

## GENDER IDENTITY AND FAMILY LAW

**objective:** To explore how courts factor a family member's gender identity into decisions about the formation and dissolution of families.

### Activities/Discussion

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#### ■ ADVANCED:

1. Custody Cases: Gender Identity and Parental Rights
  - a. What other factors should courts consider when trying to determine the best interests of a child? The best interests test is sometimes criticized for being too subjective. After comparing the Christian and Daly cases, do you think the test is too subjective? If so, what other test would you propose? Try applying your test to the facts in Christian and Daly and see if they turn out differently.
  - b. In a 1984 case called *Palmore v. Sidoti*, the U.S. Supreme Court ruled that a state court could not deprive a mother custody of her child simply because the mother, a white woman, had married an African American man. In his decision, Chief Justice Burger famously said "The Constitution can not control [racial] prejudices but neither can it tolerate them. Private biases may be outside of the reach of law, but the law cannot, directly or indirectly, give them effect." How is denying custody based on race similar to denying custody based on gender identity? How is it different?
2. Marriage Cases and Gender Identity
  - a. The Littleton court decided that Christie was a man because she still had male chromosomes. If a court must determine someone's sex, what factor(s) should the court use? Are chromosomes the most important factor? What about the person's physical appearance, including clothes, accessories, and mannerisms? Should the court rely on the person's birth certificate or driver's license? Should the court instead rely on how that person chooses to identify himself or herself? Is it important to consider whether the person has had sex reassignment surgery? Should a court use a combination of these factors?

- i. Some people, called intersex individuals or people with disorders of sex development (DSD), have different combinations of male and female chromosomes or male and female genitalia. How would this affect a court's determination of the individual's sex?
    1. Is it even necessary for a court to decide whether someone is male or female? Is it necessary for *you* to decide? Why or why not?
  - ii. The court's ruling in *Littleton* means that because of Christie's male chromosomes, she could only legally marry another woman. Does this seem like the correct result in a state that prohibits marriage for same-sex couples?
  - iii. A lawyer who argued Christie's case said, "Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male." (This was before some states adopted laws allowing same-sex couples to marry.) Does this seem reasonable? What does this example tell you about the experiences of transgender Americans?
- b. In *M.T. v. J.T.*, the court rejected the argument that an individual's sex is unchangeable and can only be determined by his or her chromosomes. Instead, the court ruled that a person's sex has been changed, for the purposes of marriage, if the person's physical features match his or her gender, and if the person is able to engage in sexual activity as that gender. However, some transgender individuals do not choose to have surgery at all. Others choose surgeries that do not affect their sexual functions, such as facial surgery or chest surgery. Still others would like to have surgery but cannot afford it. Do you think the *M.T. v. J.T.* court would consider these individuals to have changed their sexes and allow them to marry individuals of the opposite sex? Do you agree with the court's reasoning?

## ■ INTERMEDIATE

### 1. Custody Cases: Gender Identity and Parental Rights

- a. What other factors should courts consider when trying to determine the best interests of a child? The best interests test is sometimes criticized for being too subjective. After comparing the Christian and Daly cases, do you think the test is too subjective? If so, what other test would you propose? Try applying your test to the facts in Christian and Daly and see if they turn out differently.
- b. In a 1984 case called *Palmore v. Sidoti*, the U.S. Supreme Court ruled that a state court could not deprive a mother custody of her child simply because the mother, a white woman, had married an African American man. How is denying custody based on race similar to denying custody based on gender identity? How is it different?

### 2. Marriage Cases and Gender Identity

- a. The *Littleton* court decided that Christie was a man because she still had male chromosomes. If a court must determine someone's sex, what factor(s) should the court use? Are chromosomes the most important factor? What about the person's physical appearance, including clothes, accessories, and mannerisms? Should the court rely on the person's birth certificate or driver's license? Should the court instead rely on how that person chooses to identify himself or herself? Is it

important to consider whether the person has had sex reassignment surgery? Should a court use a combination of these factors?

- i. Some people, called intersex individuals or people with disorders of sex development (DSD), have both male and female chromosomes (small pieces of DNA that determine our biological sex), or other male and female body parts. How would this affect a court's determination of the individual's sex?
    1. Is it even necessary for a court to decide whether someone is male or female? Is it necessary for you to decide? Why or why not?
  - ii. The court's ruling in *Littleton* means that because of Christie's male chromosomes, she could only legally marry another woman. Does this seem like the correct result in a state that prohibits marriage for same-sex couples?
  - iii. A lawyer who argued Christie's case said, "Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male." (This was before some states adopted laws allowing same-sex couples to marry.) Does this seem reasonable? What does this example tell you about the experiences of transgender Americans?
- b. In *M.T. v. J.T.*, the court rejected the argument that an individual's sex is unchangeable and can only be determined by his or her chromosomes. Instead, the court ruled that a person's sex has been changed, for the purposes of marriage, if the person's physical features match his or her gender. However, some transgender individuals do not choose to have surgery at all. Others choose surgeries that do not affect their sexual functions, such as facial surgery or chest surgery. Still others would like to have surgery but cannot afford it. Do you think the *M.T. v. J.T.* court would consider these individuals to have changed their sexes and allow them to marry individuals of the opposite sex? Do you agree with the court's reasoning?



