

Transgender Legal Issues for the Non-Attorney



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Transgender (TG) Definitions

In order to better understand this information, we provide the following definitions as reference points:

Transgender: A broad “umbrella” term that applies to people who identify and/or express themselves with a gender other than their birth sex. This includes transsexuals, cross-dressers or others who feel that their biological sex fails to reflect their true gender.

Gender identity: A person’s innate sense of gender not synonymous with sexual orientation.

Gender expression: The way a person presents his/her gender.

Transsexual: A person whose sense of gender conflicts with his/her anatomical sex. In keeping with their gender identity, some, but not all, transsexual people undergo change through medical treatments, such as hormone therapy or surgeries.

Transvestite: An outdated term that refers to people who sometimes cross-dress, or dress in clothing typically associated with the opposite sex. Many cross-dressers are heterosexual and typically present themselves in a manner consistent with their birth sex.

Gender non-conforming: People who go beyond gender norms, but may not be attempting to present themselves as a different gender.

Do civil rights laws protect TG people?

Neither Michigan nor federal civil rights laws include the category of gender identity/expression. Currently, the only states that include this specific category are: California, Maine, Minnesota, New Mexico, and Rhode Island. However, five Michigan cities have human rights ordinances that could cover TG people. Ann Arbor, Dearborn Heights, East Lansing, Grand Rapids, Huntington Woods, and Ypsilanti have ordinances, but may not be enforceable if challenged in court.

Laws that protect TG People

Disability discrimination

Though federal disability rights laws (the *Americans with Disabilities Act* and *Section 504 of the Rehabilitation Act of 1973*) specifically exclude “transsexuals” and cross-dressers, Michigan’s disability rights law (the *Person’s with Disabilities Act*) does not exclude TG people. However, to be covered under Michigan’s law, you would have to show that you have a physical or mental impairment expected to last at least a year that affects one or more major daily living activity.

While some states, such as Massachusetts, have considered gender dysphoria (gender identity disorder) to be a disability that is protected under Massachusetts’ disability rights law, this has not yet been tested in Michigan.

Many TG people after being diagnosed with gender dysphoria, begin a transition and express themselves according to their gender identity. Far from being disabled, they feel a sense of freedom. It is controversial as to whether or not being TG should be considered a disability. Some TG people, due to the side-effects of hormonal and other medical treatments, do experience an impairment with major life activities while others may suffer from depression, as well as physical problems.

Sex Discrimination laws

“Gender stereotyping” as sex discrimination was first recognized by the U. S. Supreme Court in a case of a female employee who was denied a partnership in her accounting firm because some of the partners thought she acted insufficiently feminine to conform with the expectations of a “lady partner.” *Price Waterhouse v Hopkins*, 490 US 228 (1989).

Two recent employment discrimination cases heard by the Sixth Circuit Court of Appeals, which covers Michigan, show positive signs for TG people. In both, the Court found that gender stereotyping constitutes sex discrimination that violates state and federal civil rights laws.

In the case of *Smith v Salem*, 378 F 3d 586 (2004), the city of Salem, Ohio tried to terminate a TG firefighter (male to female) who had been hired as a man, because of her gender identity/expression and her failure

to conform to the sexual stereotypes of what a “male” employee should be. The Court ruled that the City was gender stereotyping and found in favor of Smith.

In the second case, Court found that the Cincinnati Police Department’s failure to promote a police officer (TG male to female) to sergeant was due to gender non-conformity and in violation of federal laws prohibiting sex discrimination. *Barnes v City of Cincinnati*, 401 F 3d 729 (2005)

Legalizing Your Gender Identity: Changing Legal Documents in Michigan

What makes your name legal?

Your legal name is your official identity and is generally based on your given name which appears on your birth certificate and on official documents.

If you want to change your legal name, you have two options: a “common law” name change or a court-ordered name change.

Common Law Name Change

A common law name change occurs when someone uses a name different from that on a birth certificate. If the new name is used over time and on legal documents, it may be considered a “common law” name change. The method is free, but it does not give you the official documentation that a court ordered name change offers and that many government agencies require.

Court Ordered Name Change

You can ask a judge to approve your name change, which will provide you with proof in the form of a court order, by following the guidelines adopted by the legislature and described below:

First, you must complete a specific form, *Petition to Change Name*, along with a filing fee and submit it to the court in the county in which you reside. The form is available at the court or online at www.courts.michigan.gov. The filing fee will vary depending on the county.

Next, if you are over 21 years old, you must have a set of fingerprints taken at a local police agency to determine whether you have a criminal record.

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After your petition is submitted to the court, take a copy of the petition to your police department. An officer will take your prints, give you a fingerprint card and inform you of the fee. Send the fingerprint card, the fee, and a copy of your petition to the state police at: *Michigan State Police, Criminal Justice Information Center, 7150 Harris Drive, Lansing, MI 48913*. The state police will then do a state and federal background check, via the FBI, and report the findings back to the court.

