
A Legal Q & A for Kids of Trans Parents

1. Who is a parent?

As a practical matter, a parent is a person who takes care of the daily, ongoing and long-term needs of a child, as well as a person who directs his or her moral, social, cultural, spiritual and educational upbringing. Oftentimes, a parent is a person who is also genetically related to a child (usually the father) or the person who gave birth to the child (usually the mother). That is not, however, uniformly the case. Children come into families in a variety of ways. Some children are born into a married or non-marital family unit and others are adopted. Still others develop relationships with a parent or parents over time. There is no one-size-fits-all for families.

The legal definition of who a parent is does not always match the practical reality of a child's life. Some states only recognize as a parent persons who are related to a child by blood, through marriage to the birth parent, or by adoption. An increasing number of states recognize "de facto" or "psychological" parents, persons who have formed a parent-like bond with a child or functionally served as a parent. However, not all have done so; there is usually a very high standard set for individuals to meet the definition, and the status does not always come with the full range of legal rights available to fully legal parents.

2. How does being transgender affect a person's parentage?

Being transgender should not ordinarily have any effect on one's legal parentage. It may change the way that a child relates to his or her parent but it should not change the way the legal world views the relationship between parent and child.

3. Are there ways that a person who is not legally regarded as a parent can create a legal relationship to a child?

For someone who is not related to a child by having given birth to him/her, through genetics, or by being married to the birth parent, the adoption process is the gold standard for ensuring that one's parental role is respected by other people. For those who do not adopt, in some states it is possible that a court would recognize the developed relationship (as a de facto parent, psychological parent, or through some related doctrine), but that is far from guaranteed. Attorneys who work with contemporary families strongly recommend that anyone who is a parent and wants to ensure respect for that relationship go through a formal adoption process. In some states, another alternative may be to get a court to issue a parentage judgment, which provides comparable rights to that of an adoption.

4. ***What is custody and visitation?***

When the relationship between parents breaks down, courts often get involved in dealing with questions about how decisions will be made that involve children, and how parents will share time with their children. This is true both for both marital families going through a divorce and for non-marital families where the parents cannot agree on parenting responsibilities and benefits.

Custody is a term that typically refers either to with whom the child will live (physical custody) or who will have authority for making major decisions regarding a child's medical care, education, religious upbringing, and other decision (legal custody). Visitation refers to the time a non-custodial parent will be able to spend with a child. Some states have gotten rid of the language of custody and visitation altogether and use parental rights and responsibilities instead.

5. ***How does being transgender affect a determination of custody or visitation during divorce or dissolution of the parents' relationship?***

Being transgender should not alone affect a court's determination of a parent's custody or visitation in a break-up. Unfortunately, many courts share the bias and prejudice that is generally pervasive in our society. We have certainly seen courts put restrictions on transgender parents that would not be imposed upon non-transgender parents. For example, one court restricted a transgender parent (a genetically male parent with a female identity) from expressing a female identity around the child. One court went as far as terminating a transgender parent's legal relationship with a child and allowing neither custody nor visitation. These examples, however, are not typical of how most courts treat transgender parents and their children during a divorce or a break-up.

More typically, we know that parents do not always act in the best interests of their children when they are going through a break-up. Sometimes because they feel both scared and desperate, a non-transgender parent may try to appeal to prejudice and bias to argue that a transgender parent should not get custody or have a limited visitation schedule. We have heard of non-transgender parents arguing that having a relationship with a transgender parent may be confusing, disturbing, or stigmatizing to a child.

We know that many of these arguments unfortunately sometimes resonate with judges and decision makers who may not know much or anything about transgender people. For this reason, we strongly encourage any transgender person going through a contested court proceeding to contact someone with expertise about transgender issues to be involved in any assessments of a child that a court will consider.

It may also be worthwhile to independently provide a court with information about what it means to be transgender and the fact that being a transgender parent has no adverse impact on children. Provided a parent is not a physical risk to a child, fostering a healthy relationship with both parents through any emotionally difficult time (and beyond) is important for all children, regardless of their parent's gender identity.

