



The Uncertainty and Reality of Transgender Marriage in Pennsylvania

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It is undeniable that the transgender community has been gaining greater public attention in the last several years. While activists have been working for decades to increase acceptance, the high-profile case and transition of Chelsey Manning and celebrities like Chaz Bono, Laverne Cox, and Caitlyn Jenner, combined with the integration of transgender story lines in shows like *Transparent*, have helped the community gain traction within the mainstream—increasing awareness about the difficulties faced by individuals with gender dysphoria.

Understanding Gender Dysphoria

Gender dysphoria is recognized by *Diagnostic and Statistical Manual of Mental Disorders (DSM-V)* as the psychological distress individuals experience when their gender identities are incompatible with their sex assigned at birth. Treatments for gender dysphoria range from “social transition,” which may include coming out to friends and family, changing names, and/or adjusting appearance, to “medical transition” which may include hormone treatment, psychotherapy, or surgery.¹

To give perspective on the challenges faced by the transgender community, in 2011 the *National Gay and Lesbian Task Force* and the *National Center for Transgender Equality* completed a National Transgender Discrimination Survey with staggering statistics. Specifically, the survey produced the following results:

- 57% of respondents experienced family rejection
- 45% of relationships ended for those who came out
- 29% of those relationships involving children experienced the ex-partner limiting contact with the children
- 19% reported domestic violence by a family member
- 13% experienced the court system limiting or stopping access to their children²

Understanding the issues that affect the transgender community, the potential treatment options, and the history of a particular transgender person’s transition—whether social or medical—may have a great impact on representing a transgender client in a family law matter.

¹ Brief of Transgender Law Center, the National Center for Transgender Equality, Our Family Coalition, PFLAG, Inc., COLAGE, and FORGE as Amici Curiae for *Conover v. Conover*, 120 A.3d 874 (Md. Ct. Spec. App. 2015)

² National Transgender Discrimination Survey (2011), “Family Life” pages 88-105

Legal Certainties and Uncertainties for Transgender Marriages

On the legal front, transgender individuals are challenging existing laws—fighting for recognition and equal rights. Some legal ground has been gained regarding marriage. On June 26, 2015, the landmark United States Supreme Court case *Obergefell v. Hodges* cemented that all states must recognize same-sex marriages. Pennsylvania began recognizing same-sex marriages a year earlier following its May 20, 2014 ruling in *Whitewood, et al. v. Wolfe, et al.*, 992 F. F. Supp. 2d 410, 424 (M.D. Pa. 2014). More recently, the Superior Court of Pennsylvania in *In re Estate of Carter*, 2017 Pa. Super. 104, 2017 WL 1375680 (2017), ruled that same-sex couples have the same rights to prove the existence of a common law marriage prior to the abolishment of this type of union in January 1, 2005. What do these rulings mean for transgender individuals? While some issues are clear, others remain ambiguous.

What is Certain for Transgender Clients?

What is certain is that *Obergefell* solidified that no states in the United States or its territories can limit marriages based upon gender, as same-sex and different-sex marriages are recognized throughout the nation. Additionally, if a marriage was entered into validly in any state, that marriage will remain lawful even if a spouse transitions during the marriage. Further, many states, including Pennsylvania, have found that transgender and same-sex couples can back-date their marriage as a common law marriage, as long as they meet the criteria of establishing a common law marriage.

What is Uncertain for Transgender Clients?

Since *Obergefell* cleared the way for any person of any gender to enter into marriage, one would think that no uncertainties exist with marriage for transgender individuals; however, that is not the case. In the very limited available research and case law present since *Obergefell*, it appears many issues remain with very little case law offering guidance.

Specifically, there is no current case law that addresses situations where one spouse is unaware that the other spouse is transgender, and whether or not an argument for fraud is applicable. While there is currently no case law where a marriage was dissolved as a result of a transitioning spouse, it does not appear that the Supreme Court has yet heard a claim about fraud. Since family law cases are virtually all fact-specific, it is conceivable that an argument for fraud will arise in the near future.

To minimize risk against fraud claims, transgender persons should take extra protective measures to safeguard themselves, including securing precautionary legal documents such as:

- a last will and testament,
- medical and financial powers of attorney, and
- an agreement with an acknowledgement that the non-transgender spouse is aware that the other spouse is transgender, which may avoid any later claims of fraud or deception.³

³Lesbian, Gay, Bisexual and Transgender Family Law, August 2016 Update. Courtney G. Joslin, Shannon P. Minter, and Catherine Sakimura

Additionally, the recognition in Pennsylvania that same-sex marriages can be back-dated as common law marriages (*In re Estate of Carter*), raises questions regarding the length of the marriage for equitable distribution purposes in divorce. Additional issues include whether or not alimony is applicable and for how long, as well as the appropriate dispersal of Social Security survivor and pension/retirement benefits. Questions may also arise concerning paid inheritance taxes, and whether or not a refund is applicable, as well as litigation regarding previous intestate succession.

Further, some states—namely Idaho, Kansas, Ohio, and Tennessee—still do not permit transgender persons to change their gender on birth certificates, marriage licenses or other official documents. This may cause identity inconsistencies within their home state. Pennsylvania does permit a transgender person to change the gender on a birth certificate officially with a certified letter from the treating doctor stating “appropriate treatment” has been provided. It is no longer a requirement for a transgender person in Pennsylvania to have sex-reassignment surgery in order to change the gender on a birth certificate.

Finally, there are questions regarding the acceptance and treatment of couples in countries that do not recognize same-sex marriages. For example, in all of Asia, only Taiwan permits same-sex marriages, and only did so as of May 24, 2017. In many of the Asian countries, same-sex relationships are illegal or even punishable by imprisonment or death. Israel recognizes same-sex marriages from foreign nations, but does not condone them within the country. As such, transgender couples who validly enter into marriage in the United States may not have their marriage recognized elsewhere, and may face actual danger if they relocate to certain countries.

This doesn't even scratch the surface of potential issues for divorce cases. Further, custody cases are a completely different animal. Litigation is arising in custody actions where one parent is supportive of a transitioning child but the other parent is not, and where other courts are challenging certain parent-child relationships. Some courts have limited access to children by transgender parents, while others have even terminated the parental rights of transgender parents.

Family Law and the Transgender Community

The law surrounding gender dysphoria is evolving daily. New cases challenging traditional legal conventions, and upcoming decisions—at all levels of the judiciary—will be watched closely by those practicing family law. As we await these landmark decisions, it is our responsibility to understand our client's perspectives, needs and background; to research and educate ourselves on the topic area; and then explain, argue, and even teach our results to the fact finders.

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