See, e.g., Frazier,* 2013 WL 646309; *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005); *Rubano v. Dicenzo*, 759 A.2d 959, 967, 972-76 (R.I. 2000); *Robinson v. Ford-Robinson*, 196 S.W. 3d 503, 506–07 (Ark. Ct. App. 2004).

Facing a Problem?

The legal rights of transgender parents are largely unsettled and there is some terrible case law out there. However, there are steps parents can take to try to protect themselves and there are strong legal arguments and evidence to present to courts to help transgender parents protect their relationships with their children.

If you are facing a problem with respect to your parental rights or child custody issues because you are transgender, we may be able to help. Please contact the ACLU LGBT & AIDS Project at lgbthiv@aclu.org or (212) 549-2627.

Appendix 1
Case Law Regarding Transgender Parents[1]

Cases Involving Challenges to the Parental Fitness of Transgender Parents

POSITIVE CASES:

Mayfield v. Mayfield, No. 96AP 030032, 1996 WL 489043 (Ohio Ct. App., Aug. 14, 1996)

An appellate court affirmed a trial court's order establishing shared parenting where the trial court found that "despite appellee's proclivity to cross-dressing, there was no evidence in the record appellee 'would not be a fit, loving and capable parent.'"

Summers-Horton v. Horton, No. 88AP-622, 1989 WL 29421 (Ohio Ct. App., Mar. 30, 1989)

An appellate court affirmed a trial court ruling granting custody to the father who had a "history of cross dressing as a woman to achieve sexual gratification," noting that the evidence supported the determination that this was in the children's best interest.

Christian v. Randall, 516 P.2d 132 (Colo. Ct. App. 1973)

An appellate court reversed a trial court ruling that had denied custody to a parent on the basis of the parent's gender transition from female to male. The appellate court said that the fact that the parent was transsexual, adopted a male name, and had married a woman did not justify a change of custody where the record showed no adverse effect on the parent-child relationships or the children's emotional development.

MIXED CASES:

In re D.F.D., 862 P.2d 368 (Mont. 1993)

A state high court reversed a trial court's decision awarding sole custody to the wife and ordering that the cross-dressing father's visitation be supervised because, the high court said, the trial court's order was not supported by credible evidence. The court emphasized the fact that the evidence showed that the father would never cross-dress in the presence of his son and "had every intention of getting counseling and getting his problem resolved." However, the court also concluded that "even assuming that [the father's cross-dressing was observed by his son], every counselor who testified in this case testified that the negative impact on the son would be less than the impact from not having a normal relationship with his father. The uncontroverted evidence was that supervised visitation during the daytime on alternate weekends was not conducive to a normal relationship between this child and his father."

1 This does not include every case involving a transgender parent but rather just those cases in which the parent's gender transition or gender expression was a central issue in the case.

In re Custody of T.J., No. C2-87-1786, 1988 WL 8302 (Minn. Ct. App., Feb. 9, 1988)

An appellate court affirmed a trial court ruling that had awarded sole custody to a gender dysphoric father. The appellate court highlighted the trial court's findings that the child was aware of his father's gender dysphoria and this was not causing him any problem. However, the court also emphasized the finding that the father "has decided to maintain his male identity."

HARMFUL CASES:

Magnuson v. Magnuson, 170 P.3d 65 (Wash. Ct. App. 2007)

A trial court granted primary custody to the non-transgender parent after finding that "the impact of [the parent's] gender reassignment surgery on the children was unknown." The appellate court affirmed, holding that the "children's needs," not the parent's "transgender status", is the proper focus in a custody determination, but concluding that the trial court's decision was in fact based on the needs of the children.

M.B. v. D.W., 236 S.W.3d 31 (Ky. Ct. App. 2007)

A trial court terminated the parental rights of a parent who transitioned gender. The court found that the child suffered emotional harm, including suicidal ideation, and that this was caused by the transgender parent's behavior, including exhibiting a feminine appearance when the children visited without any warning to prepare them. The appellate court affirmed. It said it was not holding that a parent's gender transition is, itself, a grounds for termination of parental rights. Rather, it relied on the parent's "behavior surrounding the sex change." The appellate court also pointed to the trial court's finding that the parent's decision to undergo a gender transition "was about doing what was good for [the appellant] in [the appellant's] own self-centered interest and not about what was good for, or otherwise in the best interest of, the parties' children ...."

