



Transgender Legal Issues

New England

April 2015

This document is intended to provide general information only and cannot provide guidance or legal advice as to one's specific situation. Moreover, the law is constantly changing and evolving and this publication is based upon the information that is known to us as of this printing. For guidance on your particular situation, you must consult a lawyer. You should not act independently on this information. The provision of this information is not meant to create an attorney-client relationship. Check our website, www.glad.org, for more information.

If you have questions about this publication, other legal issues or need lawyer referrals, contact **GLAD Answers** by live chat or email at www.GLADAnswers.org or by phone weekdays between 1:30 and 4:30pm at (800) 455-GLAD (4523).

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Introduction¹

Everybody has a gender identity. However, because most people's gender identity is consistent with the sex ascribed to them at birth, they never think about it. Nevertheless, gender identity turns out to be very important, largely because of societal expectations and responses based on how one expresses that identity.

GLAD historically focused on issues of discrimination based on sexual orientation and HIV status. Later, the roots of discrimination against gay, lesbian, bisexual and transgender people became increasingly indistinguishable, and we came to see how we all face pervasive discrimination based on gender identity and expression. As a result, GLAD expanded its mission to include the eradication of discrimination based on gender identity and expression.

Since then, we have successfully litigated numerous cases in which a transgender person's rights or liberties are compromised simply because someone does not meet societal expectations of what it means to be a man or to be a woman. We offer this publication to ensure that transgender people are aware of their rights under the law.

Transgender people face serious discrimination in our society, in areas ranging from appropriate medical care to parental rights; from personal identification documents to the freedom to marry. And perhaps most common, transgender people face harassment and discrimination in the areas of employment, housing, and public accommodations – mistreatment that threatens their freedom to work and live safely in their own communities

¹ This publication is an overview intended to outline the general parameters of the rights of transgender people and is not for the purpose of providing guidance or legal advice relating to any specific situation. Moreover, this area is rapidly developing at the local, state, and federal levels. For specific guidance on your situation, you must consult a lawyer. You may also contact GLAD Answers at www.GLADAnswers.org in the New England area for referrals and information.

Like gay men, lesbians and bisexuals, transgender people often find that the legal system is poorly equipped to deal with their needs and concerns. Throughout the 1970s and 1980s, courts frequently held that transgender people were not protected under existing non-discrimination statutes. Despite this history, courts have recently begun to interpret federal and state anti-discrimination laws as providing protection for transgender people. In addition, many statewide laws and local municipal ordinances have been amended to add explicit coverage for transgender people. In fact, all six New England states in which GLAD does its work have explicit legislation, case law, or regulatory guidance providing that transgender people are protected from discrimination. In addition, several federal court decisions have ruled that transgender people are protected under federal non-discrimination laws as well.

Despite this progress, serious legal concerns remain for transgender people, in part because of the very long-term educational work that is just beginning both within the courts and in society at large. To deepen GLAD's longstanding transgender equality work, the Transgender Rights Project (TRP) was initiated in 2008. Through the TRP, GLAD will continue to chart a new course, eradicating discrimination based on gender identity and expression along the way. GLAD's victories will help set precedents that allow other attorneys to successfully argue similar cases on behalf of transgender people.

In addition to impact litigation, GLAD's mission is to inform the community about our legal rights. GLAD operates free, confidential information service called GLAD Answers. Anyone with questions about their rights under the law, in need of referrals to trans-friendly attorneys, or wishing to discuss the details of a legal situation, can contact GLAD Answers by live chat or email at www.GLADAnswers.org or by phone weekdays between 1:30 and 4:30 pm at (800) 455-GLAD (4523).

Attorneys working on transgender rights cases are also encouraged to call GLAD for information and assistance from GLAD's legal staff.

Legal Principles for Inclusion of Transgender People Under Existing Anti-Discrimination Laws

No one deserves to be harassed or discriminated against based on someone else's idea of "appropriate" male or female gender identity. Five New England states, Rhode Island, Maine, Vermont, Connecticut and Massachusetts provide explicit legal protections for transgender persons. That only leaves New Hampshire without explicit protections for gender identity and a coalition is working to get the New Hampshire legislature to enact similar protections.

Transgender people have historically had little or no protection under federal and state anti-discrimination statutes. Occasionally, this exclusion is made explicit, as under the federal Americans with Disabilities Act, which specifically states that its anti-discrimination protections do not apply to transgender people. More often, there is no explicit exclusion, but the courts interpret the statutes so as to exclude transgender people from protection.

These decisions holding that transgender people are excluded from protection were based on bias rather than any principled reason. They relied on narrow definitions of sex and gender, leaving transgender people trying to fit into a legal system that recognized only biological males and females, without recognizing a spectrum of gender expression beyond the categories of "women" and "men," which the law and society conceptualize as separate, distinct and oppositional.²

² In order to understand some of the distinctions made in cases and laws related to transgender people, it is important to understand the different ways terms such as sex, gender and sexual orientation have been used. Although there is disagreement about these terms and courts use them imprecisely, it may be helpful in some instances to distinguish them. Sex is typically understood to refer to one's biological sex. Gender typically refers to sexual difference as it is expressed in culture (e.g. behavior or dress), and sexual orientation typically refers to an individual's sexual attractions and partnerships.

As the more recent case law indicates, transgender people should be protected from discrimination based on existing principles of anti-discrimination law. In this section, we first explain the legal principles for the inclusion of transgender people under current laws prohibiting discrimination on the basis of sex or disability or, in some cases, sexual orientation. We then describe for each New England state the legal protections for transgender persons under federal and state antidiscrimination statutes.³

³ For a complete list of states that have explicit laws prohibiting discrimination based on gender identity/ expression see: <http://nctequality.org/AntiDiscriminationByJurisdiction.pdf>.

Legal Grounds to Protect Transgender People When There is no Explicit Protection

Discrimination Based on Sex

Most instances of discrimination against transgender people can be fairly characterized as sex-based; action is taken against an individual because of stereotypical beliefs about the nature of men and women (about their appearance and behavior, including a belief that men and women cannot or should not change their sex).

Unfortunately, the argument for a straightforward application of sex-based anti-discrimination law has been rejected in many cases. Some courts have ruled that Title VII, the federal statute that includes a prohibition on sex discrimination in employment, was intended only to prevent people from discriminating against men because they are men and women because they are women (i.e., not to broadly prevent discrimination based on normative notions of sex), thereby eliminating the possibility of transgender people seeking such protection. Other courts have denied transgender litigants' Title VII claims on the grounds that the discrimination was not based on the person's sex per se, but rather on the individual's change of sex. This logic fails to acknowledge that the transgender person has been singled out for adverse treatment based on a belief about his or her sex – namely, that he or she cannot or should not change his or her sex or express it in a different manner than cultural norms allow.

Discrimination Based on Disability

State laws that prohibit discrimination on the basis of disability offer a significant source of legal protection for transgender people. Because of misperceptions and misunderstandings about disability laws, some people have expressed discomfort in pursuing legal protections for transgender people based on disability. The term 'disability' in anti-discrimination laws, however, is not used in the popular or colloquial sense, and is not limited to individuals who are significantly debilitated or who appear outwardly ill.

Rather, under anti-discrimination laws, the term ‘disability’ refers to individuals who have a wide range of *serious health conditions*.

Misunderstandings about the term ‘disability,’ and the stigma associated with disability, should not prevent people’s access to the courts and other protections.⁴

Federal disability laws – the Federal Rehabilitation Act (FRA) and the Americans with Disabilities Act (ADA) – explicitly exclude from coverage “gender identity disorders not resulting from physical impairments.”⁵ As a consequence, most transgender people may not bring claims of disability discrimination under federal anti-discrimination law. Fortunately, however, some state disability laws do not contain this exemption.

In most states, a person is protected from discrimination if he or she:

- has a physical or mental impairment that substantially limits a major life activity;
- has a record of such an impairment; or
- is regarded as having such an impairment.⁶

Therefore, if a transgender person is in a state that does not have an explicit exclusion for gender dysphoria and the person falls within one of the three prongs listed above, the person should be protected under the state disability discrimination provisions.

Many transgender people will be able to prove that they meet the statutory definition of disability in their state in two ways. Applying the first part of the definition, a transgender person must first prove that he or she has a physical or mental ‘impairment.’ Certainly, many transgender people have a condition,

⁴ Rather than restrict the valid legal options of transgender people, work must be done to eliminate the stigma associated with disability.

⁵ 29 U.S.C.A. § 705 (1)(F)(i)(1973); 42 U.S.C.A. § 12211(b)(1)(1990).