After the court receives the report, a hearing date on your petition can be scheduled. Be sure to give the court a self-addressed stamped envelope so that you can be notified when the report arrives from the state police. If you do not hear from the court within eight weeks after you have submitted all of the information to the state police, call the court to be sure that the report was received.

The court will approve a name change petition if the request was not made for a “fraudulent purpose” or to deceive others, avoid debt, etc. Generally, the court does not assume that you have a fraudulent purpose, but if you have a criminal record, the court is required to presume your intent is unlawful. In that case, you must provide evidence of your lawful intentions and your reasons to change your name, e.g. your desire to conform to your gender.

When your hearing is scheduled, complete the form labeled *Order Following Hearing on Petition to Change Name*, (available online at www.courts.mi.gov) and give it to the court. The court will complete the form. If you are requesting a new birth certificate, be sure to ask the court to complete that portion of the order.

If you are a minor, Michigan law only allows your parent or guardian to seek a court ordered name change on your behalf.

How is a person’s “legal” gender determined?

There is no easy answer to this question. In Michigan, people who have completed sexual reassignment surgery can request a new birth certificate with a gender marker change. Under Michigan law, if you have completed gender reassignment surgery and want to apply for a new birth certificate, you must provide an affidavit from a physician certifying that sexual reassignment surgery has been performed.

A new birth certificate is not a guarantee for a legal gender change, but it is still considered the best available method. Some legal experts believe that a new birth certificate is sufficient proof of a person’s legal gender. However, this theory has not yet been tested in the courts.

Unfortunately, Michigan law permits only those who have had gender reassignment surgery to apply for a new birth certificate. Therefore, people who are unable or unwilling to have gender reassignment surgery cannot officially change their gender, leaving out a majority of Michigan's TG population.

Changing Legal Documents to Conform to Your Name and Gender Identity

Birth Certificate

If you obtain a court ordered name change, you may request a new birth certificate with your new name. To obtain a revised certificate, complete the form entitled *Application to Record Court-Ordered Legal Name Change to a Michigan Birth Record* (available online at www.michigan.gov/mdch), and mail it to the state as directed. There is a fee for this service.

If you have completed sexual reassignment surgery, you may request that your sex designation be corrected at the same time.

Be sure to ask the local registrar or state vital records office to provide you with a "new" rather than "amended" birth certificate and to seal the original document, whether you change only your name or both your name and gender.

Driver's License or State ID

If you obtain a court-ordered name change, you may apply for a new driver's license or state identification card through the Secretary of State's (SOS) office. At one time, the SOS had a policy of permitting TG people to have their gender marker changed without requiring additional documentation or information. However, this policy changed in 2004 and now requires the completion of sexual reassignment surgery. This limited policy ignores the majority of the TG population and can cause problems with business transactions, employers, and encounters with law enforcement.

Social Security Card

To change your name on your social security card, complete the *Application for Social Security Card (SS-5)* form (available online at www.ssa.gov). Once completed, mail the form or drop it off to your local social security office. This service is free.

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Social Security officials generally require proof that gender reassignment has been completed – or at least started – before they will change an individual’s gender marker. However, this requirement has not been consistently enforced and providing a letter from a physician stating that an individual is undergoing treatment may suffice.

Passport

You may change your name on your passport by completing a *Passport/Amendment/Validation Application* (available online at http://travel.state.gov/get_forms.html). Your gender marker may be changed by completing the same form, but the U.S. State Department requires that an individual complete gender reassignment surgery before issuing a passport with a gender marker different from the gender marker on the original birth certificate. If you are unable to undergo gender reassignment surgery, you may consider providing the State Department with a letter from a health provider explaining that you have undergone all recommended treatment. However, such a request may be denied.

If you cannot get a passport with your correct gender identity, you may wish to take your official birth certificate with a letter from a health professional explaining your circumstances when you travel. This could help clarify for custom officials why your gender presentation differs from the gender on your passport.

Selective Service

A TG (female to male) applying for federal benefits, including student loans, must obtain a “Status Information” letter from the Selective Service System to prove that he was never required to register for the draft. The form requesting a letter is available at www.sss.gov/FSmen.htm. This service is free.

Family Issues

Can a marriage between a TG male to female (who has had sexual reassignment surgery) and a man be recognized?

There is currently no Michigan law on this issue and decisions in other states have differed considerably. While a New Jersey court ruled that the “post-operative” sex of a person is the one to be considered in determining the validity of a marriage (*MT v JT*, 355 A 2d 204 (NJ Super Ct App 1976), other state courts have been preoccupied with whether a person can really change his/her sex. Several courts have expressed the fear that recognizing

a post-operative TG heterosexual marriage will open the door to same-sex marriage. At this time, no state provides legal marriage between same-sex couples, with the exception of Massachusetts.