J.L.S. v. D.K.S., 943 S.W.2d 766 (Mo. Ct. App. 1997)

In a custody dispute involving a parent who transitioned from male to female, the trial court granted the parents joint custody and removed a one year restriction placed on the transgender parent's visitation rights. The appellate court reversed both parts of the order. One of the bases for its ruling that joint custody was improper was that there was no evidence regarding how the parent's gender transition would affect the parents' ability to work together in making parenting decisions. The court held that it was error to lift the visitation restriction without evidence of successful counseling before implementing reunification of the children with the transgender parent.

B. v. B., 585 N.Y.S.2d 65 (N.Y. App. Div. 1992)

An appellate court affirmed a trial court's order denying a cross-dressing father's request for overnight visitation, holding that "the decision not to expand visitation so as to include overnight stays with the father by this impressionable child has a sound and substantial basis in the record ...."

In re V.H., 412 N.W.2d 389 (Minn. Ct. App. 1987)

An appellate court affirmed a trial court ruling that transferred custody from the mother to the father who "cross-dresses in his bedroom;" however, the court emphasized the fact that the father "has taken positive steps to keep his behavior from his daughter. He does not cross-dress in front of her and he has made plans for discussing his transvestism with his daughter and a therapist when she is old enough to be told."

Daly v. Daly, 715 P.2d 56 (Nev. 1986)

A state high court affirmed a trial court ruling that terminated the parental rights of a transgender parent. The trial court found that the child was emotionally disturbed after learning that her parent was transitioning, that she did not want to see that parent, and that visitation would create a serious risk of mental and emotional harm. The high court held that the trial court's findings were supported by the evidence and commented that "it can be said that Suzanne, in a very real sense, terminated her own parental rights as a father. 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."

Cisek v. Cisek, No. 80 C.A. 113, 1982 WL 6161 (Ohio Ct. App. July 20, 1982)

An appellate court terminated a transsexual parent's visitation. It noted the opposing party's expert testimony that "the transsexualism of the appellee would have a sociopathic affect [sic] on the child ... without appropriate intervention." It also said the following:

> We are further bothered by any substantial basis explaining the motivations of the father. He presented no evidence that he was compelled by some mental imbalance to opt for a change in his sex. Was his sex change simply an indulgence of some fantasy? Whatever the nature, the change certainly worked a burden upon the two minors. The duty of all courts is to protect these two girls from whatever physical, mental, or social impact might occur. There is evidence that there might be mental harm. Common sense dictates that there can be social harm.

Cases Involving Challenges to the Legal Parentage of Transgender Parents Who Formed Families After Transitioning

POSITIVE CASES:

Pierre v. Pierre, 898 So.2d 419 (La. Ct. App. 2005)

A mother filed a petition to terminate the parental rights of her ex-husband, who was a female-to-male transsexual. She alleged that the couple's marriage was invalid because her husband was female and, thus, they were a same-sex couple and her ex-husband was not a biological parent of the child. The appellate court reversed the trial court's order terminating parental rights, holding that a state statute provided that even if a marriage is deemed void, the party still may be awarded child custody or visitation.

HARMFUL CASES:

In re Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005)

In a custody dispute between a woman and her female-to-male transgender husband who had a child through donor insemination, the appellate court held that: the marriage was not valid; the state law providing that a husband is treated as the father of children born through his wife's assisted reproduction did not apply to a transgender man; the husband could not be declared a de facto parent; the child was not a third party beneficiary to the assisted reproduction agreement; and the child's equal protection rights were not violated.

Kantaras v. Kantaras, 884 So.2d 155 (Fla. 2d Dist. Ct. App. 2004)

A female-to-male transgender father adopted the child born to his wife. After the couple separated, the wife argued that their marriage was an invalid same-sex marriage and the adoption was void because it violated Florida's then ban on adoption by "homosexuals." After a lengthy trial, the trial court found, based on expert testimony, that the father—who was on hormone therapy and had undergone sex reassignment surgeries—was legally male and, thus, the marriage was valid. The court also granted him custody based on a best interest evaluation. The appellate court reversed, holding that being "male" and "female" are "immutable traits determined at birth" and, thus, the father is female and the marriage is void. The court sent the case back down to the trial court to determine the legal status of the children.