⁶ This language may vary slightly from state to state. It is important to check each state’s definition of disability as well as any state administrative regulations interpreting that definition. Some states, such as Connecticut, have a broader definition of disability.

whether characterized as a physiological or a psychological one.⁷ Next, he or she must show that the impairment ‘substantially limits a major life activity.’ The issue of what constitutes a major life activity is still evolving in courts and state agencies.

Some people may be able to demonstrate that the need for ongoing medical care – including hormone therapy, sex reassignment surgery, or other treatment – qualifies as a substantial limitation to the major life activity of caring for oneself. Other people may at times experience depression or other psychological effects that are sufficiently debilitating to meet the definition, perhaps even to the point of suicidal feelings and behavior. In addition, even with treatment, many individuals can prove a substantial limitation to the major life activities of intimate sexual relations and procreation. It is important to keep in mind that the term ‘substantial limitation’ does not mean that a person is unable to engage in the activity, but only that the condition creates complexities and obstacles that would not otherwise exist.⁸

Even if an individual does not meet the first part of the definition, he or she may be ‘regarded as’ disabled, because the ADA definition of disability also extends to prohibit any discrimination arising from stereotypes and ignorance about physical and mental impairments. This part of the definition is clearly intended to cover stigmatized impairments that elicit discriminatory reactions based on fear and ignorance.

According to regulations issued by federal agencies that have interpreted the ADA, the “regarded as” part of the definition of disability is intended to prohibit discrimination against persons who have impairments which invoke negative attitudes or discomfort in others. The regulations state that an individual is “regarded as” disabled when an individual has a “physical or mental impairment that substantially limits major life activities only as a result

⁷ As a legal matter, because gender identity disorder (“GID”) is listed in the *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed), people who have been diagnosed with GID arguably qualify as having “a physical or mental impairment.” However, whether an individual’s gender identity is characterized as psychological, neurological, or endocrinological, it is certainly a health condition for some transgender people.

⁸ According to the second part of the definition, one may prove discrimination based on a record of a physical or mental impairment. Therefore, transgender people who have no current limitation of a major life activity may, nonetheless, be covered because they had such a limitation at an earlier time in their life.

of the attitudes of others towards the impairment.”⁹ While the courts do not give these regulations the same weight as the text of the statute itself, the regulations provide a strong framework for an expansive interpretation of disability laws on both the federal and state level.

Transgender people have a quintessentially stigmatizing condition – a condition that sometimes produces discomfort or fear in others. As a result, transgender people may be substantially limited as a result of the negative attitudes of others toward their impairment, whether or not their gender identity condition itself substantially limits major life activities. The irrational fears attached to transgender people are analogous to the type of stigma and stereotypes associated with HIV. When a transgender person is denied employment or services based on a negative reaction to their transgender identity (including their gender non-conforming personal appearance and presentation), that person may be protected because he or she has been “regarded as” having an impairment.

State disability anti-discrimination laws present an important tool to eradicate irrational discrimination against transgender people in employment, housing, public accommodations and other areas of law. An accurate understanding of the term ‘disability’ as specifically used in anti-discrimination laws brings transgender people squarely within the scope of these protections. As long as a transgender person can demonstrate that he or she has a physical or mental impairment that substantially limits a major life activity, or has a record of such in the past, or is regarded as having such, he or she should be covered, depending on the scope of the state law. Of course, to prevail in a nondiscrimination case, the person must also demonstrate that he or she was qualified for the job (or eligible for the housing, etc.) and was discriminated against on the basis of disability, not for some other reason.

⁹ 28 C.F.R. § 36.104(4); 29 C.F.R. § 1630.2(l).

Discrimination Based on Sexual Orientation

Many transgender people are harassed or treated adversely because they are identified as, or perceived to be gay. Assumptions about a person's sexual orientation may often arise either because of clothing the person wears or because of their gender presentation, which may be subtler than a person's attire. In such cases, although the transgender individual may or may not be gay or lesbian, he or she may still have a claim based on existing laws that prohibit discrimination based on actual or perceived sexual orientation that exist in all six New England states.

Legal Protections for Transgender People Under Federal Law and in New England

Federal Law

Most cases in which transgender people have sought protection under federal law have based arguments on Title VII, a federal law that prohibits an employer from discriminating against any employee on the basis of sex, among other categories.

Recently, a number of key cases have called into question the type of faulty reasoning that excluded transgender people from protection under sex discrimination laws in the past, and have changed the way that Title VII should be interpreted. First, in *Price Waterhouse v. Hopkins*,¹⁰ the Supreme Court ruled that a person who failed to conform to gender stereotypes (specifically, a female employee at an accounting firm who acted aggressively and refused to wear makeup to ‘soften’ her appearance), was permitted to pursue a claim under Title VII. Later, *Schwenk v. Hartford*¹¹ repudiated a previous 9th Circuit ruling that had denied the application of Title VII to a transgender woman. The ruling in *Schwenk* stated that the definition of “sex” under federal non-discrimination laws encompasses both biological differences between men and women, and failure to “conform to socially-prescribed gender expectations,” basing its reasoning on the previous Supreme Court ruling in *Price Waterhouse*. While not every circuit has followed the example of the 9th Circuit by clearly overturning precedent that created a transgender exclusion, it is arguable that the Supreme Court’s broad interpretation of Title VII in *Price Waterhouse* effectively reverses those that have not done so explicitly.

A 1st Circuit decision reinforces the idea that transgender people can seek protection against discrimination under federal laws prohibiting

¹⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹¹ *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

discrimination on the basis of sex.¹² In *Rosa v. Park West Bank & Trust Co.*,¹³ a claim was brought under the Equal Credit Opportunity Act, which has been construed consistently with Title VII. The plaintiff, a biological male who presents and lives as a woman, was refused a loan application unless she¹⁴ returned in traditional male attire. The court found that, based on the allegations, Rosa may be able to make out a case of sex discrimination.

And, more recently, the 6th Circuit ruled that a transgender employee could bring a sex discrimination claim under Title VII, explaining that “discrimination against a plaintiff who is a transsexual – and therefore fails to act/ or identify with his or her gender” is impermissible sex discrimination.¹⁵ These decisions have broad implications for LGB and transgender people because the root of much of our shared oppression is the enforcement of stereotypical notions of how men and women should look and act. These cases create a key legal building block for arguing that discrimination because of a person’s failure to meet widely shared normative beliefs about gender—whether that person is lesbian, gay, bisexual or transgender—is prohibited sex discrimination.

The federal Equal Employment Opportunity Commission (EEOC), which is the federal agency that receives Title VII discrimination complaints, announced in 2012 that gender identity discrimination is a form of sex discrimination, and so the EEOC has jurisdiction to hear those complaints. Hopefully this decision by the EEOC will also affect future Title VII court cases.¹⁶ Here is a link to a brochure published by the EEOC:

<http://www.eeoc.gov/eeoc/publications/upload/Gender-Stereotyping-LGBT-brochure-OLC.pdf>.

In a landmark ruling issued on April 1, 2015, the EEOC found that the Department of the Army discriminated against Tamara Lusardi, a transgender employee who transitioned from male to female on the job, by barring her

¹² The 1st Circuit includes Massachusetts, Maine, Rhode Island, New Hampshire, and Puerto Rico. The ruling in *Rosa* sets precedent for others to successfully pursue similar claims of discrimination under federal law in this region. Other regions have looked to this case in interpreting similar laws.

¹³ *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

¹⁴ Although the court refers to Rosa as “he,” this document uses “she” to reflect and respect Rosa’s gender identity.

¹⁵ *Smith v. City of Salem, Ohio*, 378 F. 3d 566, 575 (6th Cir. 2004).

¹⁶ See <http://www.federaltimes.com/article/20120424/PERSONNEL01/204240308/>

from using the same restroom as all other female employees, and by her supervisors' continued intentional use of male names and pronouns in referring to Ms. Lusardi after her transition. This ruling means that employers must allow transgender employees to use the restroom that conforms to their gender identity and must address them by the name and pronouns they choose. For more information see: <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf>.

New England State Laws

In addition to the growing recognition of existing federal protection for transgender people, each New England state now protects transgender people, either explicitly by statute, or through an interpretation of sex or disability antidiscrimination laws. For more detailed information about each state go to: <http://www.glad.org/rights/topics/c/anti-lgbt-discrimination>.

Connecticut

Effective October 1, 2011, Connecticut became the fourth state in New England to add gender identity and expression to its anti-discrimination laws in employment, housing, public accommodations, credit, public schools and some other areas.¹⁷ Gender identity or expression is defined as “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence”¹⁸ Attempts to amend the bill to exclude bathrooms, locker rooms and boarding houses failed.

¹⁷ See <http://www.cga.ct.gov/2011/act/pa/pdf/2011PA-00055-R00HB-06599-PA.pdf>.

¹⁸ Conn. Gen. Stat. sec 46a-51(21).

