of forced trans divorce, are a painful reality. Married trans people often face unique stressors and marginalization and thus may seek out therapists and counselors for outside support. Thus, clinical providers need to be gender affirming in their practice.

Markie L. C. Twist and Y. Gavriel Ansara

See also Divorce, Psychological Issues; Marriage, Divorce, and Parenting, Legal Issues; Therapy/Therapist Bias

Further Readings


Marriage, Divorce, and Parenting, Legal Issues

Trans people have made great legal and social progress, although they continue to face lingering discrimination in the family law arena. Before nationwide marriage equality, trans people faced a patchwork of conflicting state laws and judicial opinions regarding the validity of their marriages. Since the Supreme Court struck down gender-based restrictions on marriage in 2015, trans people who marry or wish to marry now have the same legal protections as others. In the contexts of divorce and child custody, however, trans people continue to face unique legal challenges and disadvantages due to the persistence of misinformation and bias.

Validity of Marriages Before Nationwide Marriage Equality

In 2015, the Supreme Court in Obergefell v. Hodges struck down state laws that barred same-sex couples from marriage. As a result of that decision, two persons of any gender who otherwise meet the requirements for marriage are free to marry and must be given the same state and federal rights and benefits as all other married couples.
In addition, no state may refuse to recognize a valid marriage from another state simply because one (or both) of the spouses is transgender.

Before that landmark decision, each state could set its own rules about trans people and marriage, which resulted in a chaotic patchwork of conflicting legal rules. In some states that barred same-sex couples from marriage, state courts invalidated marriages in which one spouse was trans, holding that for the purposes of marriage, a trans person could not legally change their gender. In these cases, the courts held that, even if the individual had undergone a gender transition, the marriage was an invalid same-sex union. For example, in 1999, the Texas Court of Appeals invalidated a 7-year marriage between a trans woman and her deceased husband. The court held that a person’s legal gender is genetically fixed at birth, that the trans woman was therefore legally male, and that the marriage was invalid based on the state’s law restricting marriage to different-sex couples (Littleton v. Prange, 1999). Similar decisions created uncertainty and placed trans spouses in legally vulnerable situations.

The landscape for trans spouses who married a different-sex spouse before they transitioned was different. In those cases, even though both spouses were of the same sex after the trans spouse transitioned, every court to rule on the issue held that the marriage was valid, based on the longstanding rule that the validity of a marriage is determined at the time the parties marry. Even so, the prospect of potentially having to go through litigation to test the validity of one’s marriage was a major source of stress and uncertainty for trans people in this situation.

Validity of Marriages After Obergefell

With the Supreme Court’s ruling that the legal right to marry cannot be restricted on the basis of gender, trans people no longer have to fear their marriages may be invalidated simply because they are trans. Obergefell applies retroactively as well as prospectively. As a result, it protects trans spouses who married before 2015 even in a state that, at the time of the marriage, barred marriage by same-sex couples. Today, a trans person’s marriage cannot be invalidated on the ground that it is or was a “same-sex marriage.”

Even today, however, a spouse may claim their marriage to a trans person is void based on fraud by claiming they did not know their spouse was trans at the time of the marriage. Especially after Obergefell, many courts would hold that even if such a claim were true, it would not invalidate the marriage. Others, however, might still accept that failure to disclose one’s trans status is a sufficient ground to invalidate a marriage. To avoid this possibility, it is advisable to have a written relationship agreement acknowledging that one of the spouses is trans.

Trans Parenting Rights and Issues

Before marriage equality in 2015, when a court ruled that a trans person’s marriage was invalid, the trans person could also lose their parental rights. In practically every state, the law provides that a husband who has a child through donor insemination is the child’s legal father. However, if a marriage is held to be void, the husband’s parental rights may be challenged. For example, in 2005, the Illinois Court of Appeals upheld a trial court decision that severed a trans man’s relationship with his son, who was born through donor insemination. Even though the trans man had transitioned and been living as a man for over 20 years, the court held that he was legally female, that his 15-year marriage to his wife was invalid, and that he was not a legal parent to the couple’s 10-year-old son (In re Marriage of Simmons, 2005).

Another major effect of Obergefell is that, now that marriages cannot be voided simply because one of the spouses is trans, trans parents need no longer fear that their parental rights can be stripped away in cases where those rights depend on marriage.

Even today, however, parentage laws for people who use assisted reproduction to have children, as many trans people do, vary significantly from state to state. In most states, married couples who use assisted reproduction to have children are generally both recognized as legal parents so long as they comply with any legal requirements. Just as any other married couple in this situation should do, trans people should be sure they understand their state’s laws before using assisted reproduction to have a child. Where possible, it is highly advisable for spouses who use assisted reproduction to have
a child to get a court judgment declaring that both spouses are the child’s legal parents.

Legal protections for unmarried couples and individuals who use assisted reproduction to have children are even more varied. If a trans person has a child through assisted reproduction with an unmarried partner or as an individual, they should be sure to know and follow any applicable state parentage laws to ensure that their parental rights are protected. Importantly, there is no state in which a written agreement alone is sufficient to establish a person’s legal rights.

Trans people may also become parents through adoption. Although no state bars or restricts adoption because a person is trans, informal bias and discrimination against trans people on the part of birth parents, social workers, and courts are still common.

