

HELPING LGBTQI FAMILIES: GENDER SPECTRUM AND TRANSGENDER CHALLENGES INCLUDING TRANSITIONING

I. BASIC TERMINOLOGY/GENDER SPECTRUM 101 (15 minutes)

A. TED TALK VIDEO – HOW TO TALK TO TRANSGENDER PEOPLE, JACKSON BIRD (6-7 minutes) <https://youtu.be/HbQZ7jAvgol>

B. DIFFERENTIATE SEXUAL ORIENTATION FROM GENDER IDENTITY

Everyone has both:

Sexual Orientation:

- Who are you attracted to. (Common categories are Heterosexual, Gay, Lesbian, Bi-sexual)
- Sexual Orientation is **not a choice**: it is innate.

Gender Identity:

- What gender you identify with.
- Typically male or female, but;
- Can include non-binary, fluid.
- Gender Identity **is not a choice**: it is also innate, but because of societal pressure to conform to established gender roles, may take a long time to present.

In this context Words matter.

C. AAML LGBT BENCH BOOK FOR THE JUDICIARY REGARDING A GLOSSARY OF TERMS AND GENDER PRONOUNS

D. GENDER SPECTRUM

For our purposes, the two categories we will talk about are Transgender and Cisgender:

- Transgender means that the **gender identity** of the person is **different** than the gender assigned at birth.
- Cisgender means that the person's **gender identity** conforms with the gender assigned at birth.
- A person who has the physical body that we typically associate with males, and who identifies in his mind as male is **cisgender**, and we would refer to him as a **man**.

- A person who has the physical body that we typically associate with males, but identifies internally as a woman is **transgender**, and we would typically refer to this individual as a **woman**.
- The term “cisgender” is a recent term, and it is a break-through idea, because it helps us understand that each of us has a gender identity.

NOTE: Bench Book uses “CISGENDER SPOUSE” as a replacement for “NORMAL SPOUSE” to put the parties on equal footing.

- From a mental health perspective, for a person who identifies as one gender internally, but has the physical traits of another gender, the condition is referred to as **Gender Dysphoria**, and it is listed in the DSM V

A couple of other useful terms:

- FTM = Female to Male transition
- MTF = Male to Female Transition

E. MICROAGGRESSIONS AND AFFIRMATIONS OF GENDER IDENTITY

1. Questions for Discussion:

Imagine realizing you identify as a gender different from the sex you were assigned at birth:

- How would you feel?
- What concerns would you have?
- Imagine sharing this with your friends, family, and your colleagues.
- Consider how these people would respond.

Imagine yourself moving through your day in a gender identity different than the sex you were assigned at birth:

- What would be different?
- What might you encounter or feel?
- How might your perceptions of the world around you change?
- How might your perceptions of those around you change?
- Explore implicit bias.

How would you feel if your parent came out as transgender and began to transition?

- How would you feel if your parent came out as gay or lesbian?
- If your child came out as transgender or gay or lesbian? What about your spouse?
- What about your child’s teacher?
- What about your boss or a colleague or co-worker?

- What questions, if any, might emerge for you?

2. Microaggressions:

Microaggression, as defined by the Oxford dictionary:

noun / A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority.

- Remember, when a Client is transitioning, **Gender Identity is always front and center. Anything that negates the person's gender identity is a microaggression.**
- In that context, **PRONOUNS** are REALLY important. Ask a Client their preferred pronouns.

Typical pronouns are:

he/him/his

she/her/hers

they/them/theirs

PRACTICE TIP: Consider putting your preferred pronouns in your **signature block** on your emails to tell would-be and existing clients that you respect the importance of their gender identity.

Examples of Microaggressions with Transgender individuals:

- Using the pronoun of the person's body at birth instead of the pronoun they have chosen, which generally conforms with their gender identity:

Example: referring to a MTF as "he" instead of "she"

- Using the name they were given at birth instead of the name they have chosen to express their gender identity, **even if that is still their legal name.**

Example: Referring to the MTF transgender Client "Carol" by her birth name, John.