## ■ INTRODUCTORY

### 1. Custody Cases: Gender Identity and Parental Rights

- a. What other things should courts consider when trying to determine the best interests of a child?
- b. In which case did the court make the best decision? Why?
- c. In a case called *Palmore v. Sidoti*, the U.S. Supreme Court ruled that a state court could not take a child away from her mother simply because the mother, a white woman, had married an African American man. How is denying custody based on race similar to denying custody based on gender identity? How is it different?

### 2. Marriage Cases and Gender Identity

- a. The *Littleton* court decided that Christie was a man because she still had male chromosomes. How would you decide whether someone is male or female? Are chromosomes the most important factor? Would you want to know how that person looked and dressed? Would you want to see the person's birth certificate or driver's license? Would you want to know if that person would like you to think him as male, or her as female?
  - i. Some people are born with both male and female chromosomes. How would that affect your decision?
  - ii. Is it even necessary to decide whether someone is male or female? Why or why not?
- b. The court's ruling in *Littleton* means that because of Christie's male chromosomes, she could only legally marry another woman. Does this seem like the right result in a state that does not allow marriage for same-sex couples? A lawyer who argued Christie's case said, "Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male." (This was before some states adopted laws allowing same-sex couples to marry.) What does this example tell you about the lives of transgender Americans?
- c. In *M.T. v. J.T.*, the court rejected the argument that an individual's sex is unchangeable and can only be determined by his or her chromosomes. Instead, the court ruled that a person's sex has been changed, for the purposes of marriage, if the person's physical features match his or her gender. However, some transgender individuals do not choose to have surgery at all. Some choose surgeries that do not affect their sexual functions, such as facial surgery or chest surgery. Some want to have surgery but cannot afford it. Do you think the *M.T. v. J.T.* court would consider these individuals to have changed their sexes and allow them to marry individuals of the opposite sex? Do you agree with the court's reasoning?

# GENDER IDENTITY AND FAMILY LAW

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background reading

## Custody Cases: Gender Identity and Parental Rights

**IN THE EVENT THAT PARENTS END THEIR RELATIONSHIP WITH ONE ANOTHER, MOST COURTS DECIDE HOW TO AWARD CUSTODY OF CHILDREN BASED ON THE BEST INTERESTS OF THE CHILD.** To determine this, courts might consider which parent the child is more emotionally bonded to, which parent has custody of the child's brothers and sisters, which parent will provide the best ethical, educational, and intellectual guidance, and how best to keep the continuity of care. Many courts see a transgender parent as a threat to his or her child's best interests, and will decline to award custody or visitation rights to that parent. Some courts will even revoke these rights if they have already been awarded. Other courts disagree and do not think a parent's gender identity affects whether he or she can provide the best environment for his or her child. Consider the following two cases.

*Christian v. Randall*, 516 P.2d 132 (Colo. App. 1973).

After their parents divorced, four children lived with their biological mother, now named Mark, who was transitioning from female to male. When the children's biological father petitioned the court for custody, the court ruled that it was in the children's best interest to remain with Mark.

"The evidence failed to show that the anxiety and confusion created by a change of custody would be outweighed by any advantages to the children resulting from such a change."

The children were happy, healthy, successful in school, and involved in their community. Mark's transition, the court said, did not affect his relationship with them or impair their emotional development.

*Daly v. Daly*, 715 P.2d 56 (Nev. 1986).

After Mary's parents divorced, she lived with her mother and visited her father. Mary's father began to live as a woman, Suzanne, and underwent sex reassignment surgery. When Mary's biological mother, Nan, discovered this, she stopped Mary and Suzanne from visiting each other and filed a lawsuit to terminate Suzanne's parental rights.

The Supreme Court of Nevada, finding that Mary had become inattentive and withdrawn since Suzanne's transition, terminated Suzanne's parental rights. The court decided that resumed visitation would present Mary with a "risk of serious maladjustment, mental or emotional injury." The dissenting opinion noted that, even if this were true, Suzanne did not actually seek resumed visitation, but only the maintenance of her legal status as a parent.

## Marriage Cases and Gender Identity

Marriage laws uniquely affect transgender individuals and vary from state to state. Because many

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Chief Justice Burger, *Palmore v. Sidoti*

courts refuse to give legal recognition to changes in sex or gender, states that do not allow marriage for same-sex couples do not recognize, for example, the marriage between a male-to-female transgender woman and a biological male, as in *Littleton v. Prange*, below. The court in *M.T. v. J.T.*, below, disagreed. Courts so far have not invalidated any marriages in which one spouse transitioned after entering into the marriage. This means, for example, that when a biological man and a biological woman marry, their marriage is still valid in every state if the man later transitions and becomes a woman.