**Issues for Divorcing Trans Spouses**

Because of the Supreme Court’s decision in *Obergefell*, a divorce involving a trans spouse must be governed by the same legal process and rules as any other divorce. In practice, however, a divorcing trans spouse may face some unique challenges owing to courts’ unfamiliarity with trans people.

One such potential challenge relates to the economic disadvantage faced by many trans people when they come out publicly as trans. When a trans person undergoes a gender transition, the stigma associated with trans identity may lead to job loss or reduced earning potential. Some trans individuals who had successful careers before transitioning experience no significant discrimination or loss of income. For others, however, transitioning may be financially and professionally devastating. Historically, this risk has been especially high for trans people who transition after developing successful careers and who are sometimes ostracized and thus unable to sustain their professional success after transitioning. Statistically, as a group, trans individuals are twice as likely to be unemployed as others and report high rates of workplace harassment and career interruption. Trans people of color face the highest rates of unemployment and economic marginalization.

Judges who are unaware of this pervasive discrimination may incorrectly believe that a trans person’s loss of employment or reduction in income is voluntary. This can be critical because courts take income and earning potential into account when determining the amount of child or spousal support that a divorcing person must pay to their former spouse. When a judge incorrectly believes that a trans individual voluntarily quit their job or sought one with lower pay, the judge may impose financial obligations that are impossible for a divorcing trans person to meet.

For example, in 2007, the Washington Court of Appeals held that a trans woman could be jailed for her inability to pay child support at a rate based on her prior job as an auto mechanic, even though she was fired when she transitioned and was subsequently unable to find another job. The Court of Appeals upheld the trial court’s finding that she was “voluntarily unemployed” (*In re Marriage of Stankovich*, 2007).

Divorce courts may unfairly penalize trans people in other ways, as well. Every state allows for “no-fault” divorce, which means that couples can seek a divorce for any reason, without assigning fault or blame to either party. But many still allow courts to factor in fault when allocating property or spousal support. In those states, a trans individual’s spouse may attempt to portray the trans spouse’s transition as selfish or otherwise culpable conduct that warrants assigning “fault” to the trans spouse. This can lead to disparate allocation of property and spousal support.

Similarly, a divorcing spouse may argue that the trans spouse’s use of funds to pay for gender transition or loss of employment after transition had a negative economic impact on the marital estate. In such cases, a court can give the non-trans spouse a greater share of the marital estate or require the trans spouse to pay more spousal support.

**Child Custody Issues**

Courts increasingly understand that being trans is irrelevant to a person’s ability to parent and so should not be considered as a negative factor in child custody cases. For example, in 1973, the Colorado Court of Appeals reversed the trial court’s decision that removed custody from a trans parent who had transitioned. The Court of Appeals found no evidence that the transition or the parent’s trans status negatively affected the children (*Christian v. Randall*, 1973).
Nevertheless, trans parents across the country still face bias and discrimination in courts when it comes to child custody cases. Courts continue to deny custody and visitation to trans parents based solely on biases, unsupported stereotypes, and fears. In 1997, for instance, the Missouri Court of Appeals severed contact between a trans parent and her children. The court looked to expert testimony that it could potentially be “emotionally confusing” for the children to see their father as a mother, even though there was no actual evidence to this effect (J.L.S. v. D.K.S., 1997). In other circumstances, courts have required that the trans parent continue living in their birth sex or to stop crossdressing as a condition of continued custody or visitation. In some of these cases, parents who have not complied with these conditions have had their custody or visitation rights revoked. As recently as 2008, the California Court of Appeals upheld a trial court decision that kept the children in foster care and removed the father’s custody because he sometimes wore feminine clothing in front of the children after being ordered not to do so (M.R. v. Superior Court, 2008; unpublished opinion).

One of the strongest biases against trans parents in the courts is the erroneous belief that the decision to transition is a selfish choice that places the interests of the parent above the interests of their child or may be harmful to the child. For example, in 2013, the Arizona Court of Appeals affirmed a decision denying custody to a trans parent on the ground that her gender transition allegedly caused her to be absent from her children. The Court of Appeals denied that bias or prejudice played any role in the decision, holding that if the parent’s conduct in transitioning harmed her relationship with her children, this was a legitimate consideration in determining the child’s best interests (Tipsword v. Tipsword, 2013).

**Importance of Expert Testimony to Rebut Bias in the Courts**

Because misinformation and bias about trans people may influence family court decisions, it is often advisable to anticipate and be prepared to rebut any potential prejudice or misconceptions. Often this requires bringing in an expert who can educate the court about the current medical consensus regarding trans people. In a custody dispute, it is especially important to educate the court that being trans does not affect a person’s ability to be a good parent, that having a trans parent does not harm children, and that supporting a continued relationship between the trans parent and their child is crucial for the child’s long-term well-being. The best experts are medical professionals and mental health professionals who actively work with families that include trans individuals, as they can speak about the issues from their own experience while also understanding the current medical standards of care.

In conclusion, while trans people and their families have many more legal rights in 2020 than they had in the past, there are still barriers to equal treatment in child custody decisions and divorce proceedings. These barriers tend to come from unsupported stereotypes and biases within the legal system and can be successfully overcome with the use of expert testimony and appropriate efforts to educate decision makers.

Shannon P. Minter

*See also* Discrimination; Youth and Teens, Legal Issues

**Further Readings**

In re Marriage of Simmons, 335 Ill. App. 3d 942 (2005).