To give you some idea how **important** it is for the transgender individual to be **recognized in their gender identity**, consider that many transgender individuals refer to the names given to them at birth as their "**dead name**"

NOTE: The fact that a person makes the decision to take steps to **transition** toward their true gender identity **does not mean** that they are also **changing their sexual orientation**. An unauthoritative source indicated that 60% of MTF trans individuals still maintained their attraction to women. Some stay with their spouses.

II. BEST PRACTICES (5 minutes)

A. MARYLAND VOLUNTEER LEGAL SERVICES BEST PRACTICES HANDOUT

B. BEST PRACTICES

- Know the terminology (we already looked at the Bench Guide, this is another resource and reminder to educate yourself before taking such a case.)
- Understand gender identity is different than sexual orientation or biological sex
- Use the client's preferred name and pronouns
- Don't pry unnecessarily
- Be sensitive about disclosure issues
- Make your office a safe and welcoming environment
- Be aware of community events and opportunities for expanding awareness and inclusion: Pride Month (June), Transgender Day of Remembrance (November 20) and International Transgender Day of Visibility (March 31).

C. SOME ISSUES FOR YOUR COLLABORATIVE DIVORCE MATTER

- Use of Preferred Name, while you should call the transgender client by their preferred name, how do you handle legal documents and court pleadings (even of the uncontested nature) that require use of a legal name. (Legal Name Change?, Sealing the File? How searchable are public files like divorce cases?)
- Avoiding unnecessary questions about transitioning- this is given as a general rule not to pry just because you are making conversation or being curious, but will there be a need to discuss details, i.e. will the cisgender spouse want to discuss the costs (probably), impact on the children, etc. So discuss with professionals ahead of time so everyone is on the same page about how you are approaching these discussions.
- Disclosure – already touched on this with questions about sealing the file. Some transgender clients are out and open publicly and at work about their transition, others want to live as a different gender and not have anyone know that they used to be male or used to be female. You need to know where your client falls on that issue.
- Office Environment – intake forms, bathrooms, staff training, LGBTQ-friendly symbol

NOTE: Bathrooms are a really big item – having a bathroom that is single user or open to all avoids the awkwardness and shame associated with the client having to use a bathroom that does not match their gender identity.

III. WHO IS THE TRANSITIONING CLIENT (20 minutes)

A. YOUTUBE VIDEO – MY SPOUSE IS TRANSGENDER, SHOULD I LEAVE THEM? (11-12 min) <https://youtu.be/gUO3iPtW8J0>

B. TRANSGENDER EXPERIENCE/STATISTICS: SEE STATISTICS RESOURCE

By the time the transgender client has arrived at your office, they have already been through Hell:

- **FIRST**, they lived through 20, 30, 40, or 50 years of a society and possibly their parents telling them that there is only one acceptable way for them to live, and that must conform with the gender they were assigned at birth. Depending upon the environment they grew up in, the message that they are bad, worthy of condemnation, and going to hell has been hammered into them, and the worst abuse may have come from their own parents – the very people who were supposed to love and protect them.
- **SECOND**, it is likely that it took them years of therapy before they finally unearthed their long-suppressed gender identity. This search may also include discovering a different sexual orientation.
- **THIRD**, once they reached an understanding of who they are, they have to decide what they are going to do about it both from a relationship standpoint and from a personal change perspective.

Assuming a FTM transgender client, these are some of the questions that have had to ponder in relation to their family:

- Do I tell my wife?
- If yes, what do I tell her?
- Will telling her blow up my marriage? My entire life?
- Will my kids still love me?
- Will my kids be taken away from me?
- Will I lose my job?
- Will I still be able to support my family?
- Will my family support me?
- Will my wife hate me forever?
- Will I lose all my friends?
- Will I be ridiculed by family, friends, and even strangers?

AND, when they are prepared to risk all of those things happening, they then have to decide what steps they are prepared to take to make their outward appearance and function conform to their gender identity. These are some of the questions they have had to answer for themselves:

- How far do I go to effectuate my transition:

1. Cross dress (Stage 1)
2. Hormones (Stage 2)
3. Surgery? Top/Bottom/partial

NOTE: not all people opt for surgery, either because they can't afford it, or they not comfortable taking that step. AND, if surgery is contemplated, the costs are enormous. How it will be paid for is a real concern.