Massachusetts

In November 2011, the Massachusetts legislature enacted a law, *An Act Relative to Gender Identity*,¹⁹ which was signed by the Governor and went into effect on July 1, 2012. This law defines gender identity as “*a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.*” The law also includes ways for a person to demonstrate their gender-identity.

The law provides prohibits discrimination based on gender identity in the following areas:

- Employment
- Housing & Commercial Space
- Credit
- Bonds & Insurance
- Mortgage Loans
- Admission or enrollment of a student in a charter or public school

The law does not prohibit discrimination based on gender identity in public accommodations, but the Massachusetts Commission Against Discrimination (MCAD) has made it clear that it will process discrimination complaints from transgender people as a form of sex discrimination. So, if you are discriminated against in a public accommodation, legal remedies are available. GLAD will continue to fight with its coalition partners to get gender identity included in the public accommodations anti-discrimination law. For more detailed information go to:

www.glad.org/uploads/docs/publications/ma-trans-rights-law.pdf.

Rhode Island

In May, 2001, Rhode Island passed a law to explicitly prohibit discrimination on the basis of gender identity or expression, thereby protecting transgender people from discrimination in employment, housing, credit, and public accommodations. The law defines gender identity or

¹⁹ See <http://www.malegislature.gov/Bills/187/House/H03810>

expression as including a person's "actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, whether or not that gender identity is different from that traditionally associated with the person's sex at birth."²⁰

Maine

On December 28, 2005, Maine extended coverage under its non-discrimination statute to include a "person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression."²¹ The law covers discrimination in employment, housing, public accommodations, credit and education. This makes Maine the second state in New England to provide explicit legal protections to transgender people.

The Maine Human Rights Commission recently released regulations to implement the new anti-discrimination law in Maine protecting sexual orientation and gender identity and expression:

<http://www.maine.gov/tools/whatsnew/index.php?topic=mhrcNews&id=42013&v=article>.

These regulations define "gender identity" as "an individual's gender-related identity, whether or not that identity is different from that traditionally associated with that individual's assigned sex at birth, but not limited to, a gender identity that is transgender or androgynous."²²

They further define "gender expression" as "the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, speech, or lifestyle, whether or not that expression is different from that traditionally associated with that individual's assigned sex at birth."²³

²⁰ R.I. Gen. Laws, § 28-5-6 (10)

²¹ Public Law 1993, c. 327 § 1, as codified in 5 M.R.S.A. § 4552 *et seq.*

²² 94-348 Me. Code R. ch. 3, §3.02(D)(1).

²³ 94-348 Me. Code R. ch. 3, §3.02(D)(2).

One important obligation on employers imposed by these regulations is to make reasonable accommodations for transgender employees.²⁴ The regulation states that it is “an unlawful employment practice of an employer, employment agency, or labor organization to fail or refuse to make reasonable accommodations in rules, policies, practices, or services that apply directly or indirectly to gender identity or gender expression, unless the covered entity can demonstrate that the accommodations would impose an undue hardship on the conduct of the business of the covered entity.”²⁵

Such accommodations may include being allowed to use the most appropriate bathroom or planning the best way to transition while on the job. It is also illegal for an employer to deny employment if that denial is based on the need to make a reasonable accommodation.²⁶

Vermont

In May, 2007, Vermont became the third state in New England to explicitly prohibit discrimination on the basis of gender identity. The law defines gender identity as “an individual’s actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual’s gender or gender-identity, regardless of the individual’s assigned sex at birth.”²⁷ Vermont law prohibits discrimination in employment, places of public accommodation, housing, credit, and a variety of services.

New Hampshire

In New Hampshire, the Human Rights Commission has concluded that disability antidiscrimination laws can cover transgender persons, relying on a case originating in Rockingham Superior Court.²⁸

²⁴ 94-348 Me. Code R. ch. 3, sec. 3.12(F).

²⁵ 94-348 Me. Code R. ch. 3, §3.12(F)(1).

²⁶ 94-348 Me. Code R. ch.3, §3.12(F)(2).

²⁷ 1 V.S.A. § 144

²⁸ N.H. Code Admin. R. Ann. [Hum.] 401.03 (2002) (citing *Jane Doe v. Electro-Craft Corp.*, No. 87-E-132 (Rockingham Super. Ct. Apr. 8, 1988)).

Other Legal Issues

Marriage

The legality of a transgender person's marriage has become a thorny issue. Although the number of states that allow any two people to marry continues to grow and includes all of the six New England states, there are still states where civil marriage is available only to different-sex couples. Courts sometimes require a determination of a transgender person's sex, and the court's determination may or may not be consistent with the individual's gender identity, or even with the gender status reflected on government documents such as a driver's license.

This is a rapidly evolving area of law where some things are unclear and confusing and where we do not yet have a great deal of guidance as to the application and implementation of the law. You should consult an attorney before entering into marriage, or if you have questions about your marriage being respected.

People Who Transition After Entering Into a Marriage

There are no reported decisions invalidating a marriage of a transgender person who transitioned after entering into a lawful marriage. Invalidating such a marriage where both spouses wish to remain married is against public policy and seriously disadvantageous not just to the couple involved, but to the expectations of the community and society that surrounds them.

People Who Transition Prior to Entering Into a Marriage

We know that many post-transition transgender people have married and continue to marry throughout New England, whether or not the state knowingly sanctions their marriages. Practically speaking, unless the marriage of a post-operative transgender person to a person of the opposite sex is challenged (by a party seeking annulment, for example, or by a third

party challenging a spouse's right to the deceased's estate through laws of automatic inheritance), it is unlikely that the validity of the marriage will ever be an issue. No applicable case has been reported in New England, and until that time this area of law remains unclear.

Most states have a process for changing the gender on a birth certificate. Being able to change gender on a person's birth certificate is an important first step toward the recognition of the right of post-operative transgender people to marry. Presumably, if a state permits an individual to legally change his or her sex, the person's new legal sex should be recognized for all purposes, including marriage. This is how a New Jersey court ruled, stating clearly that there is no legal or public policy reason to prevent post-operative transgender people from marrying.²⁹

Unfortunately, however, several recent court decisions have been hostile towards marriages involving transgender people, calling into question whether marriages of post-operative transgender people whose legal sex matches their gender identity will be considered valid.

Recent Harmful Rulings

In *Littleton v. Prange*,³⁰ a Texas appeals court invalidated the six year marriage of a post-operative transgender woman, holding that no surgery or treatment can change a person's sex in Texas and that only the marriage of a chromosomal (XY) man and a chromosomal (XX) woman is valid.

In Kansas, *In re Estate of Gardiner*,³¹ that state's Supreme Court invalidated the marriage of a post-operative transgender widow, ruling similarly that under no circumstances may a transgender person in Kansas marry a person of the same birth sex.

In *Kantaras v. Kantaras*,³² a Florida Appeals Court ruled that state law does not permit a post-operative female-to-male transgender person to marry a

²⁹ *M.T. v J.T.* 355 A.2d 204 (NJ Super. Ct. App. Div. 1976).

³⁰ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

³¹ *In re Estate of Gardiner*, 2002 WL 397677 (Kan. 2002).

³² *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. App., 2d Dist., 2004)

female because the statutory terms, “male” and “female,” refer to “immutable traits determined at birth” and Florida law does not allow marriage between persons of the same sex. An Illinois Appellate Court ruled similarly in 2005.³³

In the past, if transgender people changed the sex designation on their birth certificate or lived in a jurisdiction where they could, it appeared that they would be able to lawfully marry. These cases cast doubt on that thinking. In these cases (except in the *Kantaros* case), the transgender litigants either had or could have had a birth certificate designating that they were of the opposite sex of their partner. Despite that, the courts looked only to their sex assigned at birth.

Even Less Restrictive Interpretations Can Pose Problems

Putting aside these restrictive rulings that insist categorically that a transgender individual is not legally the transitioned-to sex and therefore could never marry a person of the opposite sex, many transgender people still face considerable obstacles to their right to marry. Even in a more favorable jurisdiction, criteria for transgender people’s marriage eligibility might include completion of sex reassignment surgery and amending one’s birth certificate. These criteria can pose considerable difficulties.

1. Some states—such as Idaho, Ohio and Tennessee—do not allow individuals born there to change the gender on their birth certificates, regardless of any hormone therapy or surgery they undergo.
2. All six New England states allow people to change the sex designations on their birth certificates, and Vermont and Rhode Island no longer have a surgical requirement to do so. The Massachusetts Department of Public Health recently clarified that although surgery is required to change gender on a birth certificate, no particular type of surgery is required. GLAD is working to eliminate the surgical requirement for changing birth certificate gender in the remaining four New England states.