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

Christie, a male-to-female transgender woman, had lived as a woman most of her adult life and had undergone sex reassignment surgery. As a woman, she married her husband, and was with him for seven years before he passed away. She filed a medical malpractice suit as his surviving spouse. The Texas Fourth Court of Appeals, however, invalidated their spousal relationship. The court held that as a matter of law Christie was male.

“Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts... The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male... There are some things we cannot will into being. They just are.”

Because Texas does not recognize marriages of same-sex couples, the court voided Christie’s marriage to her husband and held that she therefore could not make a legal claim as his surviving spouse.

*M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. 1976).

M.T., a male-to-female transgender woman, married J.T., a biological male. Before the marriage, M.T. had undergone sex reassignment surgery and changed her birth certificate to reflect her female sex. After they separated, M.T. filed a routine request for financial support. J.T. argued that M.T. could not make such a claim because their marriage was void. Even after surgery, J.T. reasoned, M.T. was still a biological male and therefore could not marry another male under New Jersey’s marriage laws. The court disagreed:

In this case [M.T.’s] gender and genitalia are no longer discordant; they have been harmonized through medical treatment. [She] has become physically and psychologically unified and fully capable of sexual activity consistent with her . . . gender and anatomy. Consequently, [she] should be considered a member of the female sex for marital purposes.

The court upheld the trial court’s determination that J.T. should provide M.T. \$50 a week in support.

# GENDER IDENTITY AND FAMILY LAW

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## Custody Cases: Gender Identity and Parental Rights

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The Supreme Court of Nevada, finding that Mary had become inattentive and withdrawn since Suzanne's transition, terminated Suzanne's parental rights. The court decided that resumed visitation would present Mary with a "risk of serious maladjustment, mental or emotional injury." The dissenting opinion noted that, even if this were true, Suzanne did not actually seek resumed visitation, but only the maintenance of her legal status as a parent.

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In this case the transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified... Consequently, plaintiff should be considered a member of the female sex for marital purposes.

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# GENDER IDENTITY AND FAMILY LAW

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## Custody Cases: Gender Identity and Parental Rights

WHEN COURTS HAVE TO DECIDE WHICH PARENT A CHILD SHOULD LIVE WITH (FOR INSTANCE, WHEN PARENTS DIVORCE), MOST COURTS MAKE THE DECISION BASED ON THE CHILD'S BEST INTERESTS.

A child's best interests include living with a parent he or she feels emotionally close to, living with a parent who can give the child a good education, and not being separated from the child's brothers and sisters. Many courts do not think it is in the best interests of a child for him or her to live with a parent who is transgender. Other courts disagree. Consider the following two cases.

*Christian v. Randall*, 516 P.2d 132  
(Colo. App. 1973).

After their parents divorced, four children lived with their biological mother, now named Mark, who was transitioning from female to male. The court ruled that it was in the children's best interest to stay with Mark. The children were happy, healthy, successful in school, and involved in their community. Mark's transition, the court said, did not affect his relationship with them or impair their emotional development.

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to live as a woman, Suzanne, and had surgery to change her sex to female. When Mary's biological mother, Nan, discovered this, she stopped Mary and Suzanne from visiting each other and filed a lawsuit to end Suzanne's rights as a parent.

The Supreme Court of Nevada found that Mary had become quiet and spent a lot of time alone since Suzanne began to live as a woman. The court decided that if Mary were allowed to visit Suzanne again, Mary might suffer "serious... mental or emotional injury." The dissenting, or disagreeing, judges explained that, even if this were true, Suzanne was not actually trying to have Mary visit her again, but only trying to keep her legal status as Mary's parent. The court, however, ended Suzanne's parental rights.

## Marriage Cases and Gender Identity

Marriage laws affect transgender individuals differently in different states. In many states, a transgender woman cannot marry a biological man. This is because the court still considers her a man, as the following Texas case explains. A least one court has disagreed and has allowed such a marriage.

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

Christie, a male-to-female transgender woman, had lived as a woman most of her adult life and had surgery to change her physical sex. As a woman, she married her husband, and was with him for seven



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years before he passed away. She filed a medical malpractice suit as his surviving spouse. The court, however, ruled that she was not his spouse because she was still a man. Even though she “was made to look like a woman” through surgery, the court explained, she still had male chromosomes (small pieces of DNA that determine our biological sex). Because of this, the court concluded, she was still a male.

Because Texas does not recognize marriages of same-sex couples, the court ruled that Christie had never been married to her husband. Therefore, she could not file a lawsuit as his surviving spouse.

*M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. 1976).

M.T. was a male-to-female transgender woman. She had surgery to change her physical sex to female. She also changed her birth certificate. Then she married J.T., a biological man. After she and J.T. separated, J.T. argued in court that they had never been married. He claimed that M.T. had always been a biological male, even after her surgery. If this was true, their marriage would not have been valid because New Jersey did not allow two men to marry.

However, the court disagreed with J.T. It ruled that M.T.’s surgery allowed her physical sex to match the female gender she’d had all her life. As a female, M.T. had lawfully married J.T., and their marriage was valid.