Appendix 2
Sample Expert Testimony Related to Transgender Issues

Every case is unique with respect to the type of evidence that is needed. In some cases, it may be helpful to present expert testimony to educate the court about issues concerning transgender people. For example, in some situations, it might help to have an expert give the court a basic understanding of what it means to be transgender. In cases in which a parent's gender transition is part of her treatment for gender dysphoria, it may be useful to present expert testimony explaining the nature of this condition and that such treatment is medically necessary and in accordance with the accepted standards of care. In some circumstances, it may be beneficial to have an expert address the evidence related to parenting by transgender people. In some situations, it may be appropriate to have an expert cover all of these areas. In others, it may be best not to address any of them.

Below are sample excerpts of expert testimony. They are provided to give parents and their attorneys an idea of the kind of scientific evidence that is available if needed. Such evidence ordinarily must be presented through an expert witness.

If You Need to Educate the Court About What It Means To Be Transgender:

Transgender people are individuals whose gender identity or expression differs from the sex they were assigned at birth. Sex is typically assigned at birth based on the appearance of the external genitalia.[1] Gender identity is a person's basic sense of being a man or woman.[2] It can be viewed as the sex of the brain, which once established, cannot be changed.[3] For most people, gender identity is congruent with sex assigned at birth, but in the case of transgender individuals, it is not.[4] What causes an individual to be transgender remains unknown. What *is* known is that gender identity establishes itself early in life, as early as 2-3 years of age, and is not the result of conscious choice.[5]

Gender identity is distinct from sexual orientation, which refers to a person's attractions, sexual behaviors, fantasies, and emotional attachments towards others, whereas gender identity is about one's experience of self as a man or a woman.[6]

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1 *See, e.g.,* Money, J., & Ehrhardt, A.A. (1972). *Man & woman, boy & girl: The differentiation and dimorphism of gender identity from conception to maturity*. Baltimore, MD: Johns Hopkins University Press.

2 *See, e.g.,* American Psychological Association. (2011). Answers to your questions about transgender people, gender identity, and gender expression ("APA Answers"). Retrieved from http://www.apa.org/topics/sexuality/transgender.pdf; Stoller, R. (1964). A contribution to the study of gender identity. *International Journal of Psychoanalysis, 45,* 220-226.

3 *See, e.g.,* Cohen-Kettenis, P.T., & Gooren, L.J.G. (1999). Transsexualism: A review of etiology, diagnosis and treatment. *Journal of Psychosomatic Research, 46*(4), 315-333.

4 *See, e.g.,* Bockting, W. (1999). From construction to context: Gender through the eyes of the transgendered. *SIECUS Report, 28*(1), 3-7.

5 Stieglitz, K. (2010). Development, risk, and resilience of transgender youth. *Journal of the Association of Nurses in AIDS Care, 21*(3), 192–206; Cohen-Kettenis & Gooren, 1999; Money & Ehrhardt, (1972).

6 *See* APA Answers, supra n. 2.

If You Need to Educate the Court About Gender Dysphoria and the Standards of Care:

Gender dysphoria is a recognized medical condition that is characterized by "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics)."[7]

It is important for individuals with gender dysphoria to access treatment. Left untreated, this condition can cause severe distress, significant impairment in interpersonal or vocational functioning, suicidality and death. Hence, treatment for gender dysphoria is medically necessary.[8]

The treatment of gender dysphoria is guided by the Standards of Care set forth by the World Professional Association for Transgender Health, now in its 7th revision.[9] These guidelines are internationally accepted and reflect the professional consensus about the treatment of this condition.[10] The Standards of Care prescribe individualized treatment plans and the options for treatment include psychotherapy, changes in gender role and expression, hormone therapy to feminize or masculinize the body, and/or surgeries to change primary and/or secondary sex characteristics.[11] The type of treatment that is medically necessary to treat gender dysphoria varies from person to person.