³³ *In re Marriage of Simmons*, 2005 WL 368644 (Ill. App., 1st Dist., 2005)

Experts in the field of caring for and treating transgender people agree that an individualized assessment is necessary to determine what procedures a person should undergo as part of “sex reassignment.” Moreover, medical professionals concur that surgery is not required in many circumstances for some to transition from one sex to another. Unfortunately, until the law catches up to the expert medical knowledge, many transgender people are left in limbo with regard to whom they may lawfully marry.

While there are no reported decisions on point, it is possible that a court would require an FTM transgender man to have undergone both chest and genital reconstructive surgery to meet the terms of the statute, despite the fact that such a requirement is unreasonable and may be medically unsound for that particular individual.

The Appendix of this publication provides detailed information for each of the six New England states about the procedures for changing gender on that state’s birth certificate. In addition there is information about changing gender on that state’s driver’s license as well as information about changing one’s name on those documents.

Rights Of Transgender Parents

Like gay men and lesbians, transgender people often find themselves fighting for the custody of their children. Although custody decisions ideally should be based on the best interests of the child, independent of the parent’s gender identity, the case law on this issue is inconsistent.

In 1989, in a most alarming decision, a Nevada Court not only denied a transgender parent the right to primary custody, but actually terminated parental rights solely on the basis of transgender status. The court held that the child should not be required to undergo the psychological adjustments necessary for coming to terms with a parent’s transgender identity. Instead of evaluating what was in the best interests of the child, the court’s decision seemed to turn on whether a transgender person, by definition, is unfit and inadequate as a parent.

The contrary result was reached in a case in Orange County, California, in which a FTM transgender father was granted continuing visitation and custody of his child. In addition, in *Kantaros v. Kantaras*, described above, the Court remanded the case to the trial court for a determination of custody of the couple's child, implying that transgender status is not a basis for the denial of custody.

GLAD is presently unaware of any cases in New England in which a court has terminated the parental rights of a transgender person on the basis of gender identity alone. In any of the six New England states, in order to remove a child permanently from a biological parent (transgender or not), a judge must find, by clear and convincing evidence, that the parent is currently unfit to further the welfare and best interests of the child. GLAD would be interested in hearing from any parent whose parental rights are being threatened based on gender identity.

Rights Of Transgender Students

All six New England states have strong anti-bullying laws that protect all public school students (and in the case of Massachusetts, Rhode Island and Vermont some private school students), and all specifically identify gender identity as one of the characteristics that deserves special attention, since transgender students are at a high risk of being bullied.³⁴

Both Connecticut and Massachusetts have established guidelines for schools to insure that transgender students are safe and supported. For Connecticut see:

[http://www.ct.gov/chro/lib/chro/Guidelines for Schools on Gender Identity and Expression - Updated 10.4.12.pdf](http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_-_Updated_10.4.12.pdf), and for Massachusetts see: <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

Connecticut, Vermont, Massachusetts and Maine have developed policies that allow transgender students to participate in athletics based on their gender

³⁴ See <http://www.glad.org/uploads/docs/publications/new-england-anti-bullying-laws-comparison.pdf>.

identity. For more information about the rights of LGBTQ students, go to: <http://www.glad.org/rights/publications/c/students-schools>.

In Maine, GLAD won the right for transgender students to use the bathroom or locker room that conforms to their gender identity. For more information, see: <http://www.glad.org/work/cases/doe-v.-clenchy>.

Use Of Public Restroom Facilities By Transgender People

Transgender people often risk physical harm and public humiliation when they choose a restroom facility. They are frequently unwelcome or uncomfortable in either the restroom of the sex ascribed to them at birth or the restroom appropriate to their gender identity.

GLAD filed suit October 20, 2009 in Maine, on behalf of Brianna Freeman, a transgender woman who was told by the manager of a local Denny's that she could not use the women's restroom. An agreement was finally reached in this case where the owners of the restaurant agreed that in all six of the restaurants that they owned transgender people would be allowed to use the bathroom consistent with their stated gender identity. In general, however, this is a very difficult area in which to litigate. In fact, even in Minnesota, a state with explicit protections for transgender people in employment and public accommodations, the high court recently found an exception to the law for bathroom use.³⁵ It is uncertain how a court would rule in a case in which a transgender person is denied the right to use a gender-appropriate restroom. Even where clear anti-discrimination rights have been established under state laws, courts may be disinclined to protect the transgender person's right to appropriate restroom access.

A City of Boston ordinance barring discrimination on the basis of gender identity or expression does provide protection for the use of restrooms in public accommodations in Boston. That ordinance makes it discriminatory for a place of public accommodation to prohibit "the use of restrooms, baths,

³⁵ *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

showers, dressing rooms, or other private accommodations based on the gender identity publicly and exclusively expressed or asserted by the person seeking to use such restrooms, baths, showers, dressing rooms, or other private accommodations.”³⁶

A growing number of towns in New England are enacting ordinances barring discrimination based on gender identity in public accommodations, including sex segregated facilities such as bathrooms and locker rooms.

In addition, if a transgender person is threatened, assaulted, or harassed in a public restroom or any other public place, they may be able to bring criminal charges and/or pursue civil rights violations.

The issue of what bathroom a transgender person may use on the job is also of huge significance. GLAD takes the position that a transgender employee should be permitted to use the restroom that is consistent with his or her gender identity. Although some employers have not complied with this approach initially, many have been willing to change restrictive policies once they have received adequate education relating to the safety and health concerns of transgender people. Regardless, it is clear under federal and state law that a transgender employee must have access to some safe, clean restroom facilities.

Hate Crimes

Vermont, Connecticut, Rhode Island and Massachusetts are the New England states that include “gender identity or expression” as a protected category in their hate crimes laws. In these states (with the exception of Rhode Island), laws provide increased criminal penalties for assaults and destruction of property because of a person’s actual or perceived gender identity or expression.³⁷

³⁶ City of Boston Code, § 12-9.7

³⁷ For Connecticut see C.G.S.A. § 53a 181j-1 and for Vermont see 13 V.S.A. § 1455 and for Massachusetts see M.G.L. ch. 22C sec. 32 & ch. 265 sec. 39. For a list of transgender inclusive hate crimes laws see: http://nctequality.org/Hate_Crimes.asp.

The *Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*³⁸ was passed by Congress on October 22, 2009 and was signed into law by President Obama on October 28, 2009. It expands the 1969 United States federal hate crime law to include crimes motivated by a victim's actual or perceived gender, sexual orientation, gender identity or disability.

For more information about what to do if you are a victim of a hate crime, see GLAD's *Overview of Legal Issues For Gay Men, Lesbians, Bisexuals and Transgender People* publication for your state.

Medical Treatment For Gender Dysphoria

On February 2, 2010, the U.S. Tax Court issued a ruling in *O'Donnabhain v. Commissioner of Internal Revenue* that treatment for gender identity disorder (GID) qualifies as medical care under Section 213 of the Internal Revenue Code, and, therefore, provided there is adequate medical documentation, related expenses (e.g. hormones, surgery, therapy and other expenses related to the treatment of GID that satisfy the requirements of Section 213 of the Internal Revenue Code) qualify for a medical deduction for federal income tax purposes. (To see the decision go to: <http://www.ustaxcourt.gov/InOpHistoric/ODonnabhain.TC.WPD.pdf>.) On November 9, 2010 the final judgment was entered by the Tax Court and on February 7, 2011 we learned that this decision would not be appealed by the government.

This is a very strong decision, recognizing the legitimacy of GID as a medical condition and, therefore, that expenses related to the treatment of GID may be deductible. If you have had treatment for GID and are trying to decide whether you should claim related expenses as a medical deduction on your federal income tax, more detailed information can be found in GLAD's publication, *Win In O'Donnabhain Tax Court Case: GID Qualifies As Medical Care*, at: <http://www.glad.org/uploads/docs/publications/odonnabhain-win.pdf>.

³⁸ See H.R. 2647 at <http://thomas.loc.gov/cgi-bin/query/F?c111:6:./temp/~c111X7TYvf:e1999565>:

Unfortunately, many transgender people are not able to afford the cost of transition related medical treatment, and most public and private health plans currently have an exclusion for this treatment. GLAD is currently working to remove these exclusions.

However, there is also some good news in this area. The State of Connecticut Insurance Department³⁹ and the Vermont Division of Insurance⁴⁰ and the Massachusetts Division of Insurance (see below) have issued bulletins requiring all individual and insured group health plans to cover medically necessary treatment of gender dysphoria, including gender reassignment surgery.

On May 30, 2014, the U.S. Department of Health and Human Services Departmental Appeals Board ruled that Medicare's categorical exclusion for sex-reassignment surgery is not consistent with contemporary science and medical standards of care. The lifting of the coverage ban means that transgender people covered by Medicare will be able to seek authorization by submitting documentation from a doctor and mental health professionals stating that surgery is medically indicated in their individual case. They should either get coverage or, at a minimum, receive an individualized review of the medical need for the specific procedure they seek, just like anyone seeking coverage for any other medical treatment.

Because private insurance companies and state-run Medicaid programs that provide health insurance for low-income individuals often take their cue from the federal government on which treatments to approve or exclude, the decision could eventually pave the way for sex-reassignment surgeries to be a routinely covered benefit.

On June 20, 2014, the Patrick Administration announced reforms to public and private health plan coverage to ensure that transgender Massachusetts residents have full access to treatments they need. On the same day, the Division of Insurance issued a bulletin that bars private health insurers from excluding medically necessary care for gender dysphoria from private health

³⁹ See http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf.

⁴⁰ See http://www.dfr.vermont.gov/sites/default/files/Bulletin_174.pdf.

insurance plans. For more information see GLAD's publication, *Health Insurance Coverage for Transgender People in Massachusetts*, at: <http://www.glad.org/uploads/docs/publications/ma-trans-health-insurance.pdf>.

For further information about the work GLAD in this area, read GLAD's publication, *GLAD at Work: Covering Gender Transition-Related Care for Transgender People* at: www.glad.org/uploads/docs/publications/glad-covering-transition-related-care.pdf.

Rights Of Transgender People In Prisons

Prison officials have not generally been receptive to transgender people's need to live their lives consistently with their gender identity. In some cases, prisons have denied transgender people access to hormones and other medical treatment, and have also denied them the ability to express their gender through clothing, make-up, accessories, and the like. While courts have held that transgender people should receive some treatment or care, including continuation of pre-established hormone therapy regimens, they have also found that transgender people are not entitled to any specific treatment, gendered clothing, sex reassignment surgery, or transfer to a gender-appropriate prison.

Classification of Prisoners

A primary issue of concern to a transgender person being placed into a correctional facility is how he or she will be classified for housing—whether the individual is going to be placed according to his or her ascribed birth sex or gender identity. Generally, when prisoners have had sex reassignment surgery, prison authorities have confined them according to their post-surgical sex designation; prisoners who have not had surgery have been imprisoned with inmates of the sex ascribed to them at birth. In addition, this determination is typically based on whether or not the transgender inmate has had genital surgery, placing, for example, an FTM transgender person who has not had genital surgery (even if he has had chest surgery) in a women's

prison, regardless of his otherwise masculine appearance.⁴¹

In addition to sex, classification of inmates is based on the following criteria: age; tendency for violent, disruptive behavior; sentence; type of crime; prior criminal history; educational level; need for protective custody; and employment history and skills. In the case of the classification of a transgender inmate, gender identity and the need for protective custody at least deserve special consideration. Unfortunately, this consideration often results in inappropriate segregation of the transgender inmate that leads to ineligibility for services and programs available to inmates in the general population. Further advocacy is needed to ensure a safe placement for all inmates that comes with access to the full range of prison services and programs.

Protection for Transgender Prisoners Against Violence

Once a transgender person has been placed in a facility, whether that placement is with inmates of their sex ascribed at birth or gender identity, they often face threats of harm from inmates and prison authorities alike.⁴² Due to their gender identities, and prejudice against them, transgender people often have greater need for special protection.

Under federal law, prison officials have a duty to exercise reasonable care to provide reasonable protection against an unreasonable risk of harm. (State laws may include more specific language about appropriate treatment of prisoners). Specifically, prison officials have a duty under the Eighth and Fourteenth amendments to protect prisoners from violence at the hands of other prisoners. A prisoner need not wait to be assaulted to obtain relief for the infringement of this right. An unreasonable risk of harm is established where a prisoner shows that there is a “strong likelihood” that violence would

⁴¹ While these have typically been the classifications imposed by prison officials, there are exceptions. *See Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991) (rejecting privacy claim of woman whom jail officials had housed with Cheyenne Lamson, a pre-operative MTF transsexual woman, based on the Jail’s physician’s recommendations that Ms. Lamson was psychologically female and thus her integration into the female inmate population was in her best psychological and physical interest).

⁴² Recognizing that transsexualism “is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others,” one federal appeals court has held that transsexual people in general, and transsexual prisoners in particular, have a constitutional right to maintain medical confidentiality as to their transsexual status. *Powell v. Schriver*, 175 F.3d 107, 111-13 (2nd Cir. 1999).

occur. Prison officials who actually know of a substantial risk to a prisoner's health or safety have a duty to respond reasonably to the risk, but the standard for proving such circumstances is very high.⁴³

In a case involving a pre-operative male-to-female transgender person who was beaten and raped in prison, the U.S. Supreme Court ruled that prison conditions constitute cruel and unusual punishment only if officials know of, and disregard, an excessive risk to an inmate's health or safety.⁴⁴ The individual had been incarcerated with males in the federal prison system, sometimes in the general prison population, but more often in segregation. The complaint alleged that by placing her in the prison's general population despite knowledge that she would be particularly vulnerable to sexual attack, officials violated the Eighth Amendment prohibition against cruel and unusual punishment through a deliberately indifferent failure to protect her safety.

The Supreme Court's decision in that case turned on the definition of "deliberate indifference." The Court held that a prisoner may prove that officials knew of a substantial risk from the very fact that the risk that the transgender inmate would be physically assaulted by male inmates was obvious. More specifically, the risk may be shown by evidence that the problem of inmate attacks was long-standing, pervasive, well documented, or expressly noted by the officials in the past. This decision may be helpful to other transgender individuals seeking protection from substantial harm in correctional facilities.

Medical Treatment in Prison

The U.S. Constitution requires that prisoners be provided with a certain minimal level of medical treatment. However, at least one Massachusetts case has held that the Constitution does not guarantee a prisoner the treatment of his or her choice.⁴⁵ Another Massachusetts case held that the care of prisoners could depart from good medical practice, so long as the care did not rise to the level of "deliberate indifference," amounting to cruel and unusual

⁴³ *Purvis v. Ponte*, 929 F.2d 822, 825 (1st Cir. 1991); *Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970 (1994).

⁴⁴ *Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970 (1994).

⁴⁵ *Dias v. Vose*, 865 F. Supp. 53 (D. Mass. 1994).

punishment.⁴⁶ Absent a claim of cruel and unusual punishment, there is no constitutional right to medical treatment in prison.

Despite this high standard, some transgender prisoners are able to maintain their hormone treatment in prison, based on federal cases holding that it is cruel and unusual punishment to stop providing hormones to an individual who had been receiving hormone therapy upon entrance to the prison.⁴⁷

A recent case in which GLAD was involved, *Adams v. Bureau of Prisons* (*BOP*), resulted in the federal prison system agreeing to make major changes in transgender medical policy. Under the BOP's previous "freeze frame" policy, treatment for federal inmates with gender dysphoria was kept frozen at the level provided at the time he or she entered the federal prison system. Under the new policy, "current, accepted standards of care" will be applied to inmates who are diagnosed with GID. The language, as well as the reference to accepted standards of care are significant since the World Professional Association for Transgender Health, the professional organization that issues guidelines for treating GID, considers genital reconstruction therapy "essential and medically necessary" for some patients. For more information about this case, go to <http://www.glad.org/work/cases/adams-v-bureau-of-prisons>.

A case from a Massachusetts federal court, *Kosilek v. Maloney*,⁴⁸ addressed the medical needs of a transgender prisoner who had not commenced any treatment for gender identity disorder prior to imprisonment. The Court rejected a policy that absolutely barred commencement of hormone therapy or sex reassignment surgery while in prison. Rather, the Court ruled that when a prisoner's gender dysphoria causes sufficient distress to constitute a "serious

⁴⁶ *Navedo v. Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001).

⁴⁷ See *South v. Gomez*, 211 F.3d 1275, 2000 WL 222611 (9th Cir. 2000) (unpublished opinion) (finding 8th Amendment violation when a prisoner's course of hormone treatment was abruptly cut off after transfer to a new prison); *Phillips v. Michigan Department of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990) (granting preliminary injunction directing prison to provide estrogen therapy to a pre-operative transsexual woman who had taken estrogen for several years prior to her transfer to a new prison and distinguishing failure "to provide an inmate with care that would improve his or her medical state, such as refusing to provide sex reassignment surgery" from "[t]aking measures which actually reverse the effects of years of healing medical treatment"), *aff'd*, 932 F.2d 969 (6th Cir. 1991). Cf. *Wolfe v. Horn*, 130 F. Supp. 2d 648 (D. Pa. 2001) (abrupt termination of prescribed hormonal treatment by a prison official with no understanding of Wolfe's condition, and failure to treat her severe withdrawal symptoms or after-effects, could constitute "deliberate indifference"). One federal appeals court refused to follow *Phillips* because the inmate at issue had not received hormone treatment prior to incarceration. *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995).

⁴⁸ *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass., 2002)

medical need” under the Eighth Amendment to the U.S. Constitution, prison officials must allow qualified medical personnel to evaluate the prisoner and make appropriate treatment recommendations, which include psychotherapy, hormone treatment or surgery. The Court did not rule on whether prison officials must implement the recommendations, but left for another day the issue whether the refusal to provide any medically recommended treatment would violate the Eighth Amendment to the U.S. Constitution in a particular case.

In 2012, a second *Kosilek* case resulted in a decision by the Massachusetts Federal District Court that the prisoner was required to have sex reassignment surgery paid for by the Commonwealth of Massachusetts which was affirmed on January 17, 2014 by a three-judge panel of the First Circuit Court of Appeals. However, the case was appealed to the full First Circuit Court and on December 16, 2014 the previous rulings were reversed by a 3-2 decision in which there were two sharply worded dissents. A decision will be made shortly about whether to appeal this decision to the U.S. Supreme Court.

In January 2010, The Massachusetts Department of Correction issued 103 DOC 652 entitled “Identification, Treatment and Correctional Management of Inmates Diagnosed with Gender Identity Disorder (GID),” which describes the Department’s policies on the identification, diagnosis, treatment, management and placement of transgender prisoners. This policy was updated in July 2012. You can view this document at www.mass.gov/eopss/docs/doc/policies/652.pdf.

Personal Identification & Documentation

Name Change

In most states, a name change requires a petition in a local probate court. A name change granted by a probate court does not typically appear as an amendment to the individual's birth certificate. (In most states, if it is possible to amend a birth certificate, to do so requires a separate process. See below). Rather, a probate court name change allows the individual to use the new name in a legal capacity, for everything from changing one's driver's license to signing official business paperwork. Most jurisdictions allow anyone, transgender or otherwise, to choose whatever name they wish to have as long as it is not adopted for fraudulent purposes. If you are inappropriately denied a request of name change, please call GLAD.

Social Security Identification

Social Security cards are issued by the federal government, and therefore one must follow the same procedure to change them in every state.

Use Form SS-5 to apply for a Corrected Card. For directions and form go to: <http://www.ssa.gov/online/ss-5.pdf> or visit any Social Security branch office. If you already have a card, you can apply by mail. If you are applying for a card for the first time, you need to go in person.

Name Change

You will need either (a) one or more documents identifying you by both your *old name* and your *new name* (such as a court decree changing your name), or; (b) two identity documents – one in your old name and one in your new name. Generally, the Social Security Administration (SSA) prefers to see a document with a photograph. However, they can usually accept a non-photo

identity document if it has enough information to identify you (e.g., your name as well as your age, date of birth, or parents' names).

Some documents the Social Security Administration accepts as proof of identity are:

- Driver's license
- Marriage or divorce record
- Military records
- Employer ID card
- Adoption record
- Life insurance policy
- Passport
- Health Insurance card (not a Medicare card)
- School ID card

All documents must be either originals or copies certified by the issuing agency (i.e., no photocopies or notarized copies). Your documents will be returned to you.

Gender Change

In 2013, the Social Security Administration made a significant change to its policy for changing gender. Previously, the SSA had required a letter from a doctor verifying that “sex change surgery had been completed.” The new policy does not require surgery. The SSA will now accept any of the following as proof of gender change:

- A 10-year U.S. passport showing the new sex;
- a state-issued amended birth certificate showing the new sex;
- a court order directing legal recognition of change of sex; or
- a medical certification of appropriate clinical treatment for gender transition in the form of an original letter from a licensed physician). The document must have enough biographical data (e.g., name and date of birth) to clearly identify the person.

For more detailed information about changing name and gender on your social security card, go to: <http://transequality.org/know-your-rights/social-security>.

The Social Security Administration (SSA) recently ended the practice of allowing gender to be matched in its Social Security Number Verification System (SSNVS). This will result in the cessation of SSA sending “no-match letters” that alert employers when the gender marker on an employee's W-2 does not match Social Security records.

Amendment Of Birth Certificates

Although at least three states forbid the amendment of birth certificates based on sex changes (Idaho, Ohio and Tennessee), many states have statutory provisions permitting birth certificates to be amended upon completion of sex reassignment surgery. (See the *Appendix* for more details on the New England states). The fact that some states prohibit changes to birth certificates can cause further problems for people wishing to change other documentation (such as drivers' licenses), particularly when such changes require a copy of an amended birth certificate as evidence of change of sex designation. GLAD encourages people who foresee such difficulties to attach to their petition a letter explaining that the state that issued their birth certificate has a categorical exclusion for change of sex designation; nonetheless, they meet the requirements for changing sex designation on a birth certificate in the state where they live.

The American Medical Association recently issued a statement supporting “. . . policies that allow for a change of sex designation on birth certificates for transgender individuals based upon verification by a physician that the individual has undergone transition according to applicable medical standards of care.”⁴⁹

⁴⁹ See <http://www.glad.org/uploads/docs/publications/ama-resolution-fact-sheet.pdf>.

Driver's License Changes

Procedures for changing one's name and sex designation on a driver's license differ from state to state. (See the *Appendix* for more details on the New England states).

Passports

Because passports are issued by the federal government, one must follow the same procedure to change them in every state.

To change the name and sex designation that appear on a passport, a person must complete form DS-5504 (if the change is being made within one year from the date of issuance of the passport—there is no charge to file this form) or form DS-82 (if it has been over a year since the passport was issued but under 15 years—the charge for this filing this form is \$75) or form DS-11 if you are applying for a new passport or if the last renewal was more than 15 years ago. In addition, the individual must enclose a certified copy of the court decree ordering the name change.

In June 2010, the State Department announced a new policy to issue passports that reflect a person's current gender. Under the new policy, a transgender person can obtain a passport reflecting his or her current gender by submitting a certification from a physician confirming that he or she has had appropriate clinical treatment for gender transition. This policy replaces the Department's old policy, which required documentation of sex reassignment surgery. For a detailed description of this new policy, go to the National Center for Transgender Equality's website at http://transequality.org/sites/default/files/docs/kyr/passports_2014.pdf.

For more information, contact:

- National Passport Information Center
- Toll-free (877) 487-2778

- <http://travel.state.gov> (click on “Passports”—there are forms that can be downloaded and detailed directions about how to fill out and submit the forms)

Appendix:

A Guide to Changing Personal Identification & Documentation in the New England States

NOTE: When going through the name change process in court, petitioners should request both a waiver of the publication requirement and that the record be sealed.

CONNECTICUT

Connecticut *Probate Court Name Change*

According to Connecticut law, probate courts and the Superior Court have concurrent jurisdiction to grant a change of name.⁵⁰

Moreover, “an application for a change of name should be granted unless it appears that the use of the new name by the applicant will result in injury to some other person with respect to his legal rights, as, for instance, by facilitating unfair competition or fraud.”⁵¹

Probate Court Name Change Process

- Fill out application form PC-900 for adult or PC-901 for minor;*
- Submit an affidavit form PC-910 for adult or PC-910A for minor;*
- Submit a certified copy of your birth certificate;
- Provide the court with two forms of identification, including at least one form of photographic identification;
- Pay a filing fee of \$150.00.

* The forms can be obtained at your local probate court or online at www.ctprobate.gov/Pages/Probate-Court-Forms.aspx.

For complete information about the process go to:
http://www.ctprobate.gov/Documents/Name_Change_Instructions.pdf.

⁵⁰ Conn Gen. Statute §§ 45a-99 and 52-11.

⁵¹ Don v. Don, 142 Conn. 309, 311-312, 114 A.2d 203 (1955).

Connecticut *Birth Certificate Amendment*

Birth certificate changes are also allowed by statute in Connecticut.⁵²

A law enacted in October of 2001 allows for birth certificates to now be amended without the asterisks that were previously used to denote the change. Under the new law, the re-issued birth certificate will contain no evidence of the original sex designation and the original will remain confidential and under seal. A court order is not required.⁵³

Name

The applicant must provide a certified copy of the court order for name change to the Vital Records Section of the Dept. of Public Health. The court order does not need to be from Connecticut.

Sex Designation

The Vital Records Section of the Department of Public Health requires:

- An affidavit from the surgeon who performed the sex reassignment surgery attesting to the fact that the surgery was performed;
- An affidavit from a licensed psychiatrist, psychologist, or social worker, verifying that the individual has undergone an evaluation and attesting to the fact that the applicant is socially, psychologically and mentally the designated sex;
- A birth certificate request form along with the above items. The form can be found at:

http://www.ct.gov/dph/LIB/dph/hisr/VR/vs_39bst.pdf

Affidavits can be obtained through one's doctor or at the Department of Public Health in Hartford.

⁵² Conn. Gen. Stat. § 19a-42(a), as amended by Public Act No. 01-163, Sec. 32 (2001).

⁵³ The law is available on the State of Connecticut web site: The amendment to P.A. 19a-42 is in section 32 of the bill.

Documentation should be mailed to:

Department of Public Health
Vital Records Section
410 Capital Ave. M.S. #11 VRS
P.O. Box 340308
Hartford, CT 06134

Questions?

For further information, one may contact the customer service line at the Vital Records Section of the Department of Public Health at: (860) 509-7897.

Connecticut *Driver's License*

Name

One should first change the name on their Social Security card, fill out the following form: <http://www.ct.gov/dmv/LIB/dmv/20/29/E-78.pdf>, and then go to the nearest branch office of the Department of Motor Vehicles with their current license and documentation (i.e., marriage license, divorce decree, probate court documents, etc.) that shows the change. *Photocopies will not be accepted.* The new license will be issued at no cost.

Sex Designation

Concerning the gender marker, one must complete Form B-372 that can be found at: <http://www.ct.gov/dmv/lib/dmv/20/29/b-372.pdf>. This will require that Part 2 of the form be completed by a physician, therapist/counselor or psychiatric social worker who will affirm your gender designation statement in Part 1. Surgery is not required.

Questions?

For further information, one may contact the CT Department of Motor Vehicles customer service line: (860) 263-5700.

MASSACHUSETTS

Massachusetts ***Probate Court Name Change***

A change of name shall be freely granted unless such change is inconsistent with public interests.⁵⁴

It is not open for a court to inquire into the motive that prompts one to change his or her name, provided the change is not for any dishonest, fraudulent, or unlawful purpose.⁵⁵

Name Change Process

- Submit an application (CJP-27) that you can find here: <http://www.mass.gov/courts/docs/forms/probate-and-family/cjp27.pdf>;
- Submit a copy of birth certificate or naturalization papers;
- Pay a \$165 fee.
- Publish a notice of name change in a local newspaper (You can ask to waive this requirement, but it is up to the court whether your request will be granted).

Massachusetts ***Birth Certificate Amendment***

NOTE: For a detailed explanation on how to change name and gender on a Massachusetts birth certificate, see GLAD's publication: **Massachusetts Birth Certificate Tool Kit** at: www.glad.org/rights/toolkit/massachusetts-birth-certificate-tool-kit.

In October, 2014, the Massachusetts Department of Public Health provided new guidance for changing gender on a birth certificate. Although surgery is still required, no specific surgery is necessary and any licensed physician can attest to the fact that you are no longer the

⁵⁴ M.G.L. c. 210 §12.

⁵⁵ Sec'y of Comm. v. City Clerk of Lowell, 366 N.E.2d 717 (Mass. 1977).

gender listed on your birth certificate. Here is an explanation of the process:

1. Submit an applicant affidavit that contains the following:

- a. Your full name, date of birth, place of birth and parents' names on the existing birth certificate;
- b. A statement that you have completed sex reassignment surgery and are not of the sex designated on the current birth certificate (NOTE: No particular type of surgery is required, and you should not list what surgery was completed).
- c. Your request for a permanent amendment to your birth certificate to reflect a different sex and, if you want your name changed, submit a certified copy of your court name change decree with your application).
- d. Contact information including your current name and address.

2. Submit a *notarized* affidavit from a physician on office letterhead that contains the following:

(This can be from any physician and does not need to be from the doctor who did your surgery or a doctor who is treating you for reasons relating to gender transition or gender dysphoria):

- a. The physician's name, license number, state of jurisdiction, physician-patient relationship and a statement that either the physician is treating you or has reviewed your medical history and evaluated you concerning a change of sex.
- b. The physician needs to certify that you have completed surgical treatment for the purpose of sex reassignment that is appropriate for you and that you are not the sex recorded on the birth certificate. The doctor should not indicate the nature or type of surgical treatment and should use generally accepted terms such as "sex reassignment surgery," "gender confirmation surgery," or "sex change surgery." Using alternative terms or specifying the nature and type of surgery or adding any other information may delay your application.

3. Submit a court-certified copy of your legal name change decree.

Massachusetts *Driver's License*

Name

The applicant must go in person to local Registry with (1) old license, and; (2) new name on Social Security card. A listing of branch offices can be found online at <http://www.state.ma.us/rmv>. There is an application fee of \$25.

Sex Designation

The Massachusetts registry of Motor Vehicles has amended its policy to enable transgendered individuals to more easily change the gender designation on their licenses and identity cards.

Under this new policy it is no longer necessary to submit medical proof of sex reassignment surgery. An individual who wishes to change the gender marker submits an updated application with a Gender Designation Change Form, which is signed by the applicant and by a medical provider attesting to the gender the applicant has indicated. The form can be obtained at: <http://www.massrmv.com/rmv/forms/21816.pdf> or at any Registry office.

The Registry no longer requires an amended birth certificate in support of the new gender designation marker.

MAINE

Maine *Probate Court Name Change*

A person who desires to change his or her name may petition the probate judge in the county where he or she resides. If the person is a minor, the person's legal custodian may petition on his or her behalf.⁵⁶

Name Change Process

- Submit form CN-1 for adult name change, www.ptla.org/sites/default/files/CN-1.pdf, or form CN-2 for a minor name change, www.ptla.org/sites/default/files/CN-2.pdf;
- A certified copy of your birth certificate;
- Pay a filing fee;
- Publish change in newspaper (You can request that the publication requirement be waived, but it will be up to the court to decide whether to honor your request.

Detailed instructions for changing your name in Maine can be found at: <http://www.ptla.org/how-change-your-name-maine>.

Maine *Birth Certificate Amendment*

Maine law gives the Department of Health and Human Services authority for establishing procedures for amending a birth certificate.⁵⁷ The Department has established the following procedures.

Name

See Probate Court Name Change above.

⁵⁶ 18-A Me. Rev. Stat. Ann. § 1-701, amended by 2001, c. 163, § 1.

⁵⁷ 22 Me. Rev. Stat. Ann. § 2705.

Sex Designation

The applicant must present to the Office of Vital Statistics:⁵⁸

- A certified copy of form VS-14 (<http://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/documents/VS14.pdf>) indicating that a name change was granted by the probate court;
- An Application for Correction (VS-7: <https://www1.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS7.pdf>);
- A notarized affidavit from the doctor performing the surgery/treatment.

The birth record will be annotated to indicate the court where the name was changed and the date that occurred, the date surgical procedures were completed, and the day the birth record was amended. **However, these changes will not become a part of any copy issued and the birth certificate will not be regarded as amended.**

Questions?

For more information see:

<http://www.maine.gov/sos/cec/rules/10/146/146c002.doc> or contact the Maine Office of Vital Records: (207) 287-3181.

Maine *Driver's License*

Name

First change the name on your Social Security card and then go to a BMV office with a court order indicating your new name.

Sex Designation

To change gender on a Maine Driver's license, you and a doctor, therapist, counselor, social worker or other qualified professional must complete and sign a form on which the professional certifies your gender identity. Surgery is not required. The form can be obtained at any

⁵⁸ See <http://www.maine.gov/sos/cec/rules/10/146/146c002.doc>, page 17.

Bureau of Motor Vehicle (BMV) office or online at:

<http://www.maine.gov/sos/bmv/licenses/GENDER%20DESIGNATION%20FORM.doc>.

The completed form is taken to any BMV office and you will be issued a 60 day temporary license with the new gender and a new photo will be taken. You will receive the permanent license with the new gender in the mail 2-4 weeks later.

Questions?

For more information, one may contact:

Bureau of Motor Vehicles, Attn: License Services
29 State House Station, Augusta, ME 04333

NEW HAMPSHIRE

New Hampshire *Probate Court Name Change*

New Hampshire law permits individuals to change their name through Probate court.⁵⁹

Name Change Process

- File a Name Change Petition at your local probate court. There will be a charge of \$110. Here are the instructions for doing this: <http://www.courts.state.nh.us/forms/nhjb-2175-p-instructions.pdf>, and here is the form that you need to submit to the probate court: <http://www.courts.state.nh.us/forms/nhjb-2175-p.pdf>.
- Once the name change is approved, you are required to do the following: <http://www.courts.state.nh.us/probate/namechange.pdf>. Notice that you must inform the DMV within 10 days of having a name change petition approved.

New Hampshire *Birth Certificate Amendment*

New Hampshire law does not have an explicit provision relating to public records for transgender people. The law provides generally for changes to birth certificates to be made by the town clerk according to rules set by the Commissioner of the Department of Health and Human Services.

Name

See the process for changing a name above. Once the name change is accepted, the birth certificate will be amended to read “also known as [New Name]” and “name changed pursuant to an order of the [Town] probate court.” It is the individual’s responsibility to inform others of the name change.

⁵⁹ N.H. Rev. Stat. Ann. § 547:3-i.

Sex Designation

The Bureau of Vital Records and Health Statistics (603-271-4655) provides the following guidance: An applicant should petition the appropriate probate court for a court ordered sex change using Form NHJB-2128-P that can be obtained at <http://www.courts.state.nh.us/forms/nhjb-2128-p.pdf>. This involves a hearing in which evidentiary findings are made and payment of a nominal certificate amendment fee.

New Hampshire *Driver's License*

Name

To change the name on your New Hampshire Driver License or Non-Driver Identification Card, you must complete the following form and submit it IN PERSON to a DMV office:

<http://www.nh.gov/safety/divisions/dmv/forms/documents/dsmv30.pdf>.

There is no charge for this.

Sex Designation

The New Hampshire Department of Safety Division of Motor Vehicles (DMV) has modernized the criteria to change the gender on your New Hampshire Driver License or Non-Driver Identification Card **by removing any requirements of surgery**. The new process instead requires that one of the following health care providers attest to your current gender identity and that in their professional opinion this gender identity will continue for the foreseeable future:

- Physician
- Advanced Practice Registered Nurse (APRN)
- Clinical Social Worker
- Clinical Mental Health Counselor

To submit a request for a gender change, you and the health care provider must complete and submit the following form:

<http://www.nh.gov/safety/divisions/dmv/forms/documents/dsmv626.pdf>.

There will be a \$10 charge.

For more information see GLAD's New Hampshire Driver License/Non-Driver Identification Card Tool Kit at:
<http://www.glad.org/rights/toolkit/new-hampshire-driver-license-non-driver-identification-card-tool-kit>.

RHODE ISLAND

Rhode Island *Probate Court Name Change*

Rhode Island law allows individuals to change their names in probate court.⁶⁰ In every petition for change of name in the probate court, the judge shall grant or deny the petition without consideration of spousal consent.

Name Change Process

- Fill out form P.C. 8.1 (available at court or at sos.ri.gov/documents/probate/PC8.1.pdf) and get it notarized;
- Get a certified copy of your birth certificate and a copy of your Bureau of Criminal Identification (BCI) record. Instructions on how to get a copy of your BCI record can be found at: www.riag.ri.gov/bci/records.php;
- Check with your local probate court about the about the filing fee, and whether it requires that you advertise in a local newspaper;
- If required by the court, advertise in local newspaper by filling out form P.C. 9.1 (see: sos.ri.gov/documents/probate/PC9.1.pdf) at least 10 days before the hearing. You should request that the court waive this requirement to protect your privacy, but it will be up to the court whether your request is granted.

*For minors, both parents must be present with identification.

⁶⁰ R.I. Gen. Laws § 8-9-9, 33-22-28.

Rhode Island ***Birth Certificate Amendment***

NOTE: For a detailed explanation on how to change name and gender on a Rhode Island birth certificate, see GLAD’s publication: **Rhode Island Birth Certificate Tool Kit** at:

<http://www.glad.org/rights/toolkit/rhode-island-birth-certificate-tool-kit>.

Name

The applicant must submit to the registrar of vital records a certified copy of the probate court order changing the name, including applicant’s name at birth, date and place of birth, and new name. The applicant will receive an affidavit in the mail that must be signed in a notary’s presence. If you

Sex Designation

The Division of Vital Records has recently changed the procedure for changing gender on a Rhode Island birth certificate. The most important change is that **surgery is no longer required**.

For a transgender person, the procedure requires:⁶¹

1. The individual (or if a minor, the individual’s parent(s) or legal guardian(s)) must submit an affidavit attesting that the person has undergone medical treatment for the purpose of gender transition based on contemporary clinical standards established by the World Professional Association for Transgender Health (WPATH). If also submitting a name change, include the request in the same affidavit and submit a name change court order.
2. A physician, certified nurse practitioner or physician’s assistant, who is licensed to practice in the United States (or possibly some foreign country), and who has treated or evaluated the person, must sign an affidavit that the individual has “undergone surgical and/or hormonal treatment based on contemporary clinical standards and/or other treatment appropriate for the

⁶¹ See <http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOH/7895.pdf>, Part IX, 35.5(e).

individual for the purpose of gender transition based on contemporary clinical standards.”

For an intersex person, the procedure requires:⁶²

1. An affidavit by the individual attesting that the person is intersex and is not the sex designated on the Rhode Island birth certificate.
2. An affidavit by a medical professional, as listed in the procedure for a transgender person above, that the individual has an intersex condition, and, in the medical professional’s opinion, the person’s sex designation should be changed.

NOTE: Correction requests regarding sex that also include a request for a legal name change will be marked as amended only with respect to the name change.

Questions?

For more information, one may contact the Rhode Island Division of Vital Records: (401) 222-2812.

Rhode Island *Driver’s License*

Name

You must first change your name on your Social Security card and then submit a court order indicating your new name.

Sex Designation

Rhode Island Department of Motor Vehicles significantly changed its policy in May 2012. Changing one’s gender designation on a license or identification card involves completing a Gender Designation form—see http://www.dmv.ri.gov/documents/forms/license/gender_designation.pdf This form requires a physician, licensed therapist or counselor or case worker or social worker to declare under penalty of perjury what the

⁶² See <http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOH/7895.pdf>, Part IX, 35.5(e).

applicant's current gender identity is and that this identity "can be reasonably expected to continue as such in the foreseeable future."

The person submits the completed form, surrenders any current license or identification card, has a new photograph taken and pays the applicable fees.

Questions?

For more information contact: Division of Motor Vehicles
License and Registration Office
600 New London Avenue
Cranston, RI 02920-3024
(401) 462-4368

VERMONT

Vermont *Probate Court Name Change*

According to Vermont law, a person of age and sound mind may change his or her name by making, signing, sealing and acknowledging before the judge of the probate court of the district in which the person resides, a standard form available from the probate court.⁶³ The following link has detailed information and forms for changing the name of an adult or minor:

<https://www.vermontjudiciary.org/gtc/Probate/namechange.aspx>.

Vermont *Birth Certificate Amendment*

Name

Whenever a person changes his or her name, as provided in the section above, he or she shall provide the probate division of the superior court with a copy of his or her birth certificate and, if married, a copy of his or her civil marriage certificate, and a copy of the birth certificate of each minor child, if any.

The register of probate with whom the change of name is filed and recorded shall transmit the certificates and a certified copy of such instrument of change of name to the supervisor of vital records registration.

The supervisor of vital records registration shall forward such instrument of change of name to the town clerk in the town where the person was born within the state, or wherein the original certificate is filed, with instructions to amend the original certificates.

Such amended certificates shall have the words "Court Amended" stamped, written, or typed at the top.⁶⁴

⁶³ Vt. Stat. Ann. tit. 15, § 811.

⁶⁴ Vt. Stat. Ann. tit. 15, § 816.

Sex Designation

Vermont **no longer requires surgery** in order to change gender on a Vermont birth certificate.⁶⁵ Here are the steps:

- Get an affidavit from a licensed physician who has treated or evaluated the person stating that the individual has undergone “surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition.” The affidavit shall include the medical license number and signature of the physician.
- The person then files this affidavit with the probate division of the superior court, and the court will issue an order that the person’s sexual reassignment has been completed.
- Upon presentation of the court order to the state registrar, the registrar will issue a new birth certificate with the sex changed.
- The new certificate shall be substituted for the original birth certificate and shall not show that a change in name or sex has been made, and the original birth certificate will be sealed.
- Anyone who previously was issued an “amended” birth can apply to the registrar for a new birth certificate.

Vermont *Driver’s License*

Name

You must notify the Vermont Department of Motor Vehicles (DMV) within 30 days after you change your name. You should first change your name on your Social Security card. This link has the directions and form for changing the name on your Vermont driver’s license:

<http://dmv.vermont.gov/licenses/drivers/name>

Sex Designation

The Vermont Department of Motor Vehicles revised its policy in February, 2002, stating that people who wish to change their sex designation can submit a written request to do so in two alternative ways:

⁶⁵ Vt. Stat. Ann. tit. 18, § 5112

1. Accompanied by a letter from a physician stating the gender change is complete and the date of completion, OR
2. Accompanied by a statement from a physician, psychologist or psychiatrist stating the target gender to which the applicant is irrevocably committed. The statement must be signed by the medical professional and indicate his/her address, jurisdiction in which licensed and license number.

Here is more information:

http://dmv.vermont.gov/sites/dmv/files/pdf/DMV-Change_of_Gender.pdf.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity, HIV status, and sexual orientation.

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Thank You!



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