Two decisions in Texas and Kansas have narrowly interpreted a post-operative TG's gender to be that of which he/she was born. The Texas Court of Appeals ruled that a TG female by law is a male and that her marriage to a male was invalid. *Littleton v Prange*, 9 SW 2d 223 (1999). The Supreme Court in Kansas ruled that a post-operative female TG is not a woman within the meaning of Kansas' marriage law and that her marriage is invalid. They also held that without a will, she does not have inheritance rights to her late husband's estate. *Matter of the Estate of Gardiner*, 42 P 3d 120 (2002). These cases demonstrate the need to educate courts regarding gender identity issues and the need for expert testimony from TG specialists.

Are there legal issues involved if a spouse surgically changes gender during a marriage?

As long as the spouses wish to stay married, they should be able to avoid legal issues. However, legal problems could arise if one of the spouses attempts to claim inheritance or other tax benefits afforded married couples. An employer may challenge the validity of marriage as a pretext for excluding the spouse from employer-provided health plans or other benefits. Currently, there are no published decisions regarding the issue of sexual reassignment surgery within an existing marriage.

What rights does a post-operative TG parent have regarding custody and/or visitation with a child?

If a person marries after gender reassignment surgery and has children through donor insemination, adoption, or a surrogate, parental status would be secure as long as the marriage remains intact. It could be threatened, however, if the other parent seeks to dissolve the marriage and asks the court to invalidate the marriage as having not been between one man and one woman at the time of marriage. The effect could be to remove the legal rights of the TG person as a parent. *Kantaras v Kantaras*, 884 So 2d 155 (2004).

How have the courts ruled on custody and visitation rights for TG parents?

Treatment by the courts has been mixed on legal or physical custody and visitation rights. Though no decision has been published in Michigan, there have been a few positive decisions elsewhere. A Colorado Appeals Court held that custody rights should remain with a divorced mother, who was

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transitioning to a male and had married a woman because of the high quality of their home life and no showing of adverse effects on the children. *Christian v Christian*, 516 P 2d 132 (Co App 1973).

A less favorable opinion came from a Minnesota court even though no evidence was presented that the child had exhibited any atypical gender behaviors or gender identity problems as a result of being with the TG father. Although the court gave custody to the father who was taking hormones, he was required to undergo psychotherapy and maintain his male identity. *In re TJ*, 1988 WL 8302.

As with all child custody and parenting-time decisions, Michigan courts must utilize the “*Best Interests of the Child*,” MCL 722.23 when making determinations. As with gay and lesbian parents, there is nothing in these twelve standards that specifically excludes TG parents.

Michigan adoption and foster care laws do not specifically exclude TG people. Adoption petitions and foster care placement should be handled on a case by case basis, according to the “*Best Interests of the Child*.”

Bathroom Usage

In Michigan, it is legal to have bathrooms that are segregated by gender. Ideally, TG people should be able to use bathrooms according to their gender identity/expression. While employers, public accommodations and businesses should have policies in support of this, there are currently no laws in Michigan that require this. In the alternative, some employers, schools, and businesses have been providing single occupancy unisex bathrooms that are not based on a person’s gender.

As of this date, there are no definitive court decisions regarding the right of TG people to use bathrooms in accordance with their gender identity/expression. No published Michigan decisions have yet addressed this issue.

Transgender Resources

Michigan

ACLU of Michigan LGBT Project
60 W. Hancock
Detroit, MI 48201
(313) 578-6812
kaplan@aclumich.org
www.aclumich.org

Affirmations Lesbian Gay Community
Center
195 W. Nine Mile Road
Ferndale, MI 48220
(248) 398-7105
info@goaffirmations.org
www.goaffirmations.org

Crossroads
P.O. Box 1245
Royal Oak, MI 48068
(313) 719-3267
www.xroads.org
crtvmich@aol.com

Transgender Michigan
P.O. Box 224
Swartz Creek, MI 48473
(517) 424-1544
info@transgendermichigan.org
www.transgendermichigan.org

Triangle Foundation
19641 W. Seven Mile Road
Detroit, MI 48219-2721
(313) 537-3323
info@tri.org
www.tri.org

University of Michigan Health Services
Comprehensive Gender Services
Program
300 N. Ingalls Room, N14D21
Ann Arbor, MI 48109-0475
(734) 763-0466
Um-cgsp@umich.edu

National

ACLU LGBT/HIV Project
125 Broad Street
New York, NY 10004
(888) 567-ACLU
www.aclu.org

Lambda Legal Defense and
Education Fund
Midwest Regional Office
11 E. Adams, Suite 1008
Chicago, Illinois 60603
(312) 663-4413
www.lambdalegal.org

National Center for Lesbian Rights
870 Market Street, Suite 570
San Francisco, CA 94102
(800) 528-6257
info@nclrights.org
www.nclrights.org

Sylvia Rivera Law Project
322 8th Avenue, 3rd Floor
New York, NY 10001
(212) 337-8550
www.srlp.org

Transgender Law Center
160 14th Street
San Francisco, CA 94103
(415) 865-0176
info@transgenderlawcenter.org

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