- **FOURTH:** after all of the above, they pushed the nuclear button – they shared their gender identity with their wife, and one or both of them decided a divorce was the only solution.

If the Client has made it this far, they have already thought about all the above questions and a thousand more. AND they have still decided to go forward, even understanding that they risk losing everything and everyone they love. They have concluded that regardless of the consequences, they have to live as their authentic selves, embracing their true gender identity.

The analogy I make is that the transgender client in divorce is like a person who is trapped 50 feet underwater, and they are swimming for the surface as fast as they can because they will die if they do not reach the surface.

IV. ANTI-DISCRIMINATION CASES (10 minutes)

The law has really developed in recent years and for example all the state laws that used to prevent LGBTQ couples from adopting or fostering children had been done away with by 2016.

Similarly, marriage is legal now irrespective of gender and laws making certain sexual conduct between consenting adults illegal have not been repealed. Although we started out with cases in Virginia that linked parental unfitness with lesbian or gay orientation, I'm referring to the Bottoms case, it's now clear that it is no longer viable to challenge fitness of a parent based on the parent's sexual orientation. The Bottoms case was a 1994-1995 case and the fact that the sexual acts she testified she engaged in with her partner were punishable under the law as a felony at that time impacted the court. That's no longer the case.

There have been some important recent case decisions from the U.S. Supreme Court about anti-discrimination laws and constitutional protections to be aware of:

- OBAMA administration's Affordable Care Act (2016). Here the administration expanded the prior definition of sex to include discrimination on the basis of gender identity. This would have prevented insurers from considering procedures to address gender dysphoria as "cosmetic" rather than necessary medical treatment. These definitions were overturned by the Trump Administration, as the definitions are set

administratively in the applicable Regulations promulgated by the government agencies, so interpretation of what's covered by the Act differs with different administrations.

- A group of employment discrimination cases made their way to the U.S. Supreme Court in the *Bostock v. Clayton County GA* case (June 17, 2020). This landmark U.S. Supreme court decision held that the protections in the Civil Rights Act against discrimination in the workplace “on the basis of sex” extend to gay and transgender people. (This from a largely conservative court, written by Gorsuch, a Trump appointee).
- Cases are now being brought in the health care arena as well seeking to apply the same reasoning to overturn the more restrictive definition being used by Dept. of HHS. On the flip side, there's also a body of case law that pits the First Amendment free exercise clause against the federal law's anti-discrimination protections when an agency (such as a Catholic social service agency) denies services that would otherwise violate the anti-discrimination laws on the basis of religious exercise, so the battle for equality continues and it is certainly a developing area of the law.
- Most recently, anti-discrimination protections were extended by *Williams v. Kincaid* on August 16, 2022. This was a Virginia case where Kesha Williams sued the Fairfax County Sheriff, a prison nurse, and prison guard, in federal court in Virginia for violations of the American with Disabilities Act as well as her constitutional rights. Her driver's license indicated her gender as “female” and she was initially assigned housing on the women's side of the prison and given uniforms that included bras and underwear. Later that same day, however, during her preliminary medical evaluation, she told the prison nurse that she is transgender and had been receiving hormone treatment for 15 years prior to her incarceration for gender dysphoria. She had brought the hormone with her so it could continue to be administered to her while incarcerated. The nurse labeled her as “male” following the evaluation and changed her prison records including her housing assignment to reflect that label based on the prison's policy that “male inmates shall be classified as such if they have male genitals.” She was required to give up the women's clothing she had been provided and she was not administered her hormone therapy for over two weeks causing her significant mental and emotional distress. Thereafter there were other occasions when her medication was not provided. Prison deputies on the male side of the prison referred to her as “mister,” “sir,” “he,” or gentleman. Her requests to shower privately or for body searches by a female deputy were denied. After denying such a request, a male deputy aggressively search Kesha resulting in bruising to her breast and pain for several days. The Court ruled in favor of Kesha Williams applying the anti-discrimination, anti-harassment and anti-retaliation protections of the ADA to gender dysphoria.

- While these cases deal with other practice areas, the significance that extends to family law is that at a federal constitutional law level there are now rulings confirming that discrimination on the basis of sex includes discrimination on the basis of gender identity. This provides a basis for explaining to a cisgender spouse that not only the medical community and DSM V recognize gender dysphoria as not being a “choice,” the Supreme Court has said you can’t discriminate on the basis of gender identity.

V. ISSUES IN A DIVORCE SETTING (10 minutes)

What we mention below are the issues that are unique to a divorce where at least one client identifies as transgender or on the gender spectrum and may be transitioning. All of the concerns and issues we see in a more typical divorce also exist and have to be navigated by the team.

- Recalling that the transgender Client is like the person swimming for the surface, they can seem very unempathetic to their spouse, because they are in a fight for their very survival, and they may feel that the concerns of their spouse may be treated as minor by comparison.
- Understand that the fact of the marriage and their legal status as a spouse continually forces them back into the very role they are trying to escape. If my spouse is the wife, I must be the husband. Marriage is the vehicle through which the transitioning client has been forced to fulfill a role and act in a way that may be inconsistent with their gender identity.
- While courts are changing, historically LGBTQ individuals have not been treated fairly in divorce settings and where a party is transitioning, there is tremendous fear that having shared that information with their spouse will result in their children being taken away.
- To be successful, the team has to come up to speed on the correct vocabulary and create a safe judgment free zone in which the couple can discuss their issues.
- Gender confirmation surgery is expensive. One of the things that you can expect to talk about if this is in play are how those costs should be divided between the parties, and how much weight should any future expenses be given when looking at support and future budgets. FOR THE RECORD, Gender Dysphoria is a recognized medical condition, so, arguably, past expenditures were a legitimate marital expense, and future surgeries should be treated the same as in other medical condition that requires continuing treatment.
- Because of how society treats them, Transgender persons may have significant mental health issues:

28% to 48% have a substance abuse issue

38%-83% have had suicidal ideation

16% to 44% have attempted suicide.

Your transgender client is under tremendous pressure, the team has to be alert for any of these signs. AND, if a substance abuse issue is identified, handle it in the case.

- Discuss the possibility that transitioning has or will cause loss of employment – how does that affect support and property division.
- Cisgender spouse may be angry, hurt, taken by surprise, feel taken advantage of, fear the unknown, fear how discrimination may affect finances, they may even be embarrassed to tell their family and friends and feel isolated without a support network. The transitioning spouse may be getting counseling as they transition but the same may not be true for the cisgender spouse. Fears about how schools will react and how the children will adjust, that's a lot.
- How do you handle questions about whether transitioning during a marriage is considered "fault"?
- How do gender identity issues impact a parenting plan? NOTE: It may not always be one of the clients who identifies on the gender spectrum, but one of the children.

A. YOUTUBE VIDEO – DWAYNE WADE AND HIS CHILD, ZAYA (2-3 min)
<https://youtu.be/bUX7O65N1Yw>

VI. GROUP EXERCISES/HYPOTHETICALS (28 minutes)

1. Hypothetical Discussion of Parenting Plan in Team Meeting
2. Hypothetical Discussion of Transition Costs in Team Meeting

VII. WHY COLLABORATIVE IS THE BEST OPTION FOR BOTH THE TRANSGENDER AND CISGENDER SPOUSE (2 minutes)

- Privacy – Disclosure Concerns, Public access to private information, Employment discrimination concerns, protecting children from public access
- Strong emotions and concerns specific to the transition can be better addressed with the support of the team and MHP professionals
- The child specialist is an incredibly helpful person to have on your team, because even if the cisgender spouse is comfortable with the fact that the transgender spouse is transitioning, they will have concerns about what the children should be told, how they are coping, and how to handle social situations. As an aside, while all conversations should be age appropriate, it is generally held that the younger you tell the children, the better. There are also children's books that are written to help parents address these issues with younger children.