Treatment in accordance with the Standards of Care is effective and results in improved mental health.[12]

If You Need to Educate the Court About the Evidence Concerning The Well-Being of Children of Transgender Parents:

Many transgender people have children and are parents. Children generally adjust well to the disclosure and transition of a transgender parent.[13] This is not surprising given what we know about what promotes healthy child development. Half a century of scientific research has established that the factors that predict healthy child development are: i) the quality of the child's relationship with her parents (the degree to which parents offer love and affection, emotional commitment, reliability, consistency, appropriate stimulation, and guidance); ii) the quality of the relationship between the parents (harmonious relationships support healthy

7 World Professional Association for Transgender Health (2012). Standards of care for the health of transsexual, transgender and gender nonconforming people, 7th version ("WPATH Standards of Care"), at 5, retrieved from http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf. In the current edition of the Diagnostic and Statistical Manual of Mental Disorders, this condition is referred to as "gender identity disorder." American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., text rev.). Washington, DC: American Psychiatric Association, 576-582. But in the new edition, which is due to be published in May 2013, the term "gender dysphoria" will be used.

8 American Medical Association House of Delegates (2008). Resolution 122 (A-08): Removing financial barriers to care for transgender patients ("AMA Resolution"), retrieved from http://www.ama-assn.org/ama1/pub/upload/mm/16/a08_hod_resolutions.pdf; American Psychological Association (2008). Policy statement: Transgender, gender identity, and gender expression non-discrimination ("APA Policy Statement"), retrieved from http://www.apa.org/about/policy/transgender.aspx; World Professional Association for Transgender Health (2008). Clarification on medical necessity of treatment, sex reassignment, and insurance coverage in the U.S.A. retrieved from http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf.

9 WPATH Standards of Care, supra note 7.

10 See WPATH Standards of Care, supra note 7; AMA Resolution, supra note 8; APA Policy Statement, supra note 8.

11 WPATH Standards of Care, supra note 7 at pp. 8-10.

12 AMA Resolution, supra note 8; APA Policy Statement, supra note 8.

13 White, T. & Ettner, R. (2006). Adaptation and adjustment in children of transsexual parents, *European Child and Adolescent Psychiatry, 16*, 215-221

adjustment of children while significant conflict impedes it); and iii) adequate resources.[14] In other words, it is a parent's relationship with her child and her ability to provide a supportive environment—not her gender identity or expression—that matters. And contrary to what some people may assume, there is no evidence that indicates that having a transgender parent influences the gender or sexual development of a child.[15]

In addition to making clear that a parent's gender transition is no reason to deny custody or visitation, the scientific research on children's development also shows that cutting off or limiting a child's relationship with a parent (unless the parent presents a danger to the child) can be very damaging to a child.[16] Consistent with the general research on children of divorced parents, research on transgender parents and their children shows that the lack of contact between a transitioning parent and the child can negatively impact the child's adjustment.[17] Thus, in custody disputes involving a transgender parent, as in any other custody dispute, it is essential for courts to ensure children's continuing relationships with both of their parents whenever possible.

14 *See, e.g.,* Lamb, M.E. (2012). Mothers, fathers, families, and circumstances: factors affecting children's adjustment, *Applied Developmental Science, 16*(2), 98-111.

15 Freedman, D., Tasker, F., & Di Ceglie, D. (2002). Children and adolescents with transsexual parents referred to a specialist gender identity development service: a brief report of key developmental features. *Clinical Child Psychology & Psychiatry*, *7,* 423-432; Green, R. (1978). Sexual identity of 37 children raised by homosexual or transsexual parents. *American Journal of Psychiatry 135*(6), 692-697; Green, R. (1998). Transsexuals' children. *International Journal of Transgenderism 2*(4); White, T. & Ettner, R. (2006).

16 Lamb, M.E. (2002). Placing children's interests first: developmentally appropriate parenting plans. *Virginia Journal of Social Policy & the Law, 10*(1), 99-119; White, T. & Ettner, R. (2006).

17 White, T. & Ettner, R. (2006).