6. ***What is the Best Interests of the Child standard?***

In all cases, courts determine how parents share custody and visitation based on a standard called the Best Interests of the Child standard. This is a very imperfect way that courts have to assess how children should best be cared for by two parents who are breaking up. Using this standard, courts take into consideration factors including the roles of each parent prior to their break-up, the age of the child, and the ability of each parent to provide for the physical and emotional care of the child. Especially for older children, courts are very interested in learning what the child's wishes are. Very often a person called a "guardian ad litem" is appointed to represent the interests of the child in the legal proceedings.

7. ***Does a transgender person's transition affect their marriage or ability to marry?***

Except for Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Maine, Maryland, Washington State and the District of Columbia, every other state allows only different sex couples to marry. In states where couples can marry regardless of the individual's sex, there should be no question about the validity of a marriage whether it was entered into before or after the person transitioned. In states where only different sex couples may marry, as long as someone is of a different sex than the person they marry at the time they marry that person, their marriage should be lawful for the duration of their lives, regardless of whether or not one spouse transitions. There are no publicly reported legal decisions calling into question the validity of a person's marriage simply because one transitions after entering into an otherwise heterosexual marriage.

However, recently there have been policy decisions made in immigration and Social Security where when applying for a spousal benefit the government officials have looked at the current genders listed on the couple's birth certificates and used that to determine whether the marriage was a different-sex marriage (and thus entitled to federal benefits) or a same-sex marriage, and so not entitled to federal benefits because of the Defense of Marriage Act (DOMA). This is an area of the law which is evolving and so couples should consult an attorney if they have questions about their marriage being respected.

On the other hand, when people transition prior to a marriage, some recent cases have created legal complications for transgender people. It is difficult to generalize in this area because of the variability of state laws. Anyone who is transgender and considering marriage is well-advised to seek legal counsel to be sure that they understand the full implications of how one's legal life will be transformed by entering into a marriage.

Transgender people who have transitioned before getting married should change their gender marker on as many documents as possible before getting married. Once married, the couple should hold themselves out to the world as a married couple and complete all forms and documents as such.

8. ***How can transgender parents find a trans-knowledgeable attorney?***

There are an increasing number of places where trans-parents can go to find legal assistance or referrals that are transgender friendly and knowledgeable. Here are some of those places:

- New England—GLBTQ Legal Advocates & Defenders (GLAD) at 800-455-GLAD (4523) www.glad.org
- Outside New England—Lambda Legal Defense and Education Fund (5 Regional Offices) www.lambdalegal.org
 - New York—212-809-8585
 - Los Angeles—213-382-7600
 - Chicago—312-663-4413
 - Atlanta—404-897-1880
 - Dallas—214-219-8585
- National Center for Lesbian Rights (NCLR)—415-392-6257 www.nclrights.org
- ACLU’s Lesbian, Gay, Bisexual, Transgender Project—212-549-2627 www.aclu.org/lgbt/index.html
- GayLawNet www.gaylawnet.com/
- Many state and local bar associations have lists that identify LGBT-friendly and experienced attorneys
- Local organizations
 - Bay Area Lawyers for Individual Freedom (BALIF)—San Francisco Bay Area—415-621-3900
 - Gay and Lesbian Lawyers of Philadelphia (GALLOP)—215-627-9090
 - GAYLAW
 - District of Columbia—202-638-1501
 - Maryland—410-514-7051
 - Virginia—866-548-0873
 - Lesbian and Gay Bar Association of Chicago—773-404-9574
 - Lesbian and Gay Bar Association of Greater New York (LEGAL)—212-459-4873
 - New Jersey Lesbian & Gay Bar Association—908-830-1005
 - Sylvia Rivera Law Project—New York—212-337-8550 X3
 - Transgender Law Center (Primarily California)—415-